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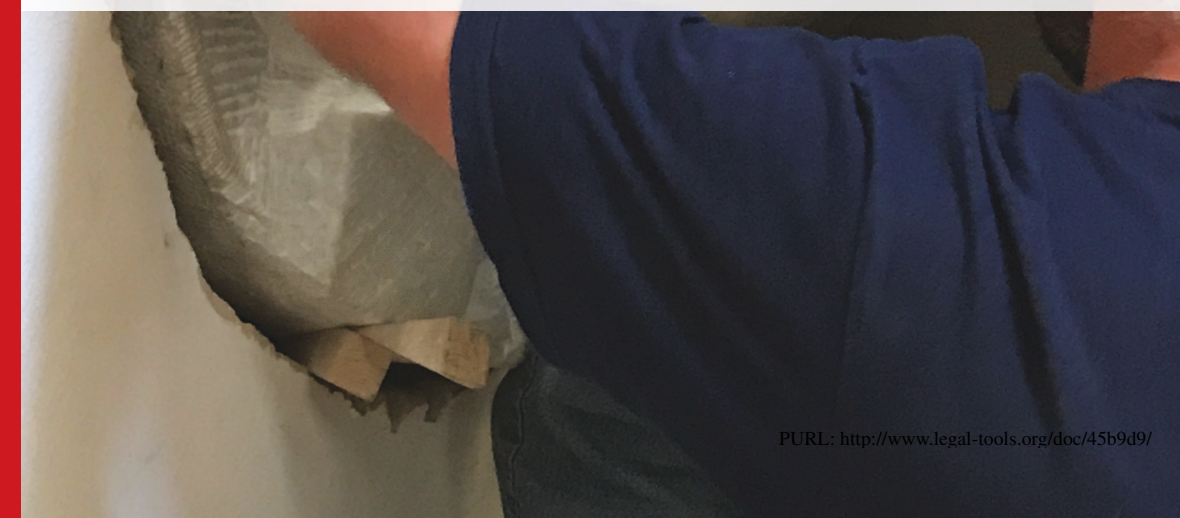

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Front cover: *Pasquale Trento, with other masons, mounting a sculpture in Florence. Masons have a proud tradition of self-regulation and quality control in Florence. The guild of master stonemasons and wood-carvers* – Arte dei Maestri di Pietra e Legname – *was already listed in 1236 as one of the Intermediate Guilds. Ensuring rigorous quality control through strict supervision of the workshops, the guild not only existed for more than 500 years (until 1770, when several of its functions were assigned to the Florentine chamber of commerce), but it has contributed to the outstanding quality of contemporary masonry in Florence. Photograph: © CILRAP 2017.*

Back cover: *Section of the original lower-floor of the Basilica of Saints Cosmas and Damian in Rome which honours the memory of two brothers and physicians for the poor in Roman Syria. Its mosaics and other stonework influenced the Florentine guild of masons referred to in the frontpage caption, as its craftsmen and sponsors created a culture of excellence through competition and exacting quality control. Photograph: © CILRAP 2018.*

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Challenges in the Relationship Between the ICC and African States: The Role of Preliminary Examinations under the First ICC Prosecutor

Benson Chinedu Olugbuo*

The exercise of prosecutorial discretion during preliminary examinations has become a critical factor in the relationship between African States Parties to the Rome Statute and the International Criminal Court ('ICC'). Noting some of the challenges between the former ICC Prosecutor and Africa States as a result of the decisions on the preliminary examinations, this chapter argues that the lack of transparency and objectivity, as well as the inability to adhere to the principles under the Rome Statute and policies of the Office of the Prosecutor ('OTP') may have been contributory to the current frosty relationship. The chapter concludes with several recommendations aimed at improving the quality of preliminary examinations at the ICC.

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11.1. Introduction

Since the inception of the Court in July 2002, the discretion exercised by the ICC Prosecutor in the investigation and prosecution of crimes has been under intense scrutiny for various reasons, and the debate generated is not likely to abate anytime soon. Nevertheless, the exercise of discretion during preliminary examinations has received very little attention, although it plays a crucial role in the overall architecture of the Court and in international criminal justice generally. In this regard, a key question that this chapter seeks to answer is: what guides the Prosecutor in the exercise of discretion to ensure that he or she operates within the ambit of the law?

The Prosecutor has the sole discretion to decide whether or not to conduct a preliminary examination. This discretion, however, is subject to the oversight functions of the Pre-Trial Chamber once the Prosecutor decides to open an investigation proprio motu (of his own accord). Although the Rome Statute provides some principles governing the conduct of preliminary examinations, other provisions of the treaty in relation to the exercise of discretion are subject to different interpretations.

The first Prosecutor, Luis Moreno-Ocampo, has been accused by some scholars of making political, rather than legal, decisions in conducting some preliminary investigations. Some observers argue that he has made some inconsistent or biased decisions regarding the outcome of preliminary examinations.[1] For example, the Prosecutor was criticized regarding the manner in which preliminary examinations were carried out in the situations of Sudan, Libya, Uganda, Central African Republic, Kenya and Côte d'Ivoire. He was also accused of not showing a clear

[1] William Schabas, "Prosecutorial Discretion v. Judicial Atavism at the International Criminal Court", in *Journal of International Criminal Justice*, 2008, vol. 6, no. 4, pp. 731–61; William Schabas, "Complicity before the International Criminal Tribunals and Jurisdiction over Iraq", in Phil Shiner and Andrews Williams (eds.), *The Iraq War and International Law*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 157; William A. Schabas, "Gravity and the International Criminal Court", in Chile Eboe-Osuji (ed.), *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay*, Martinus Nijhoff , The Hague, 2010, p. 702; William Schabas, "Victor's Justice: Selecting "Situations" at the International Criminal Court", in *John Marshall Law Review*, 2010, vol. 43, no. 3, pp. 535–22; Kamari Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa*, Cambridge University Press, New York, 2009, p. 237; Sarah Nouwen and Wouter Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan", in *European Journal of International Criminal Law*, 2010, vol. 21, no. 4, pp. 941–65.

procedure regarding his decision not to open an investigation in the Gaza Strip, Palestine. His conduct of on-going preliminary examination in Columbia had also attracted some criticisms.

As alluded above, the exercise of prosecutorial discretion has been a major source of the tension between the African Union ('AU') and the ICC concerning investigations, prosecutions of crimes, and the indictment of (mostly) Africans by the Court. In fact, there is a popular perception, especially among African politicians, that the former ICC Prosecutor had targeted African leaders while turning a blind eye to crimes committed in other parts of the world. Hence, the AU, during a Summit of Heads of States and Governments meeting in July 2009, decided not to co-operate with the ICC in the arrest and surrender of President Al-Bashir of Sudan. Furthermore, the continental body contemplated a mass withdrawal from the ICC aimed at weakening its global reach.

At a decision taken at the twenty-sixth Ordinary Session held in Addis Ababa in January 2016, the AU Heads of States and Governments gave the Open-ended Ministerial Committee a mandate to urgently develop a comprehensive strategy, including a collective withdrawal from the ICC, to inform the next action of AU Member States that are also States Parties to the Rome Statute.[2] The Ministerial Committee was required to submit this strategy to an Extraordinary Session of the Executive Council. Despite opposition from different African countries, the strategy was adopted in January 2017 by the AU's highest decision-making body.[3] Although it does not seem as if there will be a collective mass withdrawal in the near future, the symbolic act sends a strong message to the ICC and the international community at large.

The problem with prosecutorial discretion, however, goes beyond the perception of bias against Africa. Some of these criticisms have arisen from the apparent contradictions in the legal criteria, policies, principles and practices adopted by the Prosecutor in conducting preliminary examinations. These criticisms hint at a major legal problem concerning the nature of the discretion of the Prosecutor, and the principles that should

2 AU, Decision on the International Criminal Court, adopted 31 January 2016, Assembly/AU/Dec.590 (XXVI), doc. EX.CL/952(XXVIII).

3 AU, Decision on the International Criminal Court, adopted 31 January 2016, Assembly/AU/Dec.622 (XXVIII), doc. EX.CL/1006(XXX). Benin, Botswana, Burkina Faso, Cabo Verde, Côte d'Ivoire, The Gambia, Lesotho, Liberia, Madagascar, Malawi, Mozambique, Nigeria, Senegal, Tanzania, Tunisia and Zambia entered reservations.

govern how that discretion is exercised. For the ICC to operate effectively and command the respect of States and the international community, the Prosecutor has to act independently, and be totally free from any external control. Perceptions of bias, inconsistent application of the Rome Statute, and political manipulation would undermine the credibility of the Court and jeopardize its capability to administer international justice.

Accordingly, the exercise of prosecutorial discretion during preliminary examinations is an important building block of an independent and credible ICC. As the Prosecutor is the face of the ICC, the failure to discharge the responsibilities of the office effectively, as provided for in the Statute, weakens the pursuit of international justice by this global institution.

The power of the Prosecutor to conduct preliminary examinations is important for the effective functioning of the ICC. This power, however, remains poorly understood or developed. Therefore, this chapter explores the extent and scope of prosecutorial discretion, regarding the conduct of preliminary examinations conducted mostly under Moreno-Ocampo.

Responses to these questions will go a long way towards clarifying the role of the Prosecutor in the dispensation of international criminal justice. A legal analysis of the exercise of prosecutorial discretion during preliminary examinations is needed to find out whether ICC Prosecutors have developed a defensible approach to the exercise of this power, as well as whether they have adhered to, or deviated from, a standard approach. Much of this chapter therefore analyses and criticizes the provisions of the Rome Statute, its policy objectives, general principles and practices adopted by the Prosecutors during the conduct of preliminary examinations.

In order to carry out such a critical analysis, a discussion of the theoretical framework adopted for the chapter – prosecutorial neutrality, as well as principles and policies regulating the exercise of prosecutorial discretion – is necessary. The chapter aims to reveal whether the Prosecutor has developed appropriate procedures, principles and practices so that the exercise of discretion can inspire public confidence. To the extent that it has not done so, this chapter will consider how to ensure that the Prosecutor's discretion is exercised as envisaged by the Rome Statute.

To summarize, a critical aim of this chapter is to understand how the ICC Prosecutor exercises prosecutorial discretion during preliminary

examinations and whether the policies and principles adopted by the Prosecutor in carrying out the task are consonant with the provisions of the Rome Statute. It is based on the premise that a lack of neutrality and objectivity in the process of conducting preliminary examination by the ICC Prosecutor has partly contributed to the criticisms currently trailing the activities of the Court. This has also diminished the effectiveness of the ICC as a Court of last resort, whose judicial activities are expected to complement those of national judicial systems. The chapter will involve the analysis of various primary and secondary sources of law regulating the exercise of prosecutorial discretion. It will consider the theory of prosecutorial neutrality as it applies to the ICC Prosecutor using provisions of the Rome Statute as a starting point, asking whether the first Prosecutor was neutral. It will also review the policy paper on preliminary examination adopted by the ICC in 2013.

Irrespective of who triggers the jurisdiction of the ICC, the Prosecutor has a mandate to conduct a preliminary examination to decide whether there is a reasonable basis to proceed with an investigation.[4] The UNSC may suspend the decision to open an investigation after a preliminary examination, acting under Chapter VII of the UN Charter.[5] The power of the UNSC to suspend an investigation or prosecution does not, however, interfere with the discretion granted to the Prosecutor to conduct preliminary examinations.[6] The Chambers of the ICC are the Appeal, Trial and Pre-Trial Divisions.[7] However, it is only the Pre-Trial Chamber of the ICC that may intervene during preliminary examinations.

4 Article 53(1) provides that "[t]he Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute". Rome Statute of the International Criminal Court, 17 July 1998, Article 53(1) ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/). See also ICC, Situation in the Republic of Côte d'Ivoire, Pre-Trial Chamber, Judge Fernàndez de Gurmendi's separate and partially dissenting opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, ICC-02/11-15, para. 24 (http://www.legal-tools.org/doc/ea2793/).

5 Article 16 of the ICC Statute provides, "[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions".

6 *Ibid*.

7 See ICC Statute, Article 34.

Primarily, this chapter looks at the preliminary examinations concluded by the Prosecutor in the Central African Republic, Côte d'Ivoire, Kenya, Libya, Sudan and Uganda and these examinations resulted in the current challenges between the Court and African governments. These case studies reflect different means through which cases are referred to the ICC Prosecutor. The cases of Uganda and Central African Republic were self-referrals; those of Sudan and Libya were UNSC referrals, while those of Kenya and Côte d'Ivoire were initiated through *proprio motu* powers of the Prosecutor.[8]

11.1.1. The Prosecutor of the ICC

The OTP is established under Article 42 of the ICC Statute. The Prosecutor is elected by secret ballot and needs an absolute majority of the States Parties.[9] Although the Statute provides limited information on the procedure for nominating and electing the Prosecutor, the States Parties have adopted a procedure for the nomination of judges, the Prosecutor and the Deputy Prosecutors of the Court.[10]

These procedures attempt to ensure that the person appointed as Prosecutor is independent in law and practice. For example, they state that nominations for the Prosecutor should be made by several States Parties.[11] In addition, they urge States Parties to make every effort to elect the Prosecutor by consensus.[12] If consensus does not emerge, then the candidates have to be put up for election. The absolute majority required for election was intended to ensure that the Prosecutor garners widespread support from States. Such level of support would militate against partiality. In addition to these requirements, candidates are expected to be persons of

8 *Proprio motu* refers to the inherent power of the Prosecutor to initiate proceedings without a referral from a State party to the Statute or from the UNSC. See ICC Statute, Article 15 for the steps to be taken by the Prosecutor during *proprio motu* proceedings. The Prosecutor will only proceed with the approval of the Pre-Trial Chamber of the ICC. See ICC Statute, Articles 13(c) and 15.

9 ICC Statute, Article 42(4). The Assembly of States Parties of the Rome Statute consists of all States that have ratified the treaty. Though non-state parties can participate in the meetings, they do not have a right to vote.

10 ICC Assembly of States Parties ('ASP'), Resolution on the Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court, adopted at the 3rd Session of the ASP, 6th plenary meeting, on 10 September 2004, ICC-ASP/3/Res.6 (http://www.legal-tools.org/doc/fd0324/).

11 *Ibid*., para. 29.

12 *Ibid*., para. 33.

high moral character and competence, and to have extensive practical experience in the prosecution or trial of criminal cases.[13]

The Prosecutor enjoys a relatively secure tenure. She is appointed to an uninterrupted single term of nine years.[14] During this period, the Prosecutor is expected not to engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence.[15] Furthermore, the Prosecutor is prohibited from engaging in any other occupation of a professional nature while in office.[16] If there is any likelihood of conflict of interest, the Prosecutor may request to be excused from a particular situation or case.[17]

The Prosecutor can be removed from office on two grounds only. The first is when the Prosecutor is found to have committed "serious misconduct" or a "serious breach" of his or her duties under the Statute, as provided for in the Rules of Procedure and Evidence ('RPE') or displays inability in exercising the functions required by the Statute.[18] The second is when the Prosecutor is unable to exercise the functions required by the Rome Statute.[19] A serious misconduct is conduct that is incompatible with official functions, and causes or is likely to cause serious harm to the proper administration of justice before the Court or the proper internal functioning of the Court.[20] Serious breach of duty occurs where a person has been grossly negligent in the performance of his or her duties or has knowingly acted in contravention of those duties.[21] Inability to exercise the functions of the office can be due to sickness or any other factor that could militate against the effective functioning of the Prosecutor.

The security of tenure of the Prosecutor is not only guaranteed by the prescription of grounds of removal. It is also guaranteed by a specific procedure by which such removal can happen. Article 46(2) of the Rome Statute provides that a decision to remove the Prosecutor from office is

13 ICC Statute, Article 42(3).

14 *Ibid*., Article 42(4).

15 *Ibid*., Article 42(5).

16 *Ibid*.

17 *Ibid*., Article 42(6).

18 *Ibid*., Article 46(1)(a).

19 *Ibid*., Article 46(1)(b).

20 ICC, Rules of Procedure and Evidence, 9 September 2002, Rule 24(1) ('ICC RPE') (http://www.legal-tools.org/doc/8bcf6f/).

21 *Ibid*., Rule 24(2).

made by the Assembly of States Parties through a secret ballot by an absolute majority of States Parties to the Rome Statute.[22] This means that the Prosecutor can be removed for gross misconduct only during the annual sessions of the Assembly of States Parties, unless a special session is convened for that purpose.[23] Where the Prosecutor has committed misconduct of less serious nature, he or she shall be subject to disciplinary measures, in accordance with the RPE.[24]

For the Prosecutor to be independent, it is important that his or her powers are clearly laid down by law. The Rome Statute does this in Article 42 which provides that the "Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof".[25] The Rome Statute also provides that the Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. In addition, it states that the Prosecutor and the Deputy Prosecutors shall be of different nationalities and shall both serve on a full-time basis.[26]

The Rome Statute sets a high standard for the ICC Prosecutors with regard to character and competence. It provides that the Prosecutor and the Deputy Prosecutors "shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases".[27] In addition, the Prosecutor and Deputy Prosecutors shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.[28]

The Rome Statute provides expressly that the ICC Prosecutor shall act independently as a separate organ of the Court. As such, it has a re-

22 ICC Statute, Article 46(2)(b).

23 Annual Sessions of the ASP meeting are alternated between The Hague, Netherlands and the United Nations Headquarters in New York. See ICC Statute, Article 112(6); S. Rama Rao, "Assembly of States Parties", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd edition, C.H. Beck Publishers, Munchen, 2008, p. 1695.

24 ICC Statute, Article 47.

25 *Ibid*., Article 42(1).

26 *Ibid*.

27 *Ibid*., Article 43(3).

28 *Ibid*. The Working Languages of the Court are French and English. However, the Official Languages of the Court are Arabic, Chinese, English, French, Russian and Spanish. See *ibid*., Article 50.

sponsibility to receive referrals on crimes within the jurisdiction of the Court, examine evidence and conducting investigations and prosecutions before ICC judges. The OTP is prohibited from seeking or acting on instructions from any external source.[29]

This discussion shows that at the formal level, the Rome Statute has provisions aimed at ensuring that the Prosecutor is independent and exercises prosecutorial discretion without any interference or favour. Like the prosecutors at the national level and in other international criminal tribunals, the ICC Prosecutor derives his or her powers from the empowering law. Such guarantee of formal independence is bolstered by other specific provisions of the Rome Statute and its accompanying subsidiary laws that define the powers of the Prosecutor, make provision for a relatively credible appointment process of the Prosecutor, protect the tenure of the incumbent and provide the legal framework for the exercise of prosecutorial discretion.

The Prosecutor of the ICC also enjoys a longer tenure of nine years compared to the prosecutors of the Special Court for Sierra Leone and the Special Tribunal for Lebanon referred to as hybrid tribunals and appointed into office by the UN Secretary-General for three renewable years, and the prosecutors of the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR'), who enjoy four-year renewable terms.

11.2. The Theory of Prosecutorial Neutrality

An important framework to discuss the exercise of prosecutorial discretion during preliminary examinations at the ICC is the theory of prosecutorial neutrality as espoused by Bruce Green and Fred Zacharias in 2004.[30] The theory does not assume a single definition of the term neutrality. This is because the word 'neutrality' has different meanings and under the administration of criminal justice assumes an entirely different concept. For example, neutrality has been defined as "the state of not supporting or helping either side in a conflict or disagreement".[31] In addition, it is also defined as the "absence of decided views, expression, or strong feel-

[29] *Ibid*., Article 42.

[30] Bruce Green and Fred Zacharias, "Prosecutorial Neutrality", in *Wisconsin Law Review*, 2004, vol. 7, no. 3, p. 840.

[31] Angus Stevenson (ed.), Oxford Dictionary of English, 3rd edition, Oxford University Press, 2010, p. 1194.

ing".[32] A synonym of neutrality is impartiality which involves the lack of prejudice towards or against any particular side or party, the quality of fairness or being unbiased. However, looking closely at these words, they may mean different things at different times. In the context of criminal justice, neutrality and impartiality may mean different things depending on the context. The same variation is applicable to bias and fairness.

Neutrality was initially attributed to judges and as a concept was seen as a dividing line between judges and lawyers.[33] This means judges were originally meant to be neutral, while discharging their responsibilities, whereas most lawyers, as discussed earlier, were involved in private practice, and had to fight the cause of their clients. However, the concept has evolved into including those lawyers who are seen as officers of the court serving in the temple of justice.[34] Therefore in a sense, neutrality is a concept shared by prosecutors and judges as officers of the court.

In the context of our discussion, there are three broad dimensions of neutrality which are closely linked to each other and will be discussed as proposed by Green and Zacharias. These are non-bias, non-partisanship and adherence to readily identifiable and consistently applied criteria in decision making. The theory of prosecutorial neutrality calls for the emergence of a three-dimensional neutral prosecutor. The central argument made by the authors is that:

> A three-dimensional "neutral prosecutor" simply would need to remain non-biased, non-partisan, and principled. This prosecutor would ignore impermissible considerations such as race, gender and religion, self-interest, personal beliefs, and party politics. Her frame of mind would be independent, objective, and non-political. She would need to act in a non-arbitrary fashion, consistently applying decision-making criteria derived from societally acceptable sources.[35]

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32 *Ibid*.

33 Green and Zacharias, 2004, p. 839, see *supra* note 30.

34 *Ibid*.

35 Green and Zacharias, 2004, p. 886, see *supra* note 30. See also Robert Jackson, "The Federal Prosecutor", in *Journal of Criminal Law and Criminology*, 1940, vol. 31, no. 3, p. 6, who argues that a good prosecutor is one "who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility".

The authors argue that a three-dimensional neutral prosecutor is expected to take decisions that are depersonalized. In this instance, the decisions of the prosecutor should not be based on personal idiosyncrasies, but rather should be based on the pursuit of public interest. In addition, this prosecutor will consistently make decisions by reference to a set of generalized, deeply-rooted decision-making norms. These norms can be administrative laws set up to guide the operations of the office or administrative laws set out to guide prosecutors generally.[36] Furthermore, the neutral prosecutor must be accountable to the public, in the broadest sense. In this instance, accountability refers to the fact that the primary responsibility of the prosecutor is to ensure that the public is the primary constituency of the prosecutor and not the police, the victims or the even the politicians whose interests at times may run contrary to those of the general public.

This chapter adopts the theory of prosecutorial neutrality and the concept of three-dimensional neutral prosecutor proposed by Green and Zacharias. Although the theory and concept are based on an expansive study of the American criminal law system, the issues discussed are applicable to the ICC. The framework proposed by the authors clearly mirrors some of the approaches adopted by the former and current Prosecutors of the ICC. In addition, these policies have been made public in the policy paper on prosecutorial discretion during preliminary examinations which was released officially in November 2013.[37] These principles and polices in the policy paper on preliminary examinations will be applied in the case studies discussed later. In addition, ICC Prosecutors have consistently maintained that they only apply the provisions of the Rome Statute. Therefore, the policy papers ordinarily will reflect a progressive interpretation of the Rome Statute.

11.2.1. Prosecutorial Neutrality: Convergence of Domestic and International Criminal Law Systems

As noted earlier, this chapter adopts the theory of prosecutorial neutrality to examine the exercise of prosecutorial discretion during preliminary examinations at the ICC. However, since the ICC is an international justice institution and applies a hybrid legal system derived from national

[36] Rory K. Little, "Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role", in *Fordham Law Review*, 1999, vol. 68, no. 3, pp. 738.

[37] OTP, *Policy Paper on Preliminary Examinations*, 1 November 2013 ('*Policy Paper on Preliminary Examinations 2013*') (http://www.legal-tools.org/doc/acb906/).

judicial systems, it is also necessary to discuss the similarity and differences between the domestic and international criminal justice system and the applicability of the theory of prosecutorial neutrality at the ICC.

There is a nexus between the theory of prosecutorial neutrality as advanced by Green and Zacharias and the activities of the ICC Prosecutor. However, it has to be reiterated that the theory as propounded by Green and Zacharias standing alone does not answer the critical questions discussed in this chapter, which revolves around the powers of the first ICC Prosecutor during preliminary examinations and how this impacted on the relationship between Africa and the ICC. As the theory of prosecutorial neutrality was originally developed from the American legal system, there are notable differences between a domestic legal system and the international criminal justice system.

The prosecutor at the national level has more latitude to operate compared to the ICC Prosecutor in the exercise of the functions of the office. This is because the ICC Prosecutor is considerably restricted by the Pre-Trial Chamber that must approve a request by the Prosecutor to open an investigation.[38] However, at the national level and depending on the legal system in place, there is a distinction between general and specific control of the prosecutor. For example, the executive arm of the government can issue guidelines for the exercise of discretion but there is no direct control of the prosecutor in the discharge of daily activities. This includes the decision to charge or not charge a particular defendant.[39]

Depending on the jurisdiction, national prosecutors conduct investigations with police or with investigative judges. For instance, in most commonwealth countries, the police conduct investigations and hand over the docket to the national prosecutor for decision whether to prosecutor or not.[40] In civil law jurisdictions like France, an investigative judge is part of the decision to investigate and prosecute crimes. However, under the Rome Statute of the ICC, the responsibility to investigate and prosecute international crimes is the sole responsibility of the OTP. While the prosecutor at the national level is responsible for the prosecution of every crim-

38 ICC Statute, Article 15(3).

39 Kai Ambos, "The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports", in *European Journal of Crime, Criminal Law and Criminal Justice*, 2000, vol. 8, no. 2, p. 115.

40 *Ibid*., p. 116.

inal offence, the ICC Prosecutor is limited to the prosecution of "serious crimes of concern to the international community as a whole".[41]

Although national prosecutors are independent, they are accountable to government institutions. For example, some national prosecutors are accountable to the Parliament through appropriate line Ministries which is directly under the control of the executive arm of government.[42] However, the ICC Prosecutor is accountable to the Assembly of States Parties of the ICC who provides "management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court".[43]

Some national legal systems like the US employ the use of private prosecutors for the prosecution of crimes.[44] This has its historical roots in the emergence of the modern prosecutor as earlier discussed in this chapter. However, the use of private prosecutors is alien to the ICC. The Rome Statute provides that the Prosecutor is responsible for conducting investigations and prosecutions before the Court.[45] The Statute allows the ICC Prosecutor to appoint advisers with legal expertise on specific issues, including but not limited to sexual and gender violence and violence against children.[46] These experts only advise the Prosecutor on areas of their expertise but do not take over the investigation and prosecution roles of the Prosecutor which is obtainable in some national legal systems.

As the theory of prosecutorial neutrality was originally developed for the American criminal law system, it has to be adapted into the international criminal justice system, to accommodate some of the differences inherent in the two systems. The relationship between the domestic and international criminal law systems are discussed in subsequent chapters of the study. However, it is important at this stage to lay the foundation that will guide further discussions.

41 See ICC Statute, Article 5.

42 Daniel Nsereko, "Prosecutorial Discretion before National Courts and International Tribunals", in *Journal of International Criminal Justice*, 2000, vol. 3, no. 1, p. 144.

43 ICC Statute, Article 112(2)(b).

44 Roger A. Fairfax, "Delegation of the Criminal Prosecution Function to Private Actors", in *University of California, Davis Law Review*, 2009, vol. 43, no. 2, p. 415.

45 ICC Statute, Article 42(1).

46 *Ibid*., Article 42(9).

What is generally known today as the international criminal justice system is a hybrid of different domestic criminal justice systems that evolved over time to give birth to procedures applied at the Nuremberg and Tokyo Tribunals in Germany and Japan respectively. The ICTY and the ICTR in The Hague and Tanzania respectively benefitted from developments in domestic legal systems. In addition, the Rome Statute itself is an amalgam of different legal systems that converged to form what is loosely termed the 'Rome Statute system of justice'. Prosecutorial discretion, the subject matter of this study, also evolved from the national to international criminal justice systems. Lawyers in both systems train and practice at national levels. There is currently no special training for lawyers who practice in the international criminal justice system. Therefore, the major legal education received by lawyers and judges is first and foremost at the domestic level.

The Rome Statute is a treaty negotiated by sovereign States whose primary interest is to protect national interests.[47] In this regard, a key interest in establishing the ICC is for it to collaborate with national judicial institutions in investigating and prosecuting crimes within its jurisdiction. This is the reason why a key principle of the Rome Statute is complementarity.[48] It places primary obligation on States to investigate and prosecute those accused of international crimes at the domestic level. It is only when a State is unable, unwilling and inactive in doing so that the ICC will step in to ensure that there is justice and no impunity gap. The relationship between the domestic legal system and international criminal justice system is reinforced by the fact that national procedures are recognized as legitimate and effective, as long as they meet the threshold of justice and fairness and, in this instance, the principle of complementarity.

In addition, it will be recalled that that the highest decision-making organ of the ICC is the Assembly of States Parties, which appoints and elects officials of the Court, including the Prosecutor, Registrar, Judges and Board Members of the Victims' Trust Fund.[49] In addition, the Assembly of States Parties to the Statute provides management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration

47 Robert Cryer, "International Criminal Law vs State Sovereignty: Another Round?", in *European Journal of International Law*, 2006, vol. 16, no. 5, p. 995.

48 ICC Statute, Preamble and Articles 1 and 17.

49 See *ibid*., Article 112.

of the Court.[50] Although composed mainly of sovereign States, its decisions are binding on the ICC.

11.3. Prosecutorial Discretion and Policy Paper on Preliminary Examinations

The policy paper adopted by the OTP describes the practice and policy of the OTP during the conduct of preliminary examinations. The main objective of such preliminary examinations is to assess whether the legal requirement for opening investigations are met. In other words, the Prosecutor weighs the facts and circumstances of a case to determine whether it meets the criteria set in the provisions of the Rome Statute.[51]

The policy paper on preliminary examination is a combination of several legal instruments of the ICC including the Rome Statute, RPE, Regulations of the ICC, Regulations of the OTP, prosecutorial strategies of ICC and other relevant policy documents. In addition, the practical experience gained by the Prosecutor and decisions of the ICC judges have proved beneficial in the process of developing the policy paper.[52]

The policy paper is a document reflecting an internal policy of the OTP and therefore does not give rise to legal rights. Furthermore, it is subject to revisions based on experiences of the Prosecutor and decisions of the Judges of the ICC.[53] Although the policy paper is an internal document, the Prosecutor of the ICC has made it public in the "interest of promoting clarity and predictability regarding the manner in which it applies the legal criteria set out in the Statute".[54] The Rome Statute does not require the Prosecutor to declare how prosecutorial discretion is exercised during preliminary examinations, however the need for "clarity and predictability" as stated by the Prosecutor is a key ingredient of the three-dimensional neutral prosecutor.

The policy paper affirms the fact that a major goal of the ICC is to put an end to impunity for the most serious crimes of concern to the international community by ensuring effective prosecution of international crimes at the national level. It therefore prioritises the primary responsi-

50 See *ibid*., Article 112(2).

51 *Policy Paper on Preliminary Examinations 2013*, para. 19.

52 *Ibid*.

53 *Ibid*., para. 20.

54 *Ibid*., para. 21.

bility of national judicial systems to hold accountable their citizens alleged to have committed international crimes. The activation of the jurisdiction of the Court is only possible in the absence of genuine national proceedings. The prosecutor has discretion to open investigations after conducting preliminary examination. However, the power is subject to the authorization of the Pre-Trial Chambers if it is a *proprio motu* investigation.[55]

11.3.1. General Principles of Prosecutorial Discretion during Preliminary Examinations

Although the theory of neutrality identifies three distinct features, the OTP in the policy paper on preliminary examination has two main subdivisions. These are the general principles guiding the conduct of preliminary examinations and the statutory factors applied at the preliminary examination in order to determine whether there is a reasonable basis to proceed with an investigation based on the information available.[56]

It is necessary at this stage to examine the applicability of the principle of neutrality to the exercise of prosecutorial discretion during preliminary examinations at the ICC. The principle against bias, an aspect of neutrality, is implicit in the general principle of non-discrimination recognized by the Rome Statute which provides that the application and interpretation of law must be consistent with internationally recognized human rights. This of course must be without any adverse distinction founded on grounds as gender, age, colour, language, religion, or belief, political opinion, national, ethnic or social origin, wealth, birth or other status.[57] There is a relationship between bias and discrimination. If a decision is based on discrimination, it can be impeached on the basis of bias.

11.3.1.1. Independence during Preliminary Examinations

The first principle of the policy paper on preliminary examination is the independence of the OTP.[58] According to the policy paper, independence means that "decisions shall not be influenced or altered by the presumed

55 See ICC Statute, Articles 15(3), 42(1) and 53(1).

56 *Policy Paper on Preliminary Examinations 2013*, para. 35.

57 See ICC Statute, Article 21(3).

58 ICC Statute, Article 42.

or known wishes of any party, or in connection with efforts to secure co-operation".[59]

The independence of the Prosecutor is crucial to the administration of justice. It is what differentiates the Prosecutor of the ICC from prosecutors at the Nuremberg and Tokyo tribunals. The Rome Statute guarantees the independence of the Prosecutor from external influences by forbidding the Prosecutor or any member of his or her staff from seeking or acting on instructions from any external source.

The policy paper states that during preliminary examinations, the Prosecutor has a duty to investigate all sides involved in a conflict and cannot be limited in a manner contrary to the provisions of the Statute.[60] For example, when the Ugandan government submitted a referral to the Prosecutor in December 2003, it was with respect to the activities of the Lord's Resistance Army ('LRA').[61] However, the former Prosecutor correctly expanded the referral to include investigations into acts committed by both the LRA and government soldiers in the Northern Uganda conflict.[62]

The preliminary examination of the Darfur situation offered an opportunity for the Prosecutor to demonstrate independence. He consulted several publicly available materials, although he also requested information from those with expertise on the conflict. Even though a list of potential suspects was handed to the Prosecutor by an International Commission of Inquiry, his decision to proceed with an investigation was based on his independent assessment of the conflict situation.[63]

Independence is the hallmark of the ICC Prosecutor. As mentioned, prosecutorial neutrality, related to non-partisanship, encompasses independence from actors within and outside the OTP. These actors would likely influence decisions, compromising objectivity in weighing every

59 *Policy Paper on Preliminary Examinations 2013*, para. 26.

60 *Ibid*., para. 27; ICC RPE, Rule 44(2); ICC Statute, Articles 12, 13, 14, 15, 42(1) and 54(1)(a).

61 International Criminal Court, "President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC", 29 January 2004, ICC-20040129-44 (http://www.legal-tools.org/doc/ff41c3/).

62 OTP, "Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda", 29 July 2004, ICC-OTP-20040729-65 (http://www.legal-tools.org/doc/f9709e/).

63 OTP, *First Report of the Prosecutor of the ICC to the Security Council pursuant to UNSC 1593 (2005)*, 29 June 2005 (http://www.legal-tools.org/doc/34abb8/).

piece of evidence before a decision is made. In this instance, the Prosecutor of the ICC would deal with a variety of factors and actors, including the States under preliminary investigation, ASP members, and also the UNSC members with controlling influence over the activities of the ICC.

11.3.1.2. Impartiality during Preliminary Examinations

Impartiality is one of the core principles governing the work of the Prosecutor during preliminary examinations. It involves a fair-minded and objective treatment of persons and issues, free from any bias or influence.[64] The Statute provides that the Prosecutor and the Deputy Prosecutor shall not participate in any matter in which their impartiality might reasonably be doubted on any ground.[65] The Policy Paper states that the Prosecutor is expected to be impartial during preliminary examinations and that 'impartiality' requires the application of consistent methods and criteria, irrespective of the States or other parties involved.[66] Furthermore, geopolitical implications, or geographical balance between situations, are not relevant criteria for determining whether or not to open an investigation into a situation under the Statute.[67]

11.3.1.3. Objectivity during Preliminary Examinations

Objectivity relates to the ability of the Prosecutor to investigate equally both incriminating and exonerating circumstances in order to establish the truth in a situation before the ICC.[68] Article 54(1) of the Rome Statute refers to the duties and powers of the prosecution during investigations, but the Prosecutor also maintains 'objectivity' as a self-regulating principle during preliminary examination.[69] However, deciding whether the Prosecutor has been objective or otherwise during preliminary examinations is subject to debate. The principle of objectivity requires the Prose-

64 OTP, Code of Conduct for the Office of the Prosecutor, 5 September 2013, para. 29 (http://www.legal-tools.org/doc/3e11eb/).

65 ICC Statute, Article 42(7); ICC RPE, Rule 34(1).

66 *Policy Paper on Preliminary Examinations 2013*, para. 28.

67 *Ibid*., para. 29.

68 ICC Statute, Article 54(1); OTP, Regulations of the Office of the Prosecutor, 23 April 2009, ICC-BD/05-01-09, Regulation 34(1) ('OTP Regulations') (http://www.legal-tools.org/doc/a97226/).

69 *Policy Paper on Preliminary Examinations 2013*, para. 30.

cutor to ensure the reliability of the information received, as well as its source.[70]

These three principles of independence, impartiality and objectivity reflect the theory of neutrality. In addition, a prosecutor that exhibits the above traits approximates the three-dimensional neutral prosecutor as presented by Green and Zacharias. It can also be added that a combination of independence, impartiality and objectivity should ordinarily lead to neutrality because these principles are the attributes of a plain reading of the word neutral. However, beyond these principles are the policy objectives of the Prosecutor during preliminary examinations, which are discussed in detail below.

11.3.2. Prosecutorial Discretion and Policy Objectives Guiding Preliminary Examinations

The policy objectives that guide the exercise of prosecutorial discretion are transparency, ending impunity through positive complementarity and the prevention of international crimes.

11.3.2.1. Transparency during Preliminary Examinations

One of the themes addressed in the policy paper is transparency during preliminary examinations. Transparency is a process through which the Prosecutor promotes a better understanding of preliminary examinations through regular public engagements. According to the policy paper, transparency involves making public the findings of each preliminary examination to all concerned stakeholders, the provision of reasoned decisions either to or not to proceed with an investigation, and the publication of periodic reports showing how decisions on preliminary examinations are made.[71] The main goal of transparency during preliminary examinations is to ensure predictability in the activities of the Prosecutor without raising undue expectations that an investigation will be opened in every preliminary examination conducted by the Prosecutor.[72]

These provisions represent a welcome departure from the previous policy of the Prosecutor, especially during the tenure of Moreno-Ocampo, where preliminary examinations were treated as confidential information

[70] *Ibid*., para. 31.

[71] *Ibid*., para. 15.

[72] *Ibid*., para. 94.

with little or no information released to the public during the process.[73] The lack of transparency in the early years of the operation of the ICC weakened the possibility of using preliminary investigations to spur national proceedings to deter the commission of international crimes within the jurisdiction of the ICC.[74]

11.3.2.2. Ending Impunity through Positive Complementarity during Preliminary Examinations

Positive complementarity is a key policy objective of the Prosecutor during preliminary examinations. Complementarity is a key factor in the determination of whether or not to proceed with an investigation during a preliminary examination. Under the Rome Statute, the Prosecutor has to ensure that a case is admissible using the legal criteria established in the Rome Statute under Article 17. However, during a preliminary examination, the Prosecutor is expected to use the proceedings to spur the national government to investigate and prosecute international crimes within the jurisdiction of the Court that occurred in the State concerned. However, when the State remains inactive, unwilling and unable to carry out investigations and prosecutions, the Prosecutor intervenes to ensure there is no impunity for international crimes at national level.[75]

Positive complementarity has been defined by the Prosecutor as a proactive policy of co-operation aimed at promoting national proceedings.[76] It is regarded as a managerial concept that governs the relationship between the Court and domestic jurisdictions on the basis of three cardi-

[73] Human Right Watch argues that "[w]hile the OTP initially treated these preliminary examinations as confidential, it now routinely makes public the fact that it has initiated the examination and provides information on the different activities it is undertaking to further its analysis such as meetings with national authorities". See Human Right Watch, ICC: Course Correction: Recommendations to the ICC Prosecutor for a More Effective Approach to "Situations under Analysis", 16 June 2011.

[74] *Ibid*.

[75] *Policy Paper on Preliminary Examinations 2013*, para. 100.

[76] OTP, Prosecutorial Strategy 2009-2012, 1 February 2010 (http://www.legal-tools.org/doc/6ed914/). The ASP report of the Bureau on complementarity refers to positive complementarity as "all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis" See ASP, *Report of the Bureau on Stocktaking: Complementarity*, 18 March 2010, ICC-ASP/8/51, para. 16 (http://www.legal-tools.org/doc/c508a8/).

nal principles: (a) the idea of a shared burden of responsibility; (b) the management of effective investigations and prosecutions; and (c) the two-pronged nature of the cooperation regime.[77]

According to Burke-White, positive complementarity is also defined as a process by which the Prosecutor "would actively encourage investigation and prosecution of international crimes within the court's jurisdiction by States where there is reason to believe that such States may be able or willing to undertake genuine investigations and prosecutions and where the active encouragement of national proceedings offers a resource-effective means of ending impunity".[78] However, that this policy has not been pursued effectively is evident in the manner the ICC Prosecutors have interpreted and applied the principle.

According to Human Rights Watch, the Prosecutor has not used positive complementarity very effectively and its potentials are yet to be fully explored.[79] This is because the time that it takes to carry out a preliminary examination provides the ICC Prosecutor with opportunities to catalyse national proceedings. This can be understood as a component of 'positive complementarity', that is, active efforts to see the complementarity principle put into practice through national prosecutions of ICC crimes.

11.3.2.3. Prevention of International Crimes during Preliminary Examinations

The third and final policy paper on preliminary examinations deals with the prevention of international crimes. According to it, the Prosecutor performs an early warning function through public service announcements regarding crimes that appear to fall within the jurisdiction of the ICC.[80] The Prosecutor argues that publicizing ICC activities will help in breaking the circle of impunity by deterring international criminals.[81] For example, the Prosecutor has intervened in several situations currently under analy-

77 Carsten Stahn, "Complementarity: A Tale of Two Notions", in *Criminal Law Forum*, 2008, vol. 19, no. 1, p. 113.

78 William Burke-White, "Implementing a Policy of Positive Complementarity in the Rome System of Justice", in *Criminal Law Forum*, 2008, vol. 19, no. 1, p. 62.

79 Human Right Watch, 2011, see *supra* note 73.

80 *Policy Paper on Preliminary Examinations 2013*, para. 104.

81 *Ibid*., para. 106.

sis by releasing reports that condemn crimes committed against civilians and threatening prosecution for alleged perpetrators of these crimes.

In the Central African Republic, the Prosecutor argued that "deteriorating security situation […] has contributed to the escalation of unlawful killings, sexual violence, recruitment of child soldiers and other grave crimes, across the country".[82] In furtherance of the policy of preventing international crimes, the Prosecutor has issued statements in relation to situations in Georgia,[83] Kenya,[84] Guinea,[85] South Korea,[86] Nigeria,[87] Côte d'Ivoire[88] and Mali.[89] The preventive effects of these statements are, however, subject to debate. This is because the use of international criminal courts to deter future criminals is a highly contested issue.[90] There is no general agreement on whether the ICC has had any deterrent or preventive effect on future criminals and their collaborators. Payam Akhavan has argued that the ICC's preventive effect is visible in Northern Uganda where the ICC helped to isolate the LRA thereby ending the conflict.[91] The assertion is disputable to the extent that the ICC has been accused of derailing the proposed peace deal between the LRA and the government

82 OTP, "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, in relation to the escalating violence in the Central African Republic", 9 December 2013 (http://www.legal-tools.org/doc/dbdc24/).

83 OTP, "Prosecutor's statement on Georgia", 14 August 2008 (http://www.legal-tools.org/doc/5bcdc2/).

84 OTP, "OTP statement in relation to events in Kenya", 5 February 2008 (http://www.legal-tools.org/doc/765584/).

85 OTP, "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the occasion of the 28 September 2013 elections in Guinea", 27 September 2013 (http://www.legal-tools.org/doc/96982f/).

86 OTP, "ICC Prosecutor: Alleged war crimes in the territory of the Republic of Korea under preliminary examination", 6 December 2010 (http://www.legal-tools.org/doc/d7a9fb/).

87 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 Mach 2015 (http://www.legal-tools.org/doc/db08e6/).

88 OTP, "Statement by ICC Prosecutor Luis Moreno-Ocampo on official visit to Côte d'Ivoire", 14 October 2011 (http://www.legal-tools.org/doc/49e48a/).

89 OTP, "Statement by ICC Prosecutor concerning Mali", 28 January 2013 (http://www.legal-tools.org/doc/da05fb/).

90 Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?", in *American Journal of International Law*, 2001, vol. 95, no. 1, pp. 7–31.

91 Payam Akhavan, "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court", in *American Journal of International Law*, 2005, vol. 99, no. 2, pp. 403–21.

of Uganda. For example, regarding the involvement of the ICC in the Juba peace process, Kamari Clarke argues that the arrest warrants issued against the LRA were responsible for the failure of the Juba peace process.[92]

From the foregoing discussion, it can be argued that the publication of the policy paper on preliminary examination is a positive development for the OTP as it was a significant shift for the office in the way preliminary examinations were carried out. In addition, the policy paper on preliminary examination recognized the fact that there was a need for public scrutiny of the activities of the Office leading to greater predictability of its actions. The policy paper also supports the argument for guidelines regulating the conduct of preliminary examinations.

However, as has been noted in this chapter, the publication of the policy paper on preliminary examination has not totally removed the criticisms against the ICC for the conduct of preliminary examinations and what informs the decision to proceed. In addition, some of the reports produced under the policy paper on preliminary examination are yet to define clearly how the Prosecutor evaluates the decision whether to open an investigation or not.

11.4. Preliminary Examinations and Referral of Situations to the Court

There are three main procedures through which situations can be referred to the ICC Judges. These include self-referral by States, referral by the UNSC and that by the ICC Prosecutor using *proprio motu* powers. In addition, a State that is not a party to the Statute can accept the jurisdiction of the Court.

11.4.1. Referral of a Situation by a State Party

A situation that is within the jurisdiction of the ICC can be referred to the Prosecutor by a State Party to the Rome Statute. The ICC Prosecutor encourages States to self-refer cases within the jurisdiction of the Court to

[92] The Juba peace process was initiated by the former Vice-President of South Sudan, Riek Machar between the Government of Uganda and the LRA. The deliberations were inconclusive as the leader of the Lord's Resistant Army, Joseph Kony refused to sign the final peace deal. See Kamari Clarke, "Kony 2012, the ICC, and the Problem with the Peace-and-Justice Divide", in *Proceedings of the Annual Meeting of the American Society of International Law*, 2012, vol. 106, p. 312.

the ICC for adjudication.[93] This means that States Parties to the Rome Statute refer potential situations within their jurisdiction to the ICC Prosecutor to commence preliminary examinations.[94]

This procedure has given rise to self-referral or auto-referral which is consistent with the provisions of the Statute regarding the principle of complementarity.[95] For example, a State Party that fails to investigate and prosecute crimes committed in its territory and also falling within the jurisdiction of the ICC can refer the situation to the Prosecutor using the legal framework established by the Statute.[96] However, the encouragement of self-referrals by the Prosecutor has proved to be counterproductive and continues to be a source of concern in the activities of the ICC.[97]

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93 *Policy Paper on Preliminary Examinations 2013*, para. 98.

94 Non-States Parties can accept the jurisdiction of the ICC under Article 12(3) of the Rome Statute to refer situations to the Prosecutor. Carsten Stahn, "Why Some Doors May Be Closed Already: Second Thoughts on a 'Case-by-Case' Treatment of Article 12(3) Declarations", in *Nordic Journal of International Law*, 2006, vol. 75, no. 2 pp. 243–48; Steven Freeland, "How Open Should the Door Be? Declarations by Non States Parties under Article 12(3) of the Statute of the International Criminal Court", in *Nordic Journal of International Law*, 2006, vol. 75, no. 2, pp. 211–41.

95 Andreas Muller and Ignaz Stegmiller, "Self-Referrals on Trial: From Panacea to Patient", in *Journal of International Criminal Justice*, 2010, vol. 8, no. 5, pp. 1267–94; Jann Kleffner, "Auto-referrals and the Complementarity Nature of the ICC", in Carsten Stahn and Goran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, 2009, Martinus Nijhoff Publishers, The Hague, p. 42; Claus Kress, "'Self-Referrals' and 'Waivers of Complementarity':Some Considerations in Law and Policy", in *Journal of International Criminal Justice*, 2006, vol. 4, no. 4, pp. 944–48. However, see William Schabas, *An Introduction to the International Criminal Court*, 4th edition, Cambridge University Press, 2011, p. 167, who argues that "[t]he self-referral sends the troubling message that States may decline to assume their duty to prosecute, despite the terms of the preamble to the Statute, not to mention obligations imposed by international human rights law, by invoking the provisions of Article 14 and referring the 'situation' to The Hague".

96 ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber, Public Redacted Version of Corrigendum of Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, 10 February 2006, ICC-01/04-01/06-1-Corr-Red, para. 35 (http://www.legal-tools.org/doc/af6679/); see also Ignaz Stegmiller, "The International Criminal Court and Mali: Towards More Transparency in International Criminal Law Investigations?", in *Criminal Law Forum*, 2013, vol. 24, no. 4, pp. 475–99.

97 Human Rights Watch, *The Selection of Situations and Cases for Trial before the International Criminal Court*, 26 October 2006, p. 3.

11.4.2. Initiation of an Investigation by the Prosecutor

The exercise of prosecutorial discretion at the ICC begins with the Prosecutor's initiation of preliminary examinations. The Prosecutor exercises various types of discretion until the accused person is either convicted or acquitted of the alleged crimes. The Prosecutor receives information from individuals or groups, States, intergovernmental or non-governmental organizations, or a referral from a State Party or the Security Council, or a declaration issued pursuant to Article 12(3) of the Statute by a State that is not a State Party to the Statute, but which accepts the jurisdiction of the Court.[98] Subsequently, the Prosecutor embarks upon a four-phased process to evaluate whether the case complies with the requirements provided in the Statute. These factors are jurisdiction, admissibility (complementarity and gravity) and interests of justice.[99]

According to the policy paper on preliminary examinations, the information received is assessed to identify matters that fall within the jurisdiction of the ICC and those that do not. The initial assessment distinguishes between communications relating to matters that are manifestly outside the jurisdiction of the Court, situations that are already under preliminary examination, situations that are already under investigation or that form the basis of a prosecution, and lastly, matters that are neither manifestly outside the jurisdiction of the Court nor related to situations already under preliminary examination or that form the basis of a prosecution.[100]

The second phase relates to the preliminary examination, and is focused on all petitions that have scaled through the first phase.[101] It involves factual and legal assessments of the crimes committed in the re-

98 ICC Statute, Article 12; OTP Regulations, Regulation 25; *Policy Paper on Preliminary Examinations 2013*, paras. 4 and 73.

99 ICC Statute, Article 53(1)(a)–(c); Morten Bergsmo and Pieter Kruger, "Article 53", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd edition, C.H. Beck Publishers, 2008, pp. 1065–76; Giuliano Turone, "Powers and Duties of the Prosecutor", in Anthonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. II, Oxford University Press, Oxford, 2002, pp. 1138–80.

100 *Policy Paper on Preliminary Examinations 2013*, para. 78.

101 *Ibid*., para. 80.

ferred situation. The Prosecutor pays particular attention to "crimes committed on a large scale, as part of a plan or pursuant to a policy".[102]

After this phase, an 'Article 5 report' is published, which includes a decision on whether the alleged crimes fall within the material jurisdiction of the ICC in relation to Article 5 of the Statute.[103] The next phase is an assessment that leads to the publication of 'Article 17 report' detailing how admissibility issues have been resolved by the Prosecutor.[104] This involves the evaluation of whether the threshold of complementarity and gravity provided in Article 17 of the Statute has been met.[105] The final phase considers whether a decision to initiate an investigation would be in the interests of justice.[106] A report titled 'Article 53 report' is published discussing the reasons for the Prosecutor's decision to proceed or not to proceed with an investigation.[107]

For the Prosecutor to commence any preliminary examination, the above factors must be considered in detail. The Prosecutor cannot commence an investigation and prosecution of crimes within the jurisdiction of the ICC without conducting a preliminary examination. There is a difference between a preliminary examination conducted before the initiation of an investigation and the examination conducted before the initiation of a prosecution.[108] If the Prosecutor decides that there is a reasonable basis to open an investigation, the Statute mandates that a preliminary examination be conducted following the criteria laid down in Article 53 of the Rome Statute to determine whether there is reasonable basis to proceed with a prosecution.

Before the Prosecutor can decide that there is a reasonable basis to proceed with an investigation, there must be a determination that the ICC has jurisdiction over the case. The Prosecutor regards this decision to be a core element of the preliminary examination. Indeed, the policy paper on preliminary examinations states that "[t]he establishment of the Court's jurisdictional scope in accordance with Article 53(1)(a) defines in objec-

[102] *Ibid*., para. 81.
[103] *Ibid*.
[104] *Ibid*., para 82.
[105] *Ibid*.
[106] *Ibid*., para. 83.
[107] *Ibid*.
[108] ICC Statute, Article 53(1)(a)–(c) and (2)(a)–(c).

tive terms the parameters within which the Office conducts its investigative activities, that is, the 'situation'".[109]

As already mentioned, irrespective of how a preliminary examination is initiated, the Prosecutor must analyse the seriousness of any information received,[110] and may seek additional information from States, organs of the UN, intergovernmental organizations, NGOs or other reliable sources through written or oral testimonies.[111] At this stage, victims of the alleged crimes may make representations to the Pre-Trial Chamber, in accordance with the provisions of the RPE that govern such submissions.[112] A preliminary examination must conclude with a decision whether or not to proceed with an investigation.

11.4.3. Referral by the UNSC

The UN Charter provides a significant role for the UNSC in promoting international peace and security and the creation of the ICC was seen as an extension of that role.[113] The 1994 version of the Draft Code of Crimes against the Peace and Security of Mankind prepared by the ILC made the jurisdiction of the ICC subject to the approval of the UNSC.[114] If the provision had been adopted, it would have given the UNSC a considerable influence over the activities of the ICC.[115] During the Preparatory Committee meeting in August 1997, Singapore proposed an amendment re-

109 *Policy Paper on Preliminary Examinations 2013*, para. 41.

110 ICC Statute, Article 15(2); Geert-Jan Alexander Knoops, "Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective", in *Criminal Law Forum*, 2004, vol. 15, no. 4, pp. 365–90.

111 ICC Statute, Article 15(2).

112 *Ibid*.

113 United Nations Charter, adopted 26 June 1945, Article 39 (http://www.legal-tools.org/doc/6b3cd5/).

114 International Law Commission, Draft Statute for an International Criminal Court 1994, Article 23(3) (http://www.legal-tools.org/doc/17ad09/). The Article provides that "[n]o prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides".

115 Elizabeth Wilmhurst, "The International Criminal Court: The Role of the Security Council", in Mauro Politi and Giuseppe Nesi (eds.), *The Rome Statute of the International Criminal Court: A Challenge to Impunity*, Aldershot and Burlington, Ashgate, 2001, p. 40.

versing the structure of the ICC-Security Council relationship as initially provided for in the 1994 ILC Draft Statute.[116]

The adoption of Article 16 has several implications for the work of the ICC. According to some scholars:

> the drafting history of article 16 gives rise to at least three comments. First, political considerations were not surprisingly given more weight than legal arguments in the determination of the appropriate role for the [UNSC] in ICC proceedings. Second, the [UNSC]'s deferral power confirms its decisive role in dealing with situations where the requirements of peace and justice seem to be in conflict. Third, article 16 provides an unprecedented opportunity for the [UNSC] to influence the work of a judicial body.[117]

The UNSC is empowered by the Rome Statute to trigger the jurisdiction of the Court when crimes within the jurisdiction of the court have been committed in the territory of both States Parties and non-States Parties to the treaty.[118] The UNSC has made use of this provision in the cases of Sudan and Libya which were referred to the ICC pursuant to the Chapter VII powers of the UNSC. Article 16 of the Statute grants the UNSC the power to defer cases before the ICC. In deferring cases, the UNSC acts under Chapter VII of the UN Charter which means that there has to be evidence that there is a threat to international peace and security.

11.4.4. Referrals and Prosecutorial Discretion during Preliminary Examinations

When a situation is referred by a State Party or the UNSC acting under Chapter VII of the UN Charter, the Prosecutor opens an investigation after reaching a decision that there is reasonable basis to proceed. However, if the preliminary investigation is initiated through Article 15 of the Rome Statute, the Prosecutor has to apply to the Pre-Trial Chamber for an au-

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[116] Morten Bergsmo and Jelena Pejić, "Article 16: Deferral of investigation or prosecution", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd edition, 2008, C.H. Beck Publishers, Munich, p. 597.

[117] *Ibid*., p. 598.

[118] ICC Statute, Article 13(b); Sharon Williams and William Schabas, "Article 13: Exercise of Jurisdiction", in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd edition, 2008, C.H. Beck Publishers, Muchen, p. 569.

thorization to initiate an investigation.[119] The reason for this difference is that States Parties were not comfortable with an unaccountable Prosecutor exercising unfettered discretion. The Pre-Trial Chamber is expected to authorize the commencement of investigations if it appears to it that the case falls within the jurisdiction of the ICC.[120] However, the decision is without prejudice to subsequent determinations regarding jurisdiction and admissibility.[121] If the Pre-Trial Chamber refuses to authorize the investigation of crimes, the decision does not preclude the Prosecutor from making subsequent representation based on new facts or evidence regarding the same situation.[122]

Jurisdiction is not the only factor that the Prosecutor has to consider. However, jurisdiction is so fundamental that the judges of the ICC are mandated to inquire if they have jurisdiction to handle a particular situation irrespective of the determination of the Prosecutor to proceed with an investigation. Another important factor is admissibility, which is divided into complementarity and gravity as discussed below.

11.4.5. Admissibility and Prosecutorial Discretion

Article 53(1)(c) of the Statute provides that in deciding whether to initiate an investigation, the Prosecutor shall consider whether the case is or would be admissible under Article 17 of the Statute. Article 17 of the Statute provides for issues of complementarity[123] and gravity.[124]

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119 ICC Statute, Article 15(4); Lakshman Marasinghe, "*Proprio Motu* Powers – The Prosecutor of the International Criminal Court: Article 15 of the Rome Statute", in *Sri Lanka Journal of International Law*, 2010, vol. 22, no. 1, pp. 195–213.

120 ICC Statute, Article 15(4). At the stage of preliminary examination, it is still a "situation" that is before the Prosecutor and not a "case" *stricto sensu*. This is the conclusion reached by the Prosecutor and accepted by the Chambers of the ICC. Hector Olasolo, "The Prosecutor of the ICC before the Initiation of Investigations: A Quasi-Judicial or a Political Body?", in *International Criminal Law Review*, vol. 3, no. 2, pp. 87–150.

121 ICC Statute, Article 15(4).

122 *Ibid*., Article 15(5). The prosecutor has used the *proprio motu* power to initiate investigations in Kenya and Côte d'Ivoire. See International Criminal Court, Situation in the Republic of Côte d'Ivoire, *The Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11; Situation in the Republic of Côte d'Ivoire, *The Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12; Situation in the Republic of Kenya, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11 and Situation in the Republic of Kenya, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11.

123 ICC Statute, Article 17(1)(a)–(c).

The Statute does not provide a particular sequence on the examination of complementarity and gravity.[125] However, the Prosecutor must be satisfied as to admissibility on both aspects before deciding whether there is sufficient basis to proceed with an investigation.[126] An assessment of complementarity is in relation to serious crimes allegedly committed by those who bear the greatest responsibilities for international crimes within the jurisdiction of the ICC.[127] A determination on admissibility conducted by the Prosecutor during a preliminary examination is not binding on the Prosecutor when taking the decision whether to proceed with a prosecution. In addition, legal assessments conducted during preliminary examinations are not binding for the purpose of future admissibility determinations that may be made by ICC judges for a situation or case.[128] The relevance of the discussion above is that the conduct of preliminary examination relates to situations and circumstances in existence during the process. It does not bind the judges of the ICC or the Prosecutor in future determinations regarding the admissibility of a situation.

[124] *Ibid*., Article 17(1)(d).

[125] *Policy Paper on Preliminary Examinations 2013*, para. 42.

[126] *Ibid*.

[127] International Criminal Court, Situation in the Republic of Kenya, Pre-Trial Chamber, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, 31 March 2010, para. 50 ('Kenya Article 15 Decision') (http://www.legal-tools.org/doc/338a6f/).

[128] International Criminal Court, Situation in Mali: Article 53(1) Report, 16 January 2013, p. 28 (http://www.legal-tools.org/doc/abb70f/); ICC, Situation in the Democratic Republic of the Congo, *The Katanga Chui Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497, para. 56 (http://www.legal-tools.org/doc/ba82b5/); Kenya Article 15 Decision, para. 50; ICC, Situation in Central African Republic, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber, Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802, para. 217 (http://www.legal-tools.org/doc/a5de24/).

11.5. Prosecutorial Neutrality and Case Studies of Preliminary Examinations Conducted in Africa[129]

11.5.1. Neutrality as Non-biased Decision-making

The first principle of the theory is that prosecutors should not be biased in their decision-making. This means that the prosecutor should not be unduly influenced when deciding on prosecution. This principle of non-bias is corroborated, among others, by the policy of the Director Public Prosecution of Victoria, Australia on prosecutorial discretion. The policy provides that a decision whether or not to prosecute must not be influenced by (a) the race, religion, sex, national origin or political associations, activities or beliefs of the offender or any other person involved; (b) personal feelings concerning the offence, the offender or a victim; (c) possible political advantage or disadvantage to the Government or any political group or party; and (d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision-making.[130]

The principle of non-bias in the US criminal justice system extends to what is called avoiding impermissible considerations,[131] that is, prosecutors are not allowed to make decisions tainted with racial, ethnic or religious bias. This is one area where the discretion of the prosecutor is subject to judicial review as the right to non-bias is protected by the US Constitution.[132] Therefore, when a decision of the prosecutor whether or

[129] This section contains a summary of the preliminary examinations conducted in the six African countries earlier identified in the chapter. Due to space constrains, a comprehensive discussion of the case studies is not possible. However, for a detailed and thorough analysis of most of the preliminary examinations conducted by the International Criminal Court, see Benson Olugbuo, "The Exercise of Prosecutorial Discretion during Preliminary Examinations at the International Criminal Court", Ph.D. thesis submitted to the University of Cape Town, September 2016, pp. 145–236 (available on the university web site).

[130] Office of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria*, 24 November 2014, chap. 1, para. 10, p. 4 (http://www.legal-tools.org/doc/02d03e/).

[131] Earle Hobbs, "Prosecutor's Bias, an Occupational Disease", in *Alabama Law Review*, 1949, vol. 2, pp. 40–62.

[132] US Supreme Court, *United States v. Batchelder*, 442 U.S. 114 (1979), p. 125.

not to prosecute is based on an unjustifiable standard such as race, religion, or other arbitrary classification, the courts are bound to interfere.[133]

Racial and ethnic bias is where a decision is made for or against a person because of his or her race or ethnicity. In the same vein, a prosecutor may be biased in deciding whom to investigate or prosecute due to personal or economic interests. The prosecutor, in the decision to charge for a particular crime and not another one, especially when the crime committed falls under different counts of criminality, may also exhibit the possibility of bias. For countries that still retain the death penalty in their laws, the possibility of bias is always an issue. This is because any decision to charge for capital punishment may be questioned by critics when there is lack of uniformity in application.[134]

Ultimately, discretion is the hallmark of the administration of criminal justice. The prosecutor is not under obligation to explain why he decides to pursue the death penalty in a particular case and not the other. It only become problematic if a glaring case of injustice results due to racial, ethnic, gender or religious sentiments, or if the rights of the defendants are trampled upon, in the process of initiating criminal proceedings.

Prosecutorial bias in the administration of criminal justice is also possible in countries where prosecutors are elected or appointed. In this instance, the prosecutor may be an active member of a political party and therefore use the position to further party interests instead of promoting justice and fairness to all parties involved in the criminal case. Bias can also be seen when a prosecutor takes a position not according to the law of the land but because of personal beliefs. The problem with personal beliefs is that although the right to hold a belief may be protected by the law, the prosecutor will be seen by those who practice a contrary belief as biased. A clear example as pointed out by Green and Zacharias is that of laws that call for the protection of abortion clinics, and those that restrict abortion practices.[135] In this instance, it may be difficult for the prosecutor

[133] US Supreme Court, *Oyler v. Boles*, 368 U.S. 448 (1962), p. 456. See also Angela Davis, "Prosecution and Race: The Power and Privilege of Discretion", in *Fordham Law Review*, 1998, vol. 67, no. 13, p. 41.

[134] John A. Horowitz, "Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty", in *Fordham Law Review*, 1997, vol. 65, no. 6, p. 2576.

[135] Green and Zacharias, 2004, p. 854, see *supra* note 30.

to effectively enforce either of the laws without accusation of bias by the other party.

Another instance of bias is a prosecutor's decision to press charges against a defendant based on personal or economic interest, or public and media pressure. The issue of personal or economic interests is clearly a case of conflict of interest, and may also result in breaking existing professional rules or legislation, which clearly speaks against prosecutors making decisions based on personal or economic benefit. On the other hand, public and media pressure may be used by the prosecutor to gain political capital to the detriment of the rights of the defendant. The International Association of Prosecutors argues that prosecutors should "remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest".[136]

Thus, the theory of neutrality recognizes non-bias as a strong element in the exercise of discretion by the prosecutor. Bias based on ethnicity, race, religious group, economic or personal interests and party affiliations are generally seen as negating the principle of prosecutorial neutrality. However, it must be mentioned that these discussions are not cast in stone, and a decision by the prosecutor that is within an operational legal framework can still be labelled as biased, depending on the circumstance and the personalities involved. The courts can only step in when there is a clear violation of the laws of the land. This means that an accusation of bias against a prosecutor must be anchored in the provision of an existing law. The decision should not be based the discretion of the prosecutor to charge an individual for a crime and what charges should be brought before a court of law. Clearly, the courts will side with the prosecutor unless there is evidence that an impermissible consideration has been violated.

11.5.2. Neutrality as Non-partisan Decision-making

The second principle is that the prosecutor should engage in non-partisan decision-making. The factors that influence non-partisanship include (a) independence from those actors within and outside the prosecution who tend to influence decisions; (b) objectivity in weighing evidence before taking decisions; and (c) freedom from political agendas.[137] In relation to

[136] See International Association of Prosecutors, *Standards of Professional Responsibility and the Statement of the Essential Duties and Rights of Prosecutors*, 12 June 2017, Article 3(b) (http://www.legal-tools.org/doc/e39b76/).

[137] Green and Zacharias, 2004, p. 851, see *supra* note 30.

independence, prosecutors are not supposed to make decisions to prosecute or drop charges based only on the recommendations of the police or other investigating agencies. The decisions of prosecutors should be influenced by the evidence before them, the quality of witnesses, and the possibility of conviction. Although prosecutors may ordinarily be aligned with the cause of the police and victims of crimes, their primary constituency is neither the police nor the victim, but society at large.[138] Therefore, in the final analysis, the prosecutors should make decisions on the potential cases before them without leaning too closely either to the victim or the police who may have conducted the initial investigation.

Non-partisanship can also be referred to as objectivity in decision-making. This means that the prosecutor is under obligation to study the available evidence at all stages of reviewing a case file. The review of cases must be based on available evidence within the reach of the prosecutor.[139] However, the notion of objectivity also creates problems. As noted by Green and Zacharias, when prosecutors represent society at large, it equally means that the interest of the victim has to be protected. In addition, the prosecutor is under obligation to ensure that exculpatory evidence in favour of the defendant is made public or brought to the attention of the judge, as the sole aim of prosecution is not punishment, but to ensure that justice is done.[140] In addition, objectivity means that the personal dispositions of the prosecutor should not be an overriding factor in a decision whether to prosecute or not to. While they have to act in such a way as to express the will of the legislators (that is, according to the law that has been legislated), prosecutors are also under obligation to protect public interests and expectations of the society. Finally, they should be detached from factors that cloud their sense of judgment.[141]

Another facet of neutrality as non-partisanship is that prosecutors should act non-politically. A prosecutor should not use the office or position to further the political interests of affiliated political parties or politicians.[142] Green and Zacharias agree that there is tension between this principle and the concept that the prosecutor's responsibility is to repre-

[138] *Ibid*., p. 863.
[139] *Ibid*., p. 864.
[140] *Ibid*., p. 868.
[141] *Ibid*., p. 869.
[142] *Ibid*.

sent the interest of the society. An example of this inconsistency is when the interest of society is akin to mob justice or societal agitations based on community sentiments. The prosecutor's role is not to follow a particular interest group, but to weigh the evidence and make a decision based on principled criteria, guided by an objective disposition of the circumstances of each case.[143] It may turn out that the prosecutor will become unpopular in the short term, however, a non-partisan decision will stand the test of time, better than the one taken to satisfy a section of the community. This means that the prosecutor will always engage in a balancing act to satisfy different and conflicting interests.

The need for independence, objectivity and non-partisanship cannot be under-estimated. It shows that the exercise of discretion, although within the bounds of the rights of the prosecutor, is usually constrained by some of the factors outlined above.

11.5.3. Neutrality as Principled Decision-making

The third principle of neutrality is that prosecutors should base their decisions and activities on readily identifiable and consistently applied criteria.[144] These include implementing legislative will, principled decision-making rooted in the purposes of criminal law, principled policy-making through the adoption of administrative policies, and avoiding non-legal rationale in decision-making.[145] A major essence of the prosecutor's job is to implement the laws enacted by lawmakers to curtail or punish crimes. It is therefore a responsibility of the prosecutor to ensure that the enforcement of the law is not arbitrary or inconsistent and meets the threshold of justice and fairness. At times, it is noted that the desire of the lawmakers to punish a particular conduct is born out of the desire to please the electorate. Under these circumstances, the prosecutor has to work the fine line of implementing the legislators' will and also ensuring that discretion is not used to pander to the whims and caprices of elected officials.

In relation to principled decision rooted in the purposes of criminal law, the prosecutor has to decide on the sole essence of seeking punishment for a defendant. This is where the theories of punishment become handy and the prosecutor is expected to ensure that the desire to press

143 *Ibid*., p. 870.
144 *Ibid*., p. 871.
145 *Ibid*.

charges is rooted in the purposes of criminal law. This relates to the reason or aim of punishing a defendant, which can either be retributive, deterrent or restorative in nature.

In relation to retributive justice, there are several strands, which include vengeful, deontological and empirical conceptions of retribution.[146] The vengeful strand of retribution also known as *lex talionis* is associated with the Judeo-Christian Bible which seeks to punish the offender "eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe".[147] Retributive justice is an improved version of a system of overwhelming punishment, like destroying a village for one person's crime. The limited retribution in *lex talionis* is to ensure that the punishment could be no greater than the crime. Therefore, retributive justice aims at achieving equal punishment for the crime committed by the accused person.[148] The essence of punishment under retributive justice does not focus on the harm of the offense committed but on the culpability of the offender.[149] Therefore, a prosecutor's decision to seek for punishment of the defendant is in furtherance of the purposes of criminal law and in this instance, retribution.

The main argument of the retributive theory of punishment is that criminal punishment is justified by the moral desert of the perpetrator. In other words, retributive justice theories are characterized by their emphasis on the relationship between punishment and moral wrongdoing of the perpetrator.[150] Another element of retributive justice is the fact that the victims are reduced to witnesses, and not really recognized as stakeholders in the process. Although some commentators have argued that the process of arrest, prosecution and punishment of the perpetration does justice

[146] Paul Robinson, "Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical", in *Cambridge Law Journal*, 2008, vol. 67, no. 1, p. 146.

[147] See the *Book of Exodus*, King James Version, 21:24–25.

[148] Michael Moore, "The Moral worth of Retribution", in Andrew von Hirch and Andrew Ashworth (eds.), *Principled Sentencing: Readings on Theory and Policy*, 2nd edition, Oxford University Press, 1998, pp. 179–90.

[149] Robinson, 2008, p. 148, see *supra* note 146.

[150] Godfrey Musila, "Restorative Justice in International Criminal Law: The Rights of Victims in the International Criminal Court", Ph.D. thesis submitted to the University of Witwatersrand, September 2009, pp. 8–10 (available on the university's web site).

to the victims, it is clear that the focus of retributive justice is on the offender and not the victim.[151]

Second, a prosecutor's choice of punishment may be based on deterrence, which has its origin from the utilitarian moral philosophy espoused by philosophers like Jeremy Bentham, who argues that punishment persuades potential perpetrators not to commit crimes.[152] Prospective perpetrators of crimes constantly engage in a cost-benefit analysis whether or not to commit crimes.[153] Therefore, perpetrators are assumed to always rationalize whether the possibility of apprehension and prosecution outweighs the benefits of committing the crime.

Generally, deterrence is divided into two broad categories of general deterrence and specific deterrence. General deterrence refers to the situation where punishment is meted out to an individual to deter the general public. However, specific deterrence refers to the punishment that is meted out to an individual, in order to deter that particular individual from committing a related crime. General deterrence is more pronounced than individual deterrence as the goal of deterrence is aimed more at the society than an individual. It is argued that a prosecutor who decides to prosecute a defendant to deter others or the particular individual facing investigation or prosecution is exercising discretion and furthering one the aims of criminal law.

Third, if the prosecutor's reason for seeking punishment is to ensure justice for the victim through restorative justice, it is still within the confines of prosecutorial discretion. Restorative justice is aimed at both the defendant and victim of crime. It places victims at the centre of the criminal investigation and gives them a voice and place of participation, depending on the procedure in place. A major feature of the Rome Statute is the expansive focus on the rights of victims of international crimes. They participate in the proceedings and are entitled to reparations including compensation and restitution. In addition, a Victims' Trust Fund is dedicated to victims of international crimes. Therefore, a prosecutor who pri-

[151] *Ibid*.

[152] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, reprint of 1823 edition, Clarendon Press, Oxford, 1907 (http://www.legal-tools.org/doc/1746df/).

[153] Richard Posner, "An Economic Theory of the Criminal Law", in *Columbia Law Review*, 1985, vol. 85, no. 6, p. 1195.

oritises the interests of victims in prosecuting a defendant is exercising discretion, in furtherance of the purposes of criminal law.

Another concept of prosecutorial neutrality is principled policy-making, which involves the adoption of administrative policies that guide the exercise of prosecutorial discretion.[154] It is the responsibility of the prosecutor to ensure that decisions follow laid-down procedures and easy to follow principles, policies and guidelines affecting the exercise of discretion.[155]

Several countries have adopted different policies to guide the exercise of prosecutorial discretion. These policies vary from jurisdiction to jurisdiction. For example, the American Bar Association ('ABA') Standards for Criminal Justice in prosecutorial investigations provide standards governing the exercise of prosecutorial discretion during investigations.[156] The ABA Standards states that "a prosecutor is not an independent agent, but is a member of an independent institution, the primary duty of which is to seek justice".[157] The ABA Standards also expects the prosecutor not to take decisions that are considered impermissible, as earlier discussed.

In Ireland, there is a guideline for public prosecutors known as the Code of Ethics.[158] Its primary aim is to ensure the promotion of those principles and standards recognised as necessary for the proper and independent prosecution of offences. The Code of Ethics sets out the standards of conduct and practice expected of prosecutors working for, or on behalf of, the Director of Public Prosecutions in Ireland. It is intended to supplement, rather than to replace applicable professional codes, governing the conduct of lawyers and public servants.[159] The Code establishes minimum standards of ethical conduct. In addition, it is meant to provide general but not exhaustive, guidance to prosecutors. Furthermore, it is formulated to assist in securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings.

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154 Green and Zacharias, 2004, p. 877, see *supra* note 30.

155 *Ibid*., p. 870.

156 American Bar Association, *ABA Standards for Criminal Justice: Prosecutorial Investigations*, 3rd edition, 2014 (available on the ABA web site).

157 *Ibid*., "Standard 26-1.2: General Principles".

158 Office of the Director of Public Prosecutions, Ireland, *Guidelines for Prosecutors*, November 2010 (http://www.legal-tools.org/doc/c89a25/).

159 *Ibid*.

The overriding principle in the exercise of prosecutorial discretion in Ireland is public interest. For example, the code of ethics provides that "a fundamental consideration when deciding whether to prosecute is whether to do so would be in the public interest".[160] Therefore, a prosecution should be initiated or continued, subject to the available evidence disclosing a *prima facie* case, if it is in the public interest, and not otherwise.[161]

In New Zealand, prosecutorial discretion is exercised independently, and subject to evidentiary and public interest tests, which must be conducted by the prosecutor before any prosecution is carried out.[162] Therefore, if there is evidentiary evidence that a crime has been committed, the prosecutor has to be satisfied that prosecution is required in the public interest.[163]

It is clear from the discussions in this sub-section that some countries have adopted different administrative policies to guide the exercise of discretion. The extent to which these policies are adhered to is debatable. However, it is obvious that prosecutors who fail to observe the minimum ethics prescribed in these polices risk sanctions. From the foregoing, one thing that is clear is that the existence of these policies does not limit discretion, but tries to ensure consistency and less dependence on the personal disposition of the prosecutors.

There have been several debates on whether it is desirable to have clear, written criteria for the exercise of prosecutorial discretion. The contention is based on the fact that prosecutorial discretion is ordinarily not subject to judicial control and prosecutors are free to exercise their discretion within the confines of the law. However, the inability of prosecutors to show clearly how decisions are made affects citizens' perceptions of the powers of the prosecutor.

11.5.4. Uganda and Central African Republic

The analysis of the situations in Uganda and Central African Republic, both self-referrals, shows that the Prosecutor's methods concerning pre-

[160] *Ibid*.

[161] *Ibid*.

[162] Government of New Zealand, Solicitor-General's Prosecution Guidelines, 2013, Sections 5.3. and 5.5. (http://www.legal-tools.org/doc/96038e/).

[163] *Ibid*.

liminary examinations have evolved over time. The manner in which the preliminary examination in the two situations was handled differed in some important ways. While Moreno-Ocampo was not able to articulate clearly the procedure used in the preliminary examination in Uganda and in the Central African Republic I situation, Fatou Bensouda adopted the policy paper on preliminary examination and showed how she used it to arrive at her actions and decisions in Central African Republic II situation.

In terms of the substantive decisions taken, the Prosecutor was correct in concluding or assuming that both situations concerning Uganda and Central African Republic fell within the jurisdiction of the ICC. Furthermore, the Prosecutor was correct in concluding that the admissibility criteria, namely complementarity and gravity, were met in the Central African Republic situations I and II. However, in respect of the Uganda situation, the former Prosecutor failed to substantiate the decision that the crimes committed by government forces did not meet the threshold of gravity needed to trigger ICC jurisdiction and charges.

Regarding the application of the principle whether it was in the interests of justice that the preliminary investigation and full investigation took place, the policy paper adopted by the former Prosecutor holds that there is a difference between the 'interests of peace' and 'interests of justice', meaning that the Prosecutor is not concerned with peace negotiations and probable outcomes. However, these concepts are related and are difficult to separate in some cases during preliminary examinations.

On the general principles and policy objectives adopted by the Bensouda's administration, it has been noted that there is a divergence between the activities of the former Prosecutor and the present Prosecutor regarding the policy paper on preliminary examination. One conclusion is that the former Prosecutor did not follow the policy paper on preliminary examination.

It is argued that the ICC Prosecutors applied restrictive interpretations to the provisions of the Rome Statute regarding the principle of positive complementarity during preliminary examinations, especially in Uganda. Since the policy paper was released in November 2013, evaluating the former Prosecutor based on the policy that was adopted by his successor in 2013 for an activity carried out in 2004 may be problematic. However, the draft policy paper was released in 2010 and contained many of the issues discussed in the current policy. Furthermore, the policy paper has its roots in the provisions of the Rome Statute. Therefore, the former

Prosecutor clearly endorsed most of the principles that later became the policy paper on preliminary examination.

11.5.5. Sudan and Libya

The UNSC has the power to refer States not party to the ICC as provided by the Rome Statute. In addition, the ICC legal framework provides for the conduct of preliminary examination irrespective of how the jurisdiction of the ICC was activated. The involvement of the UNSC under Chapter VII of the UN Charter was significant on its own and therefore indicated that the two situations were threats to international peace and stability.

There is evidence that legal factors like jurisdiction, admissibility (complementarity and gravity) and interests of justice were met during the preliminary examinations conducted by the ICC Prosecutor. However, it is argued that the Prosecutor did not adhere to some of the policies and principles adopted by the Office in the exercise of discretion during preliminary examination. These include the policies on interests of justice, positive complementarity and using the preliminary examination as a preventive mechanism against the commission of crimes within the jurisdiction of the court.

Despite the controversial nature of the UNSC referrals of the Darfur and Libyan conflicts, it could be argued that the referrals have strengthened the activities of the ICC. This is because the involvement of the UNSC gave the conflicts and the activities of the ICC a global attention. The chapter agrees with the decision of the Prosecutor that the crimes committed in the Darfur and Libyan conflicts meet the gravity threshold established in the Statute. One cannot but agree with the Prosecutor that there was a reasonable basis to proceed with investigations.

The interpretation of the interests of justice by the Prosecutor has necessitated abandoning the peace negotiations that were organized to end the Darfur conflict. None of them has proved to be successful so far and most of the recent ones took place after the decision to proceed with an investigation. However, in Libya, the limited time of conducting the preliminary examination did not give room to activate national proceedings through positive complementarity.

The Prosecutor did not provide enough information on how the preliminary examinations were conducted and the information that is readily available is contained in the reports submitted to the UNSC which are

unfortunately limited in content and analysis of issues involved. Regarding the jurisdiction of the Court over the crimes committed in Darfur and Libya, it is evident that though Sudan and Libya are not States party to the Statute, the referrals by the UNSC satisfy the jurisdiction threshold as UN members are under an obligation to carry out the decisions of the UNSC. Besides, the Rome Statute makes provision for the referral.

11.5.6. Kenya and Côte d'Ivoire

The situations in Kenya and Côte d'Ivoire marked the first time the Prosecutor decided there was a reasonable basis to proceed with investigations using the *proprio motu* powers in Article 15 of the Rome Statute. This power is subject to oversight by the Pre-Trial Chamber of the ICC whose responsibility is to scrutinise and weigh the evidence submitted by the Prosecutor.

In Côte d'Ivoire, the initial acceptance of jurisdiction of the Court and its subsequent ratification by the government meant that the Prosecutor's power to conduct the preliminary examination into that country's situation could not be challenged. The main challenge in Côte d'Ivoire was that the Prosecutor did not charge key perpetrators from all parties to the conflict for crimes. This has called into question the neutrality of the Prosecutor.

The use of 'inactivity' or 'inaction' under Article 17 of the Rome Statute to determine Kenya's challenge of jurisdiction is a lost opportunity to engage with the ICC on interpretations of unwillingness and inability in a *proprio motu* proceedings. The adoption of 'inaction' as a basis for the intervention of the ICC under Article 15 of the Statute raises fundamental issues in the activities of the Prosecutor during preliminary examinations. Although the Prosecutor has argued that positive complementarity is a key policy objective, it was not used in Kenya and Côte d'Ivoire to spur national trials, and this lack is clearly demonstrated by subsequent events in both countries.

There was lack of co-operation between the ICC and Kenya, and this constitutes one of the challenges faced by the ICC as lack of co-operation between a State and the ICC may hamper the investigation of crimes. However, there is cooperation between the Prosecutor and the government of Côte d'Ivoire although some of the requests made by the ICC to the Ivorian government are yet to be acceded to.

With regard to the bid by the Kenyan government to invite the UNSC to use Article 16 of the Rome Statute to stop the activities of the Court, it is noted that Kenya needed to demonstrate that the principles of positive complementarity applied to the case.

One major issue that the Prosecutor did not take into consideration during the preliminary examination conducted in the two countries is that the ICC policy paper provides for the use of positive complementarity. Positive complementarity presupposes that the ICC will defer to national judicial systems when they show interest in investigating and prosecuting crimes within the jurisdiction of the ICC. However, this issue was not prioritised in the Kenya and Côte d'Ivoire situations.

It is clear that the Prosecutor failed to charge all parties to the conflict for the crimes committed, especially in Côte d'Ivoire. Although the Prosecutor had used gravity to show why some parties to conflicts were not charged in Kenya, it is not clear how the Prosecutor reached the decision on who to charge or not to charge in Côte d'Ivoire and the reasons for the decision.

11.6. The Exercise of Discretion by the Prosecutor in Preliminary Examinations in Six African Countries – Key Findings

Six country situations, all African, were used to consider how the Prosecutor has applied the principles discussed above. In essence, the inquiry in the case studies sought to find out if the Prosecutors understood and correctly applied the substantive and procedural powers provided for in the Rome Statute in the exercise of prosecutorial discretion during preliminary examinations. The choice of case studies from Africa was informed by the fact that the strongest criticisms of the ICC has come from the African continent. It was thus important to establish whether there is a substantive claim that the Prosecutor is biased against African leaders.

The analysis of the case studies produced mixed results. For example, in the preliminary examinations conducted in Uganda and Central African Republic, while Moreno-Ocampo, the first Prosecutor, did not clearly articulate the procedure through which the preliminary examinations were carried out in Uganda and situation I of the Central African Republic, Fatou Bensouda adopted the policy paper on preliminary examination and used it to justify her actions and decisions in Central African Republic II situation.

In addition, in terms of the substantive decisions made during the preliminary examinations conducted in Uganda and Central African Republic, the study found that the Prosecutor was correct in concluding that both situations fell within the jurisdiction of the ICC. Furthermore, the Prosecutors were correct in concluding that the admissibility criteria, namely complementarity and gravity, were met in the Central African Republic situations I and II. However, in respect of the Uganda situation, Moreno-Ocampo failed to substantiate the decision that the crimes committed by government forces did not meet the threshold of gravity needed to trigger ICC jurisdiction and charges.

The former Prosecutor did not follow the policy paper on preliminary examinations in investigations conducted in Uganda and Central African Republic I although the policy paper mirrors provisions of the Rome Statute. Furthermore, the study argues that the former ICC Prosecutor applied a restrictive interpretation to the provisions of the Rome Statute regarding the principle of positive complementarity during preliminary examinations especially in Uganda. This means that Uganda was not given the benefit of doubt to prove that it was willing and able to hold accountable those accused of committing international crimes in the northern Uganda conflict.

In relation to the preliminary examinations conducted in Sudan and Libya, the study noted that UNSC has the power to refer States not party to the ICC as provided by the Rome Statute. Furthermore, the ICC legal framework provides for the conduct of preliminary examinations irrespective of how the jurisdiction of the ICC was activated, UNSC referrals inclusive. With respect to both Sudan and Libya situations, the study concludes that legal factors such as jurisdiction, admissibility and interests of justice were met during the preliminary examinations conducted by the ICC Prosecutor. However, the former Prosecutor did not adhere to some of the policies and principles adopted by the office in the exercise of discretion during preliminary examination. These include policies on positive complementarity and the use of preliminary examination to spur national trials.

The chapter agrees with the decision of the Prosecutor that the crimes committed in the Darfur and the Libyan conflict met the gravity threshold established in the Statute. Therefore, there was a reasonable basis to proceed with the investigations. The interpretation of the interests of justice by the Prosecutor necessitated abandoning the peace negotia-

tions that were organised to end the Darfur conflict. As noted in the study, none of these peace processes has proved to be successful so far and most of the recent ones took place after the decision to proceed with an investigation. In addition, the chapter argues that the limited time of conducting preliminary examination in Libya did not give room to the government of Libya to activate national proceedings through positive complementarity.

However, in Sudan and Libya, the former Prosecutor did not provide enough information regarding how the preliminary examinations were conducted and the information that is available are reports submitted to the UNSC, which are limited in content and analysis. Regarding the jurisdiction of the Court over the crimes committed in Darfur and Libya, the study argues that although Sudan and Libya are not States party to the Statute, the referrals by the UNSC satisfies the jurisdiction threshold.

The situations in Kenya and Côte d'Ivoire represent the first cases where the Prosecutor decided there was a reasonable basis to proceed with investigations using the *proprio motu* powers in Article 15 of the Rome Statute. This power is subject to oversight by the Pre-Trial Chamber of the ICC whose responsibility is to scrutinise and weigh the evidence submitted by the Prosecutor before approving a request by the Prosecutor to conduct an investigation into alleged crimes.

With respect to Côte d'Ivoire*,* the initial acceptance of the jurisdiction of the Court and subsequent ratification of the same by the government meant that the Prosecutor's power to conduct the preliminary examination into that country's situation could not be challenged. However, the Prosecutor did not charge the perpetrators of violence from all parties to the conflict for crimes. This called into question the neutrality of the Prosecutor.

With respect to Kenya, the use of 'inaction' or inactivity to determine Kenya's challenge of jurisdiction represented a lost opportunity to engage with the ICC on interpretations of unwillingness and inability in *proprio motu* proceedings. The adoption of 'inaction' or inactivity as a basis of the intervention of the ICC under Article 15 of the Statute raises fundamental questions for the Prosecutor during preliminary examinations. Although the ICC Prosecutors have argued that positive complementarity is a key policy objective, it was not utilised in Kenya and Côte d'Ivoire to spur national trials. Positive complementarity presupposes that the ICC will defer to national judicial systems when they show interest to investigate and prosecute crimes within the jurisdiction of the ICC.

Overall, the ICC Prosecutors mostly followed the provisions of the Rome Statute in the preliminary examinations conducted in Uganda, Central African Republic, Sudan and Libya. However, the study has found several grey areas in the implementation of the principles governing prosecutorial discretion. Of the six countries discussed in the study, the Prosecutor received most criticisms in respect of the preliminary examinations conducted in Kenya and Côte d'Ivoire. This is due in part to the fact that *proprio motu* examinations in situation countries are controversial, and perhaps also to the questionable decisions of the Prosecutor and supported by the ICC Chamber that the crimes committed in Kenya reached the threshold of gravity required for crimes against humanity, and the failure to charge all parties to the violence in Côte d'Ivoire.

The purpose of this chapter is to investigate the exercise of prosecutorial discretion during preliminary examinations and how the activities of the former ICC Prosecutor led to the sour relationship between the ICC and the AU. As the Prosecutor has a key role in the ICC, perceptions of partiality or of lack of independence or objectivity in his or her work, have an adverse impact on the effectiveness of the ICC and international criminal law in general. For that reason, this chapter seeks to provide suggestions on how the exercise of prosecutorial discretion during preliminary examinations could be improved.

A unique feature of this chapter is the use of the theory of prosecutorial neutrality, the legal criteria in the Rome Statute and the policies and principles of the Prosecutor as analytical tools. More importantly, the chapter investigated the situations of six countries across Africa, where specific criticisms of bias have been levelled against the ICC Prosecutor. It argues that the ICC Prosecutor should exercise his or her discretion independently, impartially and objectively, as demanded by the theory of prosecutorial neutrality in the interests of the effective administration of international criminal justice. Such neutrality has to be maintained at both the formal and practical levels.

It will be recalled that the theory of prosecutorial neutrality was originally propounded for the American criminal justice system. However, the theory was re-designed to accommodate developments at the ICC. This was possible by identifying the similarities and differences in the domestic and international criminal justice systems. In addition, the chapter noted that the exercise of discretion by the ICC Prosecutor is limited

by the Rome Statute through the oversight functions of the Pre-Trial Chamber of the ICC and the UNSC.

This chapter has demonstrated that the preliminary examination is an essential feature of the ICC and as such plays a strategic role in the administration of international criminal justice. The Rome Statute grants the Prosecutor unprecedented powers to initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the ICC, subject to the approval of the Pre-Trial Chambers of the ICC.[164] Even when States party to the treaty and the UNSC refer matters to the ICC, the Prosecutor has the discretion to decide whether there is a reasonable basis to proceed with investigations. This suggests that the discretion granted to the Prosecutor to conduct preliminary examinations is not limited by the powers of the UNSC to suspend investigations or prosecutions in Article 16 of the Rome Statute.

Preliminary examinations at the ICC serve different purposes. First, they are used to establish whether or not there is a reasonable basis to proceed with full investigation. Second, they are also used by the Prosecutor to advance the principle of positive complementarity. Third, they serve as an early warning mechanism enabling the Prosecutor to put parties to a conflict on notice that the ICC is following developments in a conflict situation.

The adoption of the policy paper on preliminary examinations is a welcome development and its contents have been thoroughly analysed in this chapter. Not only does it offer an opportunity for supporters and critics of the ICC, to scrutinise the activities of the Prosecutor based on the general principles and policy objectives adopted to guide the exercise of discretion during preliminary examinations, but it also helps the Prosecutor to make consistent decisions using the re-established criteria.

11.6.1. The Significance of the Theory of Prosecutorial Neutrality

It is essential that the Prosecutor is non-biased, non-partisan and principled. The Prosecutor must also be independent, objective, and non-political. These principles constitute the elements of the theory of prosecutorial neutrality. Implementing these principles in practice could make the decisions of the Prosecutor to be more transparent and accountable,

[164] ICC Statute, Article 15; Human Right Watch, Courting History, The Landmark International Criminal Court's First Years, July 2008, pp. 30–66.

and hence bolster public confidence in the administration of international criminal justice.

Prosecutorial neutrality is crucial to the administration of criminal justice at both national and international levels. It emphasizes the absence of bias, non-partisanship and the principled application of established rules and procedures, and also provides the possibility for the exercise of prosecutorial discretion that can ensure the just and fair administration of international criminal justice irrespective of the interests of the parties to a conflict.

11.6.2. Formal Independence of the ICC Prosecutor

From an institutional point of view, the ICC Prosecutor is guaranteed more independence than any of his predecessors. In addition, the ICC Prosecutor enjoys an uninterrupted nine-year term and can only be removed from office by the Assembly of States Parties of the Rome Statute due to "serious misconduct" or a "serious breach". However, although the formal guarantee of independence is necessary, it is not sufficient to prevent perceptions of partiality. The Prosecutor must act independently in practice. As this chapter has shown, this could be achieved by the OTP adopting practices which promote transparency and accountability. In essence, the Prosecutor should be a three-dimensional neutral prosecutor.

Initially, the Prosecutor did not fully embrace the notion of prosecutorial neutrality, as already discussed. As a result, some of the preliminary examinations were conducted under the cloak of secrecy and decisions made were not justified publicly. This was partly because the former Prosecutor had not yet developed detailed guidelines, policies and principles governing the exercise of prosecutorial discretion in general and during preliminary examinations. There have been significant improvements with the adoption of the policy paper on preliminary examinations by the current Prosecutor. However, some problems still remain.

11.6.3. Legal Basis for Prosecutorial Discretion for Preliminary Examinations and Guidance

Article 53 establishes the legal framework for preliminary examinations. That article clearly shows that jurisdiction, admissibility (complementarity and gravity), and interests of justice are the substantive factors that must be taken into account when making decisions pertaining to preliminary examinations. In addition to these factors, the Prosecutor also has to

consider the question of jurisdiction in its all elements – subject matter, time and territory.

Article 17 of the Statute regulates complementarity and gravity and that, though they relate to issues of admissibility before the ICC, these are vital elements of preliminary examinations. It was also argued that the absence of proceedings by a State that has jurisdiction over a case is enough to make a situation admissible. If a State is inactive, the issues of unwillingness and inability do not arise.

Under gravity, it was argued that the Prosecutor's assessment of gravity includes quantitative and qualitative considerations. Other factors affecting gravity include the scale, nature, manner of commission of the crimes, and their impact. The chapter found that the Prosecutor's application of the principle of gravity to preliminary examinations has been inconsistent to the extent that it is not clear how the Prosecutor arrives at decisions on the issue of gravity. For example, in Uganda, the Prosecutor was not clear on how the gravity of the crimes allegedly committed by UPDF soldiers did not meet the assessment under the Rome Statute.

The last major factor that decisions on preliminary examinations have to consider is the interests of justice. It has been argued that the Prosecutor's differentiation between 'interests of peace' and 'interests of justice' restricts a practical application of the principle of interests of justice in the Rome Statute. The Prosecutor's policy paper states that the Office is only concerned with the interest of justice and not with the interest of peace. However, the Rome Statute does not make this distinction. The effect is that a situation where the Prosecutor should consider the broader effect of a peace negotiation or its potential impact on a situation is not a primary concern of the ICC Prosecutor. This is not a progressive interpretation of the Rome Statute and should be revised.

11.6.4. Accountability Mechanisms Regulating the Exercise of Prosecutorial Discretion

Despite the independence and discretion granted to the ICC Prosecutor, the Rome Statute also establishes checks and balances to ensure the Prosecutor does not act out of context. These checks and balances serve as accountability mechanisms. There are three main accountability mechanisms that serve as a check on the powers of the Prosecutor. The first is the judicial review carried out by the Pre-Trial Chamber before the Prosecutor is granted leave to proceed with an investigation under Article 15 of

the Rome Statute. In addition, if the Prosecutor decides that it is not in the interest of the justice to carry out an investigation, the Prosecutor is under an obligation to inform the Pre-Trial Chamber of this outcome.

Second, the Assembly of States Parties to the Rome is responsible for the election and discipline of the ICC Prosecutor. This means that if the Prosecutor commits a serious or material breach of his or her duties under the Rome Statute, the Assembly of States Parties can remove him or her from office with an absolute majority. Furthermore, the body approves the budget of the Prosecutor, which means they have a controlling influence on the activities of the OTP, through the allocation of funds to the Office.

Third, the UNSC acting under Chapter VII of the UN Charter can suspend an on-going investigation using Article 16 of the Rome Statute. The Rome Statute gives the UNSC the power to defer proceedings currently before the Court, if the proceedings constitute a threat to international peace and security.

11.7. Conclusion

This chapter is clearly a summary of the activities of the first ICC Prosecutor. As provided in the Rome Statute, the ICC Prosecutor enjoys significant institutional independence. There have also been notable improvements in the manner in which the office has carried out its functions especially in preliminary investigations, from the first Prosecutor who was not as transparent to the current Prosecutor who has been more so. The development of guidelines and policy papers has also helped to clarify the Prosecutor's own understanding of the powers and factors that must be taken into account when exercising prosecutorial discretion during preliminary examinations. Although most of these principles are valid and have a legal basis, their application in practice has raised some concerns, and this chapter has shown that some of those concerns have merit. It is in view of the foregoing discussions that the following recommendations are offered. This is to support the efforts of the current Prosecutor to ensure that the activities of the Court are understood by different stakeholders, including those directly affected by conflicts currently under preliminary examination, investigation or prosecution stages.

It is generally acknowledged that the Rome Statute is not a perfect document and contains ambiguous provisions that are difficult to reconcile. One issue that is not clear is whether preliminary examination is sub-

ject only to the discretion of the Prosecutor or whether the Pre-Trial Chamber can intervene in certain circumstances. In the situation in Central African Republic I, the decision of Pre-Trial Chamber III, and the response of the former Prosecutor are not clear on this.[165] It is therefore argued that this is an issue that needs to be clarified either in the Prosecutor's guidelines and policy papers or by the ICC. This will help to define the role of the Prosecutor during preliminary examinations and define the role of the Pre-Trial Chambers beyond authorisation for *proprio motu* investigations. Included in this clarification should be the timelines within which the Prosecutor has to make a decision.

The principle of a reasonable time adopted by Pre-Trial Chamber III in the Central African Republic I situation should be adopted as a benchmark, and the Court empowered to enforce a timeline on the Prosecutor regarding preliminary examinations.[166] This will be subject to the peculiarities of the situation and the Pre-Trial Chamber may give the Prosecutor the option of reporting the status of preliminary examinations while the process is ongoing.

The Pre-Trial Chamber should perform oversight functions on the exercise of prosecutorial discretion during preliminary examinations. This is because it will enhance the quality of proceedings at the ICC. If the Prosecutor routinely informs the Pre-Trial Chamber of its activities prior to a request for authorisation, it will create a dialogue process that will enable the Pre-Trial Chamber to understand the activities of the ICC Prosecutor better, thus enhancing the overall administration of justice at the ICC. After all, the Prosecutor has to obtain an authorisation from the Court before launching a *proprio motu* investigation.

The Prosecutor's application of the principle of gravity has been questionable. Although the Appeals Chamber has almost made gravity a non-issue during admissibility proceedings, the issue of gravity is still of

[165] See International Criminal Court, Situation in the Central African Republic, Pre-Trial Chamber, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, 30 November 2006, ICC-01/05-6 (http://www.legal-tools.org/doc/76e607/); See also OTP, Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, 15 December 2006, ICC-01/05-7 (http://www.legal-tools.org/doc/1dd66a/).

[166] International Criminal Court, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, 2006, see *supra* note 165.

importance to the Prosecutor during preliminary examinations. The former Prosecutor was not clear on the application of gravity and whether it involved a qualitative or quantitative analysis during some of the preliminary examinations carried out during his tenure. Although the policy paper on preliminary examination has clarified this position, stating that gravity involves both quantitative and qualitative analysis of victims of international crimes, it is not yet clear how the gravity analysis is carried out. It is recommended that a gravity policy specifically detailing how the Prosecutor analyses the gravity criteria in the Rome Statute be adopted. Since it is clear from this study that there is a change in policy between Moreno-Ocampo and Fatou Bensouda's administrations, it is recommended that the current gravity policy should be revisited.

The current Prosecutor states in the policy paper on preliminary examinations that the process is used to encourage positive complementarity whereby States are encouraged to investigate and prosecute international crimes. While there have been efforts to galvanize local support for the investigation and prosecution of international crimes by domestic judicial systems during preliminary examinations, the Prosecutor has not asserted the same pressure on all countries under preliminary examination, thereby fuelling allegations of bias against the Prosecutor. As already stated, the ICC is a court of last resort. This means that it is not meant to suppliant or take-over genuine investigations and prosecutions of international crimes by national governments. Therefore, its strength should lie in the ability to ensure that States Parties comply with the provisions of the Rome Statute regarding the principle of complementarity.[167]

It is recommended that the Prosecutor should endeavour to use preliminary examinations to spur national governments to investigate and prosecute crimes within the jurisdiction of the ICC committed by citizens. Such efforts will enhance positive complementarity and support national investigation and prosecution of international crimes. This will likely decrease the need to rely on the ICC for the investigation and prosecution of international crimes.

[167] Max du Plessis, Antoinnette Louw and Ottilla Maunganidze, "African efforts to close the impunity gap: Lessons for complementarity from national and regional actions", in *Institute for Security Studies Paper No 241*, 2012, pp. 1–24; Thomas Hansen, "A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity", in *Melbourne Journal of international Law*, 2012, vol. 13, no. 1, pp. 217–34.

The Prosecutor argues that it uses preliminary examinations as an early warning mechanism. This is, however, a recent development and was not part of the practice of the ICC during the early years of its operations. The practice itself is currently not uniform and its effect is at best minimal. The press statements of the Prosecutor are mostly posted on the website of the ICC and distributed through social media, print and electronic media outlets. However, very few of the target audience get the information when it is needed most.

It is recommended that this policy be overhauled thereby necessitating the adoption of a better strategy that will ensure the statements and official communications of the Prosecutor reach the target audience. This suggests that translating the statements into the local languages where conflicts are ongoing is vital. In addition, other means of enhancing the effectiveness of public service announcements should be explored instead of restricting it to the traditional methods of press releases and uploading information on the website of the ICC.[168] These include uploading video and audio messages that can be played by radio and television stations across the States involved.[169]

The current policy paper on the interests of justice adopted by the former Prosecutor of the ICC differentiates between the interests of peace and the interests of justice.[170] The implication is that only the UNSC acting under chapter VII of the UN can use Article 16 of the Rome Statute to defer proceedings currently before the Court. The political nature of the UNSC has made it impossible for the Council to operate in a transparent and fair manner. This development has resulted in the charge that the ICC is biased when the UNSC also has a role to play as provided under Article 16 of the Rome Statute.

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168 Press releases on preliminary examinations are posted on the first page of the ICC website. However, once the information is overtaken by other events, it gets lost in the site. It is only when the media picks up the information that it gets serious attention from the international community.

169 The Prosecutor of the International Criminal Court issued a public statement ahead of Nigeria's elections in 2015. The ICC website contains downloadable audio and video files that can be played by radio and television stations across Nigeria. See ICC, *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/).

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

The decision to suspend or defer investigations or prosecutions in the 'interests of justice' under Article 53 of the Rome Statute should be a shared responsibility between the ICC and the UNSC. This will involve the UNSC handling issues that emanate from its referrals using Article 16 of the Rome Statute while the Prosecutor concentrates on cases arising from States Party referrals or the Prosecutor's *proprio motu* powers. This will conform to the argument by the Prosecutor that the 'interests of peace' are political in nature and therefore beyond the mandate of his office.

Situations referred by the UNSC to the ICC are usually threats to international peace and security. Therefore, it should be the UNSC who considers deferrals in these situations. Such a division of labour between the UNSC and the ICC Prosecutor in considering the deferral of cases will ensure that the checks and balances provided by the Rome Statute are used to its optimum and help avoid the UNSC exerting undue influence over the activities of the ICC.

The Prosecutor needs to review the reports announcing the termination of preliminary examinations. Although the Statute provides that those that inform the ICC Prosecutor of crimes allegedly committed in their countries should be notified of the outcome of preliminary examinations, it does not preclude the Prosecutor from making the information available to the public.[171] Although it is conceded in the study that the effort of the Prosecutor in releasing reports has improved since Fatou Bensouda became the Prosecutor, reports that thoroughly discuss the substantive and procedural issues regulating the conduct of preliminary examinations is recommended.

[171] *Policy Paper on Preliminary Examinations 2013*, para. 97.

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Quality Control in Preliminary Examination: Volume 1

Morten Bergsmo and Carsten Stahn (editors)

This is the first of two volumes entitled *Quality Control in Preliminary Examination*. They form part of a wider research project led by the Centre for International Law Research and Policy (CILRAP) on how we ensure the highest quality and cost-efficiency during the more fact-intensive phases of work on core international crimes. The 2013 volume *Quality Control in Fact-Finding* considers fact-finding outside the criminal justice system. An upcoming volume concerns quality control in criminal investigations. The present volume deals with 'preliminary examination', the phase when criminal justice seeks to determine whether there is a reasonable basis to proceed to full criminal investigation. The book does not specifically recommend that prosecutorial discretion in this phase should be further regulated, but that its exercise should be more vigilantly assessed. It promotes an awareness and culture of quality control, including freedom and motivation to challenge the quality of work.

Volumes 1 and 2 are organized in five parts. The present volume covers 'The Practice of Preliminary Examination: Realities and Constraints' and 'Case Studies or Situation Analysis', with chapters by the editors, Andrew T. Cayley, Runar Torgersen, Franklin D. Rosenblatt, Abraham Joseph, Matthias Neuner, Matilde E. Gawronski, Amitis Khojasteh, Marina Aksenova, Christian M. De Vos, Benson Chinedu Olugbuo, Iryna Marchuk, Thomas Obel Hansen, Rachel Kerr, Sharon Weill, Nino Tsereteli and Ali Emrah Bozbayindir, in that order, and with forewords by LIU Daqun and Martin Sørby.

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