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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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The Pre-Preliminary Examination Stage: Theory and Practice of the OTP's Phase 1 Activities

Amitis Khojasteh*

8.1. Introduction

Of the four phases of the preliminary examination process, the first phase, which involves the initial filtering and assessment of information on alleged crimes received under Article 15 of the Statute of the International Criminal Court ('ICC' or 'Court'), is the least reported and, as a consequence, is the subject of speculation.

While Phase 1 overall does not garner as much attention or scrutiny as the other phases, the activities conducted at this early stage are nonetheless a crucial component of the work of the Office of the Prosecutor ('OTP' or 'Office') of the ICC, being an integral part of the Prosecutor's unique role in selecting situations for intervention by the Court.

A preliminary examination may be initiated on the basis of: (i) information on crimes submitted under Article 15 of the Statute by individuals or groups, States, intergovernmental or non-governmental organizations or other reliable sources (also referred to as 'Article 15 communications'); (ii) referrals from States Parties or the UN Security Council; or (iii) declarations lodged under Article 12(3) by a non-State Party, accepting the exercise of the jurisdiction by the Court on an *ad hoc* basis.[1] Pursuant to

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1 OTP, Regulations of the Office of the Prosecutor, 23 April 2009, ICC-BD/05-01-09, Regulation 25(1) ('OTP Regulations') (http://www.legal-tools.org/doc/a97226/); ICC OTP, *Policy Paper on Preliminary Examinations*, 1 November 2013, paras. 4, 73 ('OTP *Policy Pa-*

the Office's policy, the latter two mechanisms automatically trigger the opening of a preliminary examination.[2]

By contrast, Article 15 communications do not necessarily lead to the initiation of a preliminary examination.[3] Instead, such communications are first subject to an initial assessment – a filtering process which, within the OTP's phase-based approach to preliminary examinations, constitutes the Phase 1 assessment and is essentially a pre-preliminary examination stage.[4] Following such assessment, the Office will only open a preliminary examination, on the basis of information received under Article 15 of the Statute, when the alleged crimes appear to fall within the jurisdiction of the Court.[5]

Consequently, Article 15 communications must pass an additional hurdle in order to bring about the opening of a preliminary examination.[6]

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per on Preliminary Examinations') (http://www.legal-tools.org/doc/acb906/). While Article 12(3) declarations may trigger the opening of a preliminary examination, Article 12(3) of the Statute is a jurisdictional provision, as opposed to a trigger mechanism for the exercise of the Court's jurisdiction. Trigger mechanisms for the Court's jurisdiction, as set out in Article 13 of the ICC Statute, include: (1) referral by a State Party, (2) investigation *proprio motu* by the Prosecutor, and (3) referral by the UN Security Council. Accordingly, to activate the Court's jurisdiction, an Article 12(3) declaration requires separate triggering by the Prosecutor acting *proprio motu* or by a State Party referral. See Rome Statute of the International Criminal Court, 17 July 1998, Article 13 ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/). See also, for example, OTP *Policy Paper on Preliminary Examinations*, fn. 25.

2 *Ibid*., para. 76.

3 *Ibid*., para. 75.

4 *Ibid*., para. 78. See also para. 75. As explained by the OTP's policy paper, for the purposes of internal work processes, "[i]n order to distinguish those situations that warrant investigation from those that do not, and in order to manage the analysis of the factors set out in article 53(1), the Office has established a filtering process comprising four phases", *ibid*., para. 78. Phase 2 entails analysis of whether the alleged crimes fall within the subject-matter jurisdiction of the Court and identification of potential cases; Phase 3 focuses on the admissibility of potential case in terms of complementarity and gravity; and Phase 4 examines the interests of justice, *ibid*., paras. 78, 81-83. Although each phase focusses in this respect on a distinct statutory factor for analytical purposes, "the Office applies a holistic approach throughout the preliminary examination process", *ibid*., para. 77.

5 *Ibid*., para. 75.

6 However, once opened, the Office conducts the preliminary examination activities (assessing the factors set out in Article 53(1)(a)-(c)) in the same manner, irrespective of whether the examination was opened on the basis of a referral from a State Party or the UN Security Council, Article 12(3) declaration, or information on crimes obtained pursuant to Article 15. *Ibid*., para. 12. See also paras. 35, 76.

Such initial filtering and assessment, however, is consistent with the Prosecutor's obligation to "analyse the seriousness of information received" under Article 15(2) of the Statute.[7] Moreover, this process is also indispensable given the need to manage the large number of communications continuously received by the Office about possible crimes. In this latter respect, it is highlighted that in 2016, the Office received nearly 600 Article 15 communications; in total, since July 2002, the Office has received over 12,000 such communications.

In such circumstances, faced with numerous alleged atrocities around the world purportedly deserving the Court's attention, the OTP must efficiently and effectively filter hundreds of communications every year in order to decide when and where the opening of a preliminary examination is warranted. This process and how it is conducted is significant as it influences, in part, the type of situations and crimes which will later be selected and prioritized by the OTP, thereby potentially shaping how the Office carries out its mandate in years to come. In this regard, while not discounting the importance of referrals and Article 12(3) declarations, Article 15 communications undoubtedly represent a central channel[8] through which allegations of serious crimes potentially meriting the Court's intervention may be brought to the attention of the Office.[9]

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7 See ICC Statute, Article 15(2), see *supra* note 1. See also ICC, Rules of Procedure and Evidence, 2nd edition, 9 September 2002, Rule 104(1) ('RPE') (http://www.legal-tools.org/doc/a6a02b/). See also Kai Ambos and Ignaz Stegmiller, "Prosecuting international crimes at the International Criminal Court: Is there a coherent and comprehensive strategy?", in *Crime, Law and Social Change*, 2013, vol. 59, no. 4, p. 420; Morten Bergsmo, Jelena Pejic and ZHU Dan, "Article 15", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court*, C.H. Beck, 2016, marginal no. 13 (also expressing that "[i]t is essential that information submitted to the Prosecutor be properly considered, both as a matter of basic prosecutorial professionalism and in order to maintain confidence in the Office of the Prosecutor"); Human Rights Watch, "ICC: Course Correction: Recommendations to the ICC Prosecutor for a More Effective Approach to "Situations under Analysis"", 16 June 2011. Such a 'pre-preliminary' stage of filtering is also envisaged under Regulation 27 of the Regulations of the Office of the Prosecutor. See also Ambos and Stegmiller, 2013, p. 420, *supra* note 7.

8 Notably, for example, Article 15 communications provide an important opportunity for, among others, victims, NGOs, members of civil society, and ordinary citizens to have a role in triggering the exercise of jurisdiction by the Court.

9 Since 2002, the majority of preliminary examinations, namely 13, were opened on the basis of Article 15 communications. These include Afghanistan, Colombia, Guinea, Nigeria, Georgia, Kenya, Honduras, Korea, Venezuela (2006), Iraq/UK, Burundi, the Philippines and Venezuela (2018). By contrast, three were opened on the basis of Article 12(3) declarations lodged by States (Côte d'Ivoire, Ukraine and Palestine), two on the basis of

Notably, however, the Rome Statute does not envisage any mechanism for oversight or quality assessment of the Office's decisions at Phase 1. It could be suggested that this may be problematic given that selection decisions, even at such an inceptive stage, nevertheless can ultimately have an impact on victims' attempts to access justice at the international level as well as on the legitimacy of the Court as perceived by relevant audiences.[10]

However, upon closer examination of the activities undertaken at Phase 1, it is possible nonetheless to identify certain mechanisms aimed at ensuring forms of quality control in the process involved at this stage, including: (i) the implementation of a two-step internal filtering and assessment process, (ii) the manner in which discretion is applied in the OTP's decision-making process at this stage, and (iii) the efforts of the Office to act transparently in relation to the Phase 1 process and relevant decisions taken.

UN Security Council Referrals (Libya and Darfur), and six on the basis of referrals by States Parties (Uganda, Democratic Republic of the Congo, the Central African Republic, Mali, Comoros and Gabon). In February 2014, the OTP opened a preliminary examination of the situation in CAR since September 2012 (also known as the 'CAR II' situation) on the basis of information available concerning increasing violence in the country and the commission of a number of alleged crimes; however, later in May 2014, the CAR Government then referred the situation that was already under examination by the Office.

10 See, generally, Margaret M. deGuzman, "Choosing to Prosecute: Expressive Selection at the International Criminal Court", in *Michigan Journal of International Law*, 2012, vol. 33, no. 2, pp. 265-69 (also using the term 'legitimacy' to refer to "the perception among relevant audiences that the ICC's actions are worthy of respect"); Margaret M. deGuzman and William A. Schabas, "Initiation of Investigations and Selections of Cases", in Goran Sluiter (ed.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, pp. 131-32, 167-68; Thea Marriott and Rebecca Lee, "Introduction", in Rebecca Lee (ed.), *The International Criminal Court: Confronting Challenges on the Path to Justice*, Henry M. Jackson School of International Studies Task Force, 2013, p. 8. See also more generally Cale Davis, "Political Considerations in Prosecutorial Discretion at the International Criminal Court", in *International Criminal Law Review*, 2015, vol. 15, no. 1, p. 171 (noting the role of the OTP, including "to direct the Court's attention and draw its focus to situations, people, and places", and that as a consequence of such role, "the conduct of the OTP is intrinsically linked to the Court's success and viability"). Regarding the issue of legitimacy, deGuzman, for example, expresses that relevant audiences – such as States, NGOs, affected communities, and the global community – will all "assess the Court's legitimacy in significant degree according to their evaluations of its selection decisions", and explains that "[i]n light of the Court's high degree of selectivity, widespread criticisms of its selections or critiques from highly respected sources can result in broader challenges to the Court's legitimacy", *idem*, 2012, pp. 268, 274.

With a view to shedding further light on the Phase 1 process and existing mechanisms of quality control at the pre-preliminary examination stage, this chapter will thus examine the activities undertaken by the OTP during this stage. In this regard, the chapter will outline and clarify the relevant practices and methodology used by the Office in filtering and analysing information received under Article 15 of the Statute. In addition, focus in this respect will also be given to the role of prosecutorial discretion in this process, namely with respect to the OTP's current approach to so-called 'borderline situations', and to considerations concerning transparency and publicity of the Phase 1 activities conducted by OTP. Finally, the chapter will also address how quality control considerations ultimately factor in during this particular stage of analysis.

8.2. Overview of the Phase 1 Process

Phase 1 consists of an initial assessment of all information on alleged crimes received under Article 15 to determine whether the allegations appear to fall within the Court's jurisdiction.[11] Allegations of crimes come to the attention of the OTP via communications submitted by email, fax, post, or in person by, for example, individuals, groups, States,[12] or non-governmental organizations ('NGOs'). Article 15 communications come in different forms and contain widely varying levels of detail, ranging from brief emails of a couple of lines to large submissions with voluminous supporting information and materials. In all cases, these communications are subjected to the same assessment by the Office, the purpose of which is to analyse and verify the seriousness of the information received, filter out information on crimes that are outside the jurisdiction of the Court and identify those that appear to fall within the jurisdiction of the Court.[13]

The Phase 1 process essentially involves two primary activities: (i) the initial basic filtering of communications received; and (ii) the further analysis of allegations that are neither manifestly outside of the Court's

[11] OTP *Policy Paper on Preliminary Examinations*, para. 78, see *supra* note 1. The statutory jurisdictional requirements to be met include temporal, subject-matter, and either territorial or personal jurisdiction. See ICC Statute, Articles 5, 11, 12, 13(b), see *supra* note 1.

[12] While a State Party may formally refer a situation to the Court under Article 14 of the Statute, nothing prevents a State, alternatively, from filing a communication under Article 15. In fact, in the past, the Office has received Article 15 communications from States concerning various situations of alleged crimes.

[13] OTP *Policy Paper on Preliminary Examinations*, para. 78, see *supra* note 1.

jurisdiction nor related to an ongoing preliminary examination or investigation.

8.2.1. Initial Basic Filtering

Article 15 communications received are first filtered according to whether the allegations contained therein concern: (i) matters which are manifestly outside of the jurisdiction of the Court; (ii) a situation already under preliminary examination; (iii) a situation already under investigation or forming the basis of a prosecution; or (iv) matters which are neither manifestly outside of the Court's jurisdiction nor related to an existing preliminary examination, investigation or prosecution, and therefore warrant further factual and legal analysis by the Office.[14] In 2016, for example, the OTP received 593 Article 15 communications alleging the commission of relevant crimes – of which, 410 were manifestly outside of the ICC's jurisdiction, 98 related to ongoing preliminary examinations, 41 related to ongoing investigations and/or prosecutions, and 44 were considered to warrant further analysis.

If the communication concerns allegations which *prima facie* fall outside the scope of the Court's temporal, subject-matter, territorial or personal jurisdiction, it is deemed to be manifestly outside of the Court's jurisdiction and accordingly is dismissed.[15] However, such allegations may be revisited in light of new information or circumstances, such as a change in the jurisdictional situation. Communications concerning allegations or information linked to a situation that is already under preliminary examination or investigation by the OTP are forwarded on to the relevant team within the Office working on that situation or case in order to be further analysed in such context.[16] Finally, with respect to the last category, communications deemed to warrant further analysis (referred to as 'WFA communications') are the subject of a dedicated analytical report (referred

[14] *Ibid*.; OTP Regulations, Regulation 27, see *supra* note 1.

[15] OTP *Policy Paper on Preliminary Examinations*, para. 79, see *supra* note 1. See also ICC Statute, Article 15(6), see *supra* note 1; RPE, Rule 49(2), see *supra* note 7; see also Justice Hub, "How Can People Report Crimes to the ICC?", 7 January 2015 (http://www.legal-tools.org/doc/e777f0/). In addition to those that do not meet the requisite jurisdictional criteria, communications that are otherwise manifestly ill-founded or frivolous will also be dismissed.

[16] See *ibid*.

to as a 'Phase 1 report') in order to inform the determination of whether a preliminary examination should be opened into a given alleged situation.[17]

The filtering of Article 15 communications according to the categories outlined above is subject to several levels of internal review. Communications are first registered, reviewed, and filtered by the staff of Office's Information and Evidence Unit on a rolling basis as they are received.[18] Subsequently, on a monthly basis, the Office's Situation Analysis Section ('SAS') conducts an independent second review of such communications. The resulting recommendations on the disposition and subsequent action to be taken in relation to the respective communications are then subject to the review and final approval by the Prosecutor.

8.2.2. Analysis of 'Warrant Further Analysis' Communications

Phase 1 is often considered to merely consist of a basic filtering process to exclude Article 15 communications alleging crimes that are manifestly outside the Court's jurisdiction. However, in reality, this stage is more complex, involving in-depth factual and legal assessment, given the second component of the Phase 1 filtering process – that is, the analysis of WFA communications.

The purpose of such analysis is to provide an informed, well-reasoned recommendation to the Prosecutor and other members of the Executive Committee on whether the alleged crimes in question appear to fall within the Court's jurisdiction and warrant the Office proceeding to Phase 2, that is, the formal commencement of a preliminary examination. To this end, SAS produces Phase 1 reports assessing the allegations raised in WFA communications.

Phase 1 reports completed on such communications are a crucial component of the work of SAS. It is on the basis of such reports that the Prosecutor determines whether to open preliminary examinations or to

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17 OTP *Policy Paper on Preliminary Examinations*, para. 79, see *supra* note 1. This decision is made on the basis of all communications relating to the same situation, as well as publicly available information. Communications relating to one particular situation are thus analysed together, as opposed to separately. See Justice Hub, "How Can People Report Crimes to the ICC?", see *supra* note 15.

18 Article 15 communications (including any supporting materials) are registered and stored electronically by the Information and Evidence Unit upon collection, with originals stored in the vault of the Office after digitization. See OTP Regulations, Regulations 23(2), 23(4), 26, see *supra* note 1.

dismiss communications that were not manifestly outside the Court's jurisdiction at first review.

Since mid-2012, SAS has produced over 40 Phase 1 reports relating to WFA communications, analysing allegations on a range of subjects concerning situations in regions throughout the world. While most of the WFA communications in this period were ultimately dismissed, four preliminary examinations were opened following SAS's further analysis and recommendations on such communications, namely those into the situations in Venzuela, the Philippines, and Burundi and the reopening of the situation concerning UK forces in Iraq.[19]

8.2.2.1. Applicable Standard at Phase 1

As explained in the Office's policy paper on preliminary examinations, WFA communications require further analysis in order to determine "whether the alleged crimes *appear* to fall within the jurisdiction of the Court and therefore warrant proceeding to the next phase".[20] In other words, the evidentiary standard used at Phase 1 is 'appears', as opposed to the higher standard used at the preliminary examination stage of 'reasonable basis to believe'.

The 'reasonable basis' standard has been interpreted by the ICC Pre-Trial Chambers to require that "there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court 'has been or is being committed'".[21] In this context, Pre-Trial Chamber II further indicated that all of the information need not neces-

[19] Prior to 2012, preliminary examinations opened on the basis of Article 15 include Afghanistan, Colombia, Guinea, Nigeria, Georgia, Kenya, Honduras, Korea and Venezuela (2006).

[20] OTP *Policy Paper on Preliminary Examinations*, para. 79 (emphasis added), see *supra* note 1.

[21] ICC, Situation in the Republic of Kenya, Pre-Trial Chamber, Corrigendum of the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19-Corr, para. 35 ('Kenya Article 15 Decision') (http://www.legal-tools.org/doc/f0caaf/); ICC, Situation in the Republic of Côte d'Ivoire, Pre-Trial Chamber, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, ICC-02/11-14, para. 24 (http://www.legal-tools.org/doc/7a6c19/). For more information on the standard, see Matthew E. Cross, "The Standard of Proof in Preliminary Examinations", in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 2*, Torkel Opsahl Academic EPublisher, Brussels, 2018, chap. 22.

sarily "point towards only one conclusion".[22] If 'reasonable basis' means sensible or reasonable justification, then 'appears' may be appropriately interpreted as amounting something less than that.

The 'appears' threshold used at Phase 1 is derived from the statutory provisions regarding the referral by a State Party or the UN Security Council of a situation in which one or more crimes "appears to have been committed".[23] Its use in this context by the Office is designed to create analogous conditions in respect of Article 15 communications for the triggering of the potential exercise of jurisdiction by the Court in a given situation.[24] Drawing from previous practice, the 'appears' standard, as used at Phase 1, may be roughly summarized as: the information available *tends to suggest* that the alleged acts *could* amount to crimes within the jurisdiction of the Court.[25]

This standard is necessary in order to verify the seriousness of alleged crimes which on their face are not manifestly outside the Court's jurisdiction, to ensure that the reasons for moving forward are well-founded and a decision to proceed to Phase 2 is not taken prematurely without a sufficient factual and legal foundation. In this respect, information received under Article 15 must be subjected to some level of critical analysis and confirmation, rather than simply accepted at face value. Such approach and the standard applied by the Office thus serves, for example, to minimize situations where a preliminary examination is opened on the basis of allegations which later, upon further inspection, are in fact baseless or otherwise appear to fail to satisfy a fundamental condition for jurisdiction. Ultimately, effective additional filtering is essential given the need to carefully select situations for preliminary examination to make certain that the Office's time and limited resources are devoted to situations which appear to involve the "most serious crimes of concern to

22 Kenya Article 15 Decision, para. 34, see *supra* note 21.

23 See ICC Statute, Articles 13(a), 13(b), 14(1), see *supra* note 1.

24 It is noted in this regard that the ILC Statute first used the phrase "appears to have been committed" in the draft Article 25 dealing with the "complaints" procedure.

25 In the same vein, while noting that the term 'appears' lacks statutory definition, one commentary on the Statute suggests that "the threshold 'appear' within the meaning of Article 14 is not high; it involves a *prima facie* assessment and does not require to be premised on a comprehensive evidentiary discussion. Simply put: the possibility that crimes within the jurisdiction of the Court have been committed suffices". Antonio Marchesi and Eleni Chaitidou, "Article 14", in Triffterer and Ambos (eds.), 2016, marginal no. 26, see *supra* note 7.

the international community as whole"[26] and offer potentially realistic prospects for ICC intervention.

Nonetheless, the standard applied at this early stage of analysis cannot be overly exacting. Rather, the use of a lower standard during Phase 1 is appropriate in view of the purpose and nature of the analysis undertaken at this stage, namely to inform the decision on whether a preliminary examination should be opened in given situation. Such analysis cannot be done in the same depth or detail as that done at the preliminary examination proper. This consideration follows not only from the practical constraints involved at Phase 1, such as time and resource limitations, but moreover from the fact that this stage is meant to be a filtering process and is not intended to replace or be a substitute for the type of analysis conducted at Phase 2, or otherwise anticipate the prospective determination to be made by the Prosecutor under Article 53(1) of the Statute.

8.2.2.2. Scope and Nature of the Analysis

Phase 1 reports assess alleged crimes brought to the Office's attention via Article 15 communications. Individual Article 15 communications are not required to be comprehensive to the extent that they in themselves demonstrate that the threshold for opening a preliminary examination is met. Rather, communications are viewed as a means by which the Court's attention is directed to a situation of concern, which is then further examined independently and objectively by the OTP. Accordingly, the focus of Phase 1 reports is not limited to the specific allegations contained in an individual communication received. Instead, information received by the Office on alleged crimes is analysed in conjunction with other related communications as well as relevant and reliable open source information. Communications are thus not analysed in isolation (from each other), but rather are used to inform the Office's analysis of a set of allegations as a whole.

By and large, most situations referred to in WFA communications fall into one of the three general categories:

1. *Due diligence situations*: This includes situations where the allegations are limited in their scope and/or on their face will likely not fall within the Court's subject-matter jurisdiction. However, as such allegations fall within the Court's temporal and territorial and/or

[26] See ICC Statute, Preamble, para. 9 and Articles 1, 5(1), see *supra* note 1.

personal jurisdiction (and are thus not 'manifestly' outside the Court's jurisdiction), they require some limited research and analysis to confirm and explain the recommendation. This category may also include situations where a new submission or information is provided in relation to allegations which were previously dismissed.[27]

2. *Unique, discrete issue situations*: This includes situations where the allegations requiring analysis centre around a specific preliminary jurisdictional or factual issue – that is, an issue distinguishable from the standard analysis of whether alleged crimes are within the Court's subject-matter jurisdiction. Such situations often raise policy-related issues.[28]
3. *Complex factual and/or legal situations*: This includes situations involving complex set of alleged facts (such as a large number and type of alleged crimes, spanning multiple years, and/or involving multiple actors) and/or complicated or novel legal issues requiring

[27] For example, shortly after announcement of the decision to close the preliminary examination of the situation in Honduras, an additional Article 15 communication concerning alleged crimes connected to the same situation was received by SAS. In such circumstances, the Office thus conducted a brief review and analysis of the communication in order to determine whether the specific allegations and information contained therein proved any basis for reconsidering the conclusion of the Office to close the preliminary examination of the situation in Honduras for lack of subject-matter jurisdiction. In this regard, the Office assessed whether the communication provided, for example, information on additional crimes or other new information that could affect the previous legal analysis conducted and conclusions reached by the Office in its Article 5 report.

[28] Such a situation, for example, arose with respect to the Office's consideration of alleged crimes by ISIS in Syria and Iraq. While the Court has no territorial jurisdiction over crimes committed in the territories of those States, it could exercise personal jurisdiction of those members of ISIS who were nationals of States Parties and participated in such crimes, such as so-called 'foreign fighters'. However, the Prosecutor considered that, in the enduring absence of territorial jurisdiction over Syria and Iraq, the prospects of the Office investigating and prosecuting those most responsible, within the leadership of ISIS, appeared limited. In reaching such conclusion, the Office took into account both the OTP's policy to focus on those most responsible for mass crimes and the information available that indicated that the political and military leadership of ISIS was primarily led by nationals of non-States Parties. In light of these considerations, the Prosecutor accordingly concluded that the jurisdictional basis for opening a preliminary examination into the situation was too narrow at this stage. See ICC OTP, "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS", 8 April 2015 (http://www.legal-tools.org/doc/b1d672/) ('OTP Statement on Alleged Crimes Committed by ISIS').

more in-depth analysis and discussion. Such situations may potentially warrant opening a preliminary examination (that is, the alleged crimes on their face appear more likely to fall within subject-matter jurisdiction) but usually require fact-intensive research as well as more detailed legal analysis.[29]

Depending on the category, different levels and types of analysis by the Office are required and accordingly, the content and format of reports may differ. However, in general, the Phase 1 analysis of WFA communications involves two primary steps: (i) factual analysis in consultation with reliable open sources to corroborate the allegations, and (ii) legal analysis of the substantiated allegations in accordance with the applicable provisions of the Statute.

The purpose of the first step is to verify the occurrence and seriousness[30] of the conduct or incidents alleged and thereby identify the allegations to be further analysed and distinguish those which, alternatively, are unfounded and do not provide a basis for any further action or consideration. The Office thus first seeks to corroborate the key factual allegations raised in WFA communications, using credible open source information, such as that from the UN, national or international commissions, regional and sub-regional organizations, and internationally recognized NGOs.[31]

[29] Examples of such types of situations include the Office's analysis of: (i) alleged crimes by, on the one hand, State forces in the context of counter-narcotics operations and, on the other hand, by drug-trafficking organizations in Mexico; (ii) alleged crimes, respectively, by State forces against opposition parties and their supporters, and by members of the opposition against the civilian population in Bangladesh over the course of several years; (iii) alleged crimes by Burundian State forces against protesters and other persons perceived as political opponents or sympathisers of the opposition following the political unrest from April 2015 onwards; (iv) alleged crimes allegedly committed by Venezuelan government against political opposition members, protesters and others in the context of demonstrations and political and social unrest since 2014; and (v) alleged forcible displacement and related crimes committed in the context of alleged land-grabbing and forcible evictions in Cambodia.

[30] As explained in a commentary on Article 15(2) of the Statute, the "analysis of the 'seriousness' of information received is a purely evidentiary test, as opposed to one of appropriateness" and the "seriousness of the information may both concern the nature of the alleged crimes and the strength of the incrimination contained in the information", see Bergsmo, Pejić and ZHU, 2016, marginal no. 13, see *supra* note 7.

[31] In this regard, it is recalled that as the Office lacks investigative powers at the preliminary examination stage, information relied upon to inform its determinations, including at the Phase 1 stage, is largely obtained from external sources. The Office thus pays particular attention to the assessment of the reliability of sources and credibility of the information. See OTP *Policy Paper on Preliminary Examinations*, paras. 31-32, see *supra* note 1. See also

By consulting such open sources, the Office can also then obtain additional information to better inform the Office's assessment of the overall alleged situation. As the applicable standard at Phase 1 is lower than that used during a preliminary examination, the depth of the research and extent of the information collected by the Office at this stage does not necessarily need to be extensive. Instead, the focus is on identifying several diverse and reliable sources as well as summarizing the relevant information available on the issue(s) presented, in terms of information which may support or alternatively undermine the allegations received. This process can nevertheless take time, especially where there are a significant number of relevant factual allegations to be substantiated or where the State concerned engages with the Office, such as by providing counter-claims or information. Given the nature of the exercise, it is not necessary that all information required to make comprehensive legal findings be available at Phase 1, so long as there is sufficient information available to confirm the key, relevant underlying facts and make relatively informed preliminary conclusions on the critical threshold legal issues.

Following this exercise, the Office then analyses the allegations that have been confirmed by open source research in accordance with the applicable provisions of the Statute, supplementary instruments, and relevant jurisprudence. In general, the focus of the analysis conducted is on the jurisdictional requirements;[32] though within these parameters, the focus varies on a case-by-case basis, depending on the relevant issues raised in a given situation. In most cases, however, the analysis focuses on whether the alleged crimes appear to amount to any of the crimes under Article 5 of the Statute.[33] While the analysis undertaken at Phase 1 need not rise to the level of detail of Phase 2, it nonetheless must address and consider whether the basic elements of the crimes alleged *appear* to be met, particularly with respect to the contextual elements of the relevant alleged crimes. In this respect, it is noted that the majority of WFA communications raise allegations concerning alleged crimes against humanity,

generally *ibid*., para. 79; ICC Statute, Article 15(2), see *supra* note 1; RPE, Rule 104(2), see *supra* note 7.

[32] By contrast, generally, admissibility (in terms of complementarity and gravity) are not assessed at the Phase 1 stage of analysis.

[33] In certain cases, such as in the 'discrete, unique issue' type of situations, as noted above, the analysis alternatively may focus on critical preliminary jurisdictional issues, such as those related to the exercise of personal jurisdiction.

and in some cases, challenges may arise in drawing the line between large scale human rights violations and crimes against humanity, or between an 'endemic practice' and a 'systematic' attack against the civilian population pursuant to a State or organizational policy. In addressing such challenges and more generally in analysing allegations, the Office acts consistently and objectively across situations presented in the interpretation and application of the relevant provisions of Rome Statute, the Elements of Crimes and relevant jurisprudence as well as with reference to previous positions taken by the Office on similar legal issues and/or factual situations.

Although limited by the level of research conducted and information available at Phase 1, the conclusions nevertheless must be persuasive in respect of their interpretation of the information available and the application of the relevant law. However, the legal conclusions reached do not necessarily need to be definitive but rather can be subject to adjustment, reconsideration, and/or elaboration depending on further research and additional information that may only become available later, such as during Phase 2, if the Office decides to open a preliminary examination.

Finally, in this context, it is noted that in some cases, it could be that overall there is insufficient information to make a determination. In many cases, this may be indicative of the allegations being frivolous or baseless – in which event dismissal is appropriate. However, in limited cases, the insufficiency of information may be for other reasons, in which case it could be more appropriate to consider opening a preliminary examination in order to allow for further collection of information and in-depth research to reach a subject-matter determination. For example, this could be the case where the information required for the assessment of a particular required legal element[34] is contradictory (due to the existence of different accounts) and/or insufficient (such as due to lack of detailed reporting on the issue at that particular time). Such situations must be assessed by the Office on a case-by-case basis in order to determine the most appropriate course of action in the given circumstances. However, in such a case, the Office considers factors such as: whether the information gap only relates to certain discrete issue(s) and whether, despite the information gap, the information available tends to support that the other basic requisite legal

[34] Such as whether an armed group involved in a conflict is sufficiently organized for the purposes of establishing a non-international armed conflict, or a group alleged to have committed crimes against humanity would qualify as an organization for the purposes of Article 7 of the Statute.

elements of the alleged crimes could be met; the possible reasons for the lack of sufficient information on the particular issue; whether the lack of sufficient information to conclude a crime was committed is the result of a complete absence of information anywhere, or whether the information gap could potentially be resolved with further in-depth research and additional resources, such as access to information that is more easily facilitated during the Phase 2 stage; whether the information available, albeit limited or insufficient, is nevertheless possibly indicative or suggestive of a crime, or not. In some circumstances, the Office may also directly follow-up with senders of communications in order to raise such issues and explore the possibility of a relevant sender providing any additional information that might be available on particular areas of interest identified by the Office.

8.2.2.3. Internal Review and Timelines

The analysis of WFA communications is conducted by SAS. Such analysis is guided by internal guidelines designed to ensure consistency in approaches to open source research conducted, evaluation of available information, interpretation and application of the applicable law and jurisprudence, and more generally the drafting of Phase 1 reports. Additionally, the process as a whole is managed by one member of SAS who serves as a Phase 1 Coordinator, in addition to other preliminary examination tasks, and who monitors and oversees all pending WFA communications. Following a review process within SAS, the finalized Phase 1 reports containing the analysis of and recommendations on WFA communications are submitted to the Prosecutor and the Executive Committee for consideration and approval.

Just as there are no timelines provided in the Statute for bringing a preliminary examination to a close,[35] similarly there are no prescribed timelines for Phase 1 determinations on alleged crimes brought to the Office's attention through Article 15 communications. Nevertheless, the Office seeks to reach determinations within a timely manner. With respect to the initial basic filtering process, review of all communications received is generally carried out on a monthly basis, with senders of communications informed shortly thereafter regarding the outcome. By contrast, decisions on WFA communications logically require further time,

[35] OTP *Policy Paper on Preliminary Examinations*, para. 14, see *supra* note 1.

given the nature of the analysis conducted, as described above. The Office however aims to reach determinations on the outcomes of such communications within a reasonable timeframe, without undue delays, especially given the legitimate interests of senders in a timely response as well as the importance of prompt action for maximizing the effectiveness and impact of any possible further steps taken by the Office in relation to a given situation. This goal, however, is subject to the circumstances of each individual situation under Phase 1 review, such as the complexity of the alleged conduct involved or in some cases, the existence of consultations and interactions with relevant external stakeholders, and operational limitations in terms of availability of resources.[36]

8.3. Prosecutorial Discretion at Phase 1

The Prosecutor's discretionary function is typically discussed in the context of the selection of situations for investigation and the selection of cases and charges for prosecution. However, to a certain extent, prosecutorial discretion also plays a role in the selection of situations for preliminary examination within the *proprio motu* framework under Article 15.

In this regard, it is suggested that the Prosecutor indeed enjoys some discretion in the decision to open preliminary examinations on the basis communications and information received under Article 15 of the Statute. This proposition is supported by the Statute[37] as well as more broadly speaking from a common-sense perspective in light of a number of considerations. In particular, to a certain extent, the exercise of discretion in the Phase 1 selection of situations for preliminary examination is necessary and legitimate given the unique mandate of the Court as well as its capacity constraints and the resulting need for some degree of selec-

[36] In this regard, it is noted that while SAS's resources have gradually increased over time, the section still has limited personnel at its disposal. The section is composed of one head of section and 12 analysts, as well as around two to three interns at any given time. Currently, this staff is divided between 10 on-going preliminary examinations, with the majority of staff working on more than one preliminary examination at a time. Notably, there is no full-time, dedicated team or staff on Phase 1 activities. Rather, Phase 1 work is conducted in addition to relevant staff's duties and responsibilities in connection with assigned preliminary examinations.

[37] See, for example, ICC Statute, Article 15(1) (stating that "[t]he Prosecutor *may* initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court" (emphasis added)), see *supra* note 1.

tivity:[38] the ICC is a permanent court, its jurisdiction is not constrained by any time limits (but for the principle of non-retroactivity) and it has at least the potential for universal reach. Consequently, the ICC's jurisdiction extends over thousands of potential crimes and perpetrators. However, at the same time, it is unfeasible for the Court to take on and address all possible cases of serious international crimes. Against such background, the Prosecutor is tasked with the responsibility of identifying those that potentially warrant action by the Court.

In the context of Phase 1, the application of prosecutorial discretion is reflected in particular in the selectivity exercised by the Office in relation to some decisions taken on WFA communications. As previously explained, WFA communications are subjected to additional analysis, and in general, the Office's policy is to initiate a preliminary examination, and thus proceed to Phase 2, when it 'appears' that crimes within the Court's jurisdiction have been committed. In reaching such determination and selecting situations for preliminary examination, the Prosecutor's decisions are based on the information available and guided by the relevant legal criteria outlined in the Statute, as well as are taken in accordance with the overarching principles of independence, impartiality and objectivity.[39] In practice, however, the Office may be faced with situations in which the most appropriate action to be taken is not readily clear due to a number of a variety of different factors. In particular, the Office may occasionally encounter situations where alleged crimes, while not manifestly outside the Court's jurisdiction, do not necessarily clearly appear to fall within its subject-matter jurisdiction – what could be described as 'borderline situations'. In such situations, the Office has indicated that in determining whether or not to open a preliminary examination, it will take into account additional factors, including those related to policy and those

[38] See, for example, Ambos and Stegmiller, 2013, p. 416, see *supra* note 7 (expressing that given the potential universal scope of the Court's jurisdiction, "more difficult choices have to be made and selectivity plays an important role"); Matthew R. Brubacher, in "Prosecutorial Discretion within the International Criminal Court", in *Journal of International Criminal Justice*, 2004, vol. 2, no. 1, p. 76; James A. Goldston, "More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court", in *Journal of International Criminal Justice*, 2010, vol. 8, no. 2, pp. 389-90; William A. Schabas, "Victor's Justice: Selecting 'Situations' at the International Criminal Court", in *John Marshall Law Review*, 2010, vol. 43, no. 3, pp. 542-43.

[39] See, for example, OTP *Policy Paper on Preliminary Examinations*, para. 25, see *supra* note 1.

relevant to a forward-looking assessment of the exercise of the Court's jurisdiction.[40]

In particular, the Office will first consider whether the lack of clarity, with respect to whether the crimes appear to fall within the Court's jurisdiction, applies to most or only a limited set of allegations, and in the case of the latter, whether they are nevertheless of such gravity to justify further analysis.[41] The Office may therefore decide not to proceed further, pending additional information becoming available to fill in the gaps, unless the information already available tends to suggest that the alleged crimes are or were committed on a large scale or appear to be particularly serious for other reasons. Additionally, the Office will consider whether the exercise of the Court's jurisdiction may be restricted due to factors such as a narrow geographic and/or personal scope of the jurisdiction[42] and/or the existence of national proceedings relating to the relevant conduct.[43] Hence, the Office may decide not to proceed further if the alleged most responsible perpetrators appear to be outside of the Court's reach because they did not commit crimes on the territory nor are nationals of a State Party,[44] or because they are already being investigated and/or prosecuted at the national level. In general, the Office will take into account its prosecutorial strategy of focusing on those most responsible for the most serious crimes under the Court's jurisdiction,[45] and as a general rule, will

40 ICC OTP, *Report on Preliminary Examination Activities 2016*, 14 November 2016, para. 15 ('OTP 2016 Report on Preliminary Examination Activities') (http://www.legal-tools.org/en/doc/f30a53/).

41 *Ibid*.

42 For example, in this respect, the Office may consider whether the vast majority of the alleged crimes relevant to a given situation appear to fall within the Court's jurisdiction, or instead whether the Court only has jurisdiction over a limited segment of the alleged crimes or conduct at issue due to limitations in territorial and/or personal jurisdiction. Such a consideration, for example, played a role in the Prosecutor's decision in 2015 not to open a preliminary examination into alleged crimes committed by ISIS. See OTP Statement on Alleged Crimes Committed by ISIS, see *supra* note 28.

43 OTP 2016 Report on Preliminary Examination Activities, para. 15, see *supra* note 40.

44 See, for example, OTP Statement on Alleged Crimes Committed by ISIS, see *supra* note 28.

45 See OTP Regulations, Regulation 34(1), see *supra* note 1; ICC OTP, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016, paras. 42-44 ('OTP Policy Paper on Case Selection') (http://www.legal-tools.org/doc/182205/); ICC OTP, Paper on Some Policy Issues Before the Office of the Prosecutor, September 2003, pp. 3, 7 (http://www.legal-tools.org/doc/f53870/).

follow a 'conservative' approach in terms of deciding whether to open a preliminary examination.[46] Such approach adopted by the Office may be correctly interpreted as the use of prosecutorial discretion at Phase 1.

On the one hand, it could be suggested that in such circumstances as those described above, the Office instead should take a more progressive approach whereby new preliminary examinations should be opened as long as some of the alleged crimes appear to fall under the ICC jurisdiction. While such an approach could seem appealing in certain respects, on the other hand, it overlooks key pragmatic considerations, and is ultimately unrealistic since it could potentially undermine the ability of the OTP to effectively carry out and fulfil its mandate.[47] The decision to open a preliminary examination has significant implications for the Office, in terms of the investigative prospects, public expectations, and the impact on resource allocation. The opening of numerous preliminary examinations could spread the Office's limited resources too thin,[48] and consequently potentially negatively impact the quality of the assessments conducted during the examination or the time necessary for the completion of such assessments.[49] Past experience has also shown that closing or completing a preliminary examination may be much more challenging than opening one. In light of these considerations, the Office needs to effectively filter WFA Article 15 communications, and in doing so to be selective in deciding which situations are recommended for opening a preliminary examination. In this context, it is further important to highlight that the Office does not open preliminary examinations for complementarity enhancement or preventive purposes – rather, these are ancillary objectives that may only be pursued *if* there is first a sound factual and legal basis to initiate a preliminary examination.

8.4. Transparency in and Publicity of Phase 1 Activities

Measures undertaken by the Office aimed at promoting transparency and publicizing preliminary examination activities, including those at Phase 1,

46 OTP 2016 Report on Preliminary Examination Activities, para. 15, see *supra* note 40.

47 See generally, for example, Carsten Stahn, "Damned If You Do, Damned If You Don't: Challenges and Critiques of Preliminary Examinations at the ICC", in *Journal of International Criminal Justice*, 2017, vol. 15, no. 3, pp. 413–34.

48 See, in this regard, *supra* note 36.

49 See, for example, Stahn, 2017, pp. 8, 10 (also noting the 'width vs. depth' dilemma), *supra* note 47.

may serve a number of key purposes and interests, such as: promoting better understanding of the preliminary examination process, correcting misperceptions, increasing predictability and thereby enhancing public perception of the Court's legitimacy and the credibility of the Office.[50] As frequently suggested, increased publicity of the Office's activities may also potentially contribute to catalysing national investigations and prosecutions[51] and deterring on-going or future crimes,[52] thereby furthering the Court's overall goals of ending impunity and preventing crimes.[53]

However, the interest in transparency must be balanced against the need for confidentiality, particularly in the context of the Office's Phase 1 activities. In this respect, it is important to recall that pursuant to Rule 46 of the Rules of Procedure and Evidence, the Office must protect the confidentiality of information provided to the Office under Article 15 of the Statute.[54] Accordingly, the Office publicizes aspects of its work and activities only where confidentiality and security considerations so permit.[55] As

[50] See generally, for example, OTP *Policy Paper on Preliminary Examinations*, paras. 93-94, 99, see *supra* note 1; ICC OTP, Strategic Plan 2016-2018, 16 November 2015, para. 55(3) (http://www.legal-tools.org/doc/2dbc2d/) ('OTP Strategic Plan 2016-2018').

[51] See, for example, Fatou Bensouda, "Reflections from the International Criminal Court Prosecutor", in *Case Western Reserve Journal of International Law*, 2012, vol. 45, no. 1, pp. 508-09; David Bosco, "The International Criminal Court and Crime Prevention: By-product or Conscious Goal", in *Michigan State Journal of International Law*, 2011, vol. 19, no. 2, p. 181; OTP Strategic Plan 2016-2018, para. 55, see *supra* note 50.

[52] In other words, the fact that a situation is under analysis by the OTP could signal or serve as a warning to perpetrators that they may be held to account, as to potentially influence their behaviour and help to prevent the further commission of crimes or an escalation of violence. See, for example, OTP Strategic Plan 2016-2018, para. 55(4), see *supra* note 50; Human Rights Watch, "ICC: Course Correction: Recommendations to the ICC Prosecutor for a More Effective Approach to "Situations under Analysis"", see *supra* note 7; Bosco, 2011, pp. 180-81, see *supra* note 51.

[53] See ICC Statute, Preamble, para. 5, see *supra* note 1; OTP *Policy Paper on Preliminary Examinations*, paras. 93-94, see *supra* note 1. See also OTP Strategic Plan 2016-2018, para. 55(4), see *supra* note 50; *Ibid*., Annex – Results of the Strategic Plan (June 2012-2015), para. 18; Bensouda, 2012, p. 508, see *supra* note 51; Human Rights Watch, "ICC: Course Correction: Recommendations to the ICC Prosecutor for a More Effective Approach to "Situations under Analysis"", see *supra* note 7; Bosco, 2011, pp. 172-75, see *supra* note 51. See also generally OTP *Policy Paper on Preliminary Examinations*, paras. 101-06, see *supra* note 1.

[54] RPE, Rule 46, see *supra* note 7.

[55] See *ibid*., Rules 46, 49; OTP Regulations, Regulation 28(2), see *supra* note 1. See also, for example, Claire Grandison, "Maximizing the Impact of ICC Preliminary Examinations", in *Human Rights Brief*, 10 February 2012 (http://www.legal-tools.org/doc/eb1697/).

a result, the Office generally engages in limited public reporting with respect to its Phase 1 activities. For example, as a matter of practice, the Office in this regard does not publish Phase 1 reports completed on WFA communications and only in limited cases publicly comments on allegations which are under Phase 1 analysis.

Beyond the issue of confidentiality, increased publicity of the Office's activities also gives rise to a number of potential challenges and disadvantages. This is particularly true in respect of the Office's Phase 1 activities. For example, publicizing Phase 1 activities may risk unduly raising expectations.[56] Public statements indicating that the Office has received certain communications, or is contemplating opening a preliminary examination into a given situation, are likely to generate significant attention, including among affected communities, in the media, and consequently the broader public.[57] Such statements are likely to consequently raise expectations that the Court will intervene.[58] The Office, however, opens preliminary examinations on the basis of information received under Article 15 only in limited circumstances, and as previous experience shows, most allegations received ultimately do not result in the opening of a preliminary examination. Accordingly, in such circumstances, expectations of affected communities are likely to be frustrated, which could contribute to undermining the public's confidence in the credibility and legitimacy of the Court.[59]

Furthermore, as past experience has shown, some communications submitted to the Office may be politically driven. Thus, the Office must exercise caution and deflect any potential attempts at instrumentalizing

56 See, for example, Stahn, 2017, p. 13, see *supra* note 47.

57 Human Rights Watch, "ICC: Course Correction: Recommendations to the ICC Prosecutor for a More Effective Approach to "Situations under Analysis"", see *supra* note 7.

58 Human Rights Watch has also pointed out that public statements by the OTP indicating that it may act in relation to a situation may in some circumstances also "inadvertently subvert national efforts", as "where confidence in national authorities to deliver justice is low, this can deter these constituencies from undertaking efforts to press their governments to carry out their primary obligations to bring accountability". *Ibid*.

59 See, for example, *ibid*. (also noting that "a pattern of raised expectations followed by a failure to act can also dilute the impact of announced OTP preliminary investigations in helping catalyse national prosecutions and deterring ongoing crimes"). In this regard, Human Rights Watch further suggested that such situations may also "give rise to broader to broader perceptions of the ICC as a paper tiger, lessening the weight future statements of possible ICC action may carry". *Ibid*.

the Court for short-term political gains, including by not encouraging or facilitating such attempts by giving undue publicity to such types of communications and allegations contained therein.

In addition, in certain specific circumstances, publicizing situations of alleged crimes that are under Phase 1 analysis may not have a deterrent or preventive impact, but instead could influence the alleged perpetrators at issue to cover up evidence, intimidate potential witnesses or take other measures in order to frustrate any possible future examination or investigation.[60]

While such examples of the potential risks do not mean that the Office should entirely forgo publicizing its activities, they do suggest that it is appropriate for the Office to exercise caution with respect to the extent it reports on its activities, particularly those at the early stage of Phase 1. In this regard, overall, such potential drawbacks tend to militate against revising the Office's current approach of generally keeping this stage of analysis a low profile, quiet process and broadly publicizing its activities and/or decisions *only* in limited circumstances and after careful deliberation of the advantages and disadvantages involved based on the circumstances of each case.

Moreover, from a logistical perspective, there are limits to the personnel and time that the Office can and should devoted to publicizing its Phase 1 activities – such scarce resources arguably should primarily be focused on the Office's main task of analysis.[61] This approach is con-

[60] See Bosco, 2011, p. 181, see *supra* note 51. Publicity could also more generally "compromise access to victims and witnesses or complicate dialogues with States". Stahn, 2017, p. 13, see *supra* note 47. Advance warning or indications of the Office's monitoring of, and contemplation of opening a preliminary examination into, a given situation, such as through a public statement, could provide an impetus for a State Party to consider preemptively withdrawing from the Statute. For example, following the Prosecutor's statement regarding her monitoring of the situation in the Philippines, President Duterte, as well as other Filipino government officials, raised the possibility that Philippines might withdraw from the Court. Neil Jerome Morales and Stephanie van den Berg, "Philippines' Duterte says may follow Russia's withdrawal from 'useless' ICC", in *Reuters*, 17 November 2016 (http://www.legal-tools.org/doc/9138b0/); DJ Yap, "Yasay: Philippines better off withdrawing from ICC", in *Philippine Daily Inquirer*, 19 November 2016 (http://www.legal-tools.org/doc/e2cca4/).

[61] See, for example, Human Rights Watch, "ICC: Course Correction: Recommendations to the ICC Prosecutor for a More Effective Approach to "Situations under Analysis"", see *supra* note 7. See also generally OTP Strategic Plan 2016-2018, para. 55(5) (noting that "the effective use of resources is also essential during preliminary examination activities"), see *supra* note 50; *Ibid*., Annex 1 – Results of the Strategic Plan (June 2012 – 2015), para. 11

sistent with the perspective that Phase 1 analysis is an initial filtering mechanism for the primary purpose of informing a decision on whether or not to open a preliminary examination (that is, a means for selection of situations for preliminary examination). Further, where resources are devoted to publicizing the Office's activities, such efforts should likely then be prioritized in relation to areas where the OTP can have the greatest potential impact. Accordingly, the priority should be on publicizing the Office's other core activities.[62]

Despite these considerations, however, the Office does in fact take steps to act transparently, to the extent possible and appropriate, with respect to activities and decisions undertaken during Phase 1. In particular, to this end, the Office engages in a number of activities aimed at ensuring communication of its process and decisions to relevant stakeholders as well as, in certain circumstances, to the broader public.

Consistent with the OTP's Regulations, all senders of information under Article 15 are sent an acknowledgement by the Office upon receipt of their communication(s).[63] Given the Prosecutor's obligation to protect the confidentiality of information submitted under Article 15,[64] as mentioned previously, the Office normally does not publicize or comment on communications received.[65] However, if the sender of a given communication makes such communication public, the Office may then publicly confirm receipt of the communication, such as in response to media queries or requests by States, individuals, or other interested parties.[66]

("The Office is constantly confronted with an over-demand of its services which calls for the most efficient use and management of its resources.").

62 For example, in this regard, arguably the potential for catalytic or deterrent effects are likely greater with respect to preliminary examination and investigation and prosecution activities, versus those of Phase 1, where the prospect for ICC intervention is more abstract and thus the OTP's potential leverage to influence the behaviour of relevant actors is reduced.

63 OTP Regulations, Regulation 28(1), see *supra* note 1. See also OTP *Policy Paper on Preliminary Examinations*, para. 88, see *supra* note 1.

64 See RPE, Rule 46, see *supra* note 7. See also OTP Regulations, Regulation 28(2), see *supra* note 1.

65 See OTP *Policy Paper on Preliminary Examinations*, para. 88, see *supra* note 1.

66 See OTP Regulations, Regulation 28(1), see *supra* note 1; OTP *Policy Paper on Preliminary Examinations*, para. 88, see *supra* note 1. See also generally OTP Regulations, Regulation 15(1), see *supra* note 1.

Following the initial basic review and filtering, senders of communications are also subsequently informed of the outcome of the Office's assessment, the reason underlying it, and, where applicable, the action that will accordingly be taken with respect to the information provided.[67] Additionally, with respect to WFA communications, once the Office later completes its additional analysis and takes a decision on whether or not there is a basis to proceed to Phase 2 in relation to the allegations received, senders of such communications are also accordingly informed, including of the reason(s) for such decision. During the Phase 1 process, the Office also at times engages directly with communication senders and, where appropriate, other relevant stakeholders,[68] often on a confidential basis, in relation to situations under Phase 1 analysis. Such engagement includes, for example, follow-up by the Office in some cases to seek additional information or clarifications from communication senders and in-person meetings to discuss issues related to the Phase 1 process generally, specific allegations and information received under Article 15, and/or decisions taken by the Office.

When the Office decides to open a preliminary examination, such decisions are not only conveyed to the relevant communications senders but are also accompanied by a public announcement by the Prosecutor.[69] By contrast, such an approach is typically not taken in relation to situations where the Office has decided not to proceed in relation to information on alleged crimes received under Article 15. While such decisions are directly communicated to senders,[70] the Office however generally does not more broadly publicize or disseminate these decisions. That said,

[67] Such communication of the decisions taken in relation to information submitted under Article 15 is consistent with the Prosecutor's relevant obligations under the Statute and Rules of Procedures and Evidence. See ICC Statute, Article 15(6), see *supra* note 1; RPE, Rule 49, see *supra* note 7.

[68] For example, once it has been made public (by the sender) that a communication relating to a given situation have been received by the Office, governments and other concerned actors can and do frequently engage with the Office.

[69] OTP *Policy Paper on Preliminary Examinations*, para. 95, see *supra* note 1. See, for example, ICC OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela, 8 February 2018 (http://www.legal-tools.org/doc/207e84/); ICC OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the situation in Burundi, 25 April 2016 (http://www.legal-tools.org/doc/62ee7b/).

[70] See ICC Statute, Article 15(6), see *supra* note 1; RPE, Rule 49, see *supra* note 7.

the Office has issued public statements in limited cases, explaining its decisions not to open a preliminary examination into a given situation, including those (i) in relation to alleged crimes committed by ISIS;[71] and (ii) on the basis of the purported Article 12(3) declaration lodged on behalf of former Egyptian President Mohamed Morsi (following his removal from office) with respect to alleged crimes committed on the territory of Egypt since 1 June 2013.[72] Such public statements by the Office were necessary and important given the numerous inquiries received by the Office and the considerable public interest and speculation generated by such communications.[73] In light of the attention they attracted and the nature of issues involved, these situations thus warranted the Office directly addressing and clarifying publicly the decision not to proceed and the particular rationale behind it.[74]

Additionally, with respect to public reporting, the Office also provides annual statistics on the number of Article 15 communications received and how many of those were deemed either to be manifestly outside the Court's jurisdiction, linked to a preliminary examination or investigation, or to warrant further analysis.[75] In a few particular cases, the

71 See OTP Statement on Alleged Crimes Committed by ISIS, see *supra* note 28.

72 ICC OTP, The determination of the Office of the Prosecutor on the communication received in relation to Egypt, 8 May 2014 (http://www.legal-tools.org/doc/2945cd/) ('OTP Determination on Communication Received on Egypt'). See also generally OTP Strategic Plan 2016-2018, Annex – Results of the Strategic Plan (June 2012-2015), para. 17, see *supra* note 50.

73 See OTP Statement on Alleged Crimes Committed by ISIS, see *supra* note 28; OTP Determination on Communication Received on Egypt, see *supra* note 72.

74 See OTP Statement on Alleged Crimes Committed by ISIS, see *supra* note 28; OTP Determination on Communication Received on Egypt, see *supra* note 72. See also generally OTP Strategic Plan 2016-2018, Annex – Results of the Strategic Plan (June 2012-2015), para. 17, see *supra* note 50. In the situation of the alleged crimes by ISIS, the 2015 statement also provided a useful opportunity for the Prosecutor to publicly reaffirm and emphasise the essential role and responsibility of national authorities in the investigation and prosecution of mass crimes, including the alleged crimes in question which the Prosecutor described as constituting "serious crimes of concern to the international community", while at the same time express a commitment to work, as appropriate, with relevant States in order support domestic investigations and prosecutions of relevant crimes by their nationals, such as through information sharing. OTP Statement on Alleged Crimes Committed by ISIS, see *supra* note 28.

75 See, for example, OTP 2016 Report on Preliminary Examination Activities, para. 18, see *supra* note 40.

Office has also issued public preventive statements in relation to situations that were being monitored by the Office at Phase 1.[76]

Admittedly, however, there is still room for enhanced transparency in the selection of situations for preliminary examinations and the explanation of reasons underlying the conclusions taken at Phase 1. Cognizant of this, the Office has recently decided to provide a more detailed response to the senders of WFA communications outlining the reasoning for such decisions[77] – a new approach that the Office implemented in 2017. Such approach aims not only at increasing communication senders' understanding of the criteria guiding the OTP's decision-making process and the basis for the conclusions reached, but also reinforcing the perceived credibility and seriousness of the Office's actions and deliberation process. By more clearly articulating and conveying the legal basis for its decisions, the Office can potentially alleviate suspicion and counter speculation or allegations that a decision taken with respect to a given situation was motivated by political or other non-legal factors and thereby build greater trust in its decision-making process.

8.5. Quality Control in Phase 1

The activities undertaken during Phase 1 constitute an important component of the work of the OTP as they inform the decision to open a preliminary examination, when otherwise not automatically triggered by a referral or Article 12(3) declaration, and can thus play a role in the types of situations and crimes which may later become the subject of proceedings before the Court. The question thus arises as to what level of external oversight or other mechanisms are available in order to ensure quality in this integral, early stage of analysis by the Office.

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[76] ICC OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda concerning the situation in the Republic of the Philippines, 13 October 2016 (http://www.legal-tools.org/doc/bbc78e/); ICC OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the worsening security situation in Burundi, 6 November 2015 (http://www.legal-tools.org/doc/878e16/); ICC OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the recent pre-election violence in Burundi, 8 May 2015 (http://www.legal-tools.org/doc/345bf9/). So-called 'preventive statements' issued by the Office are generally meant to "deter the escalation of violence and the further commission of crimes" and "put perpetrators on notice". OTP *Policy Paper on Preliminary Examinations*, para. 106, see *supra* note 1.

[77] OTP 2016 Report on Preliminary Examination Activities, para. 15, see *supra* note 40.

In this regard, importantly, it is pointed out that the Statute does not provide for any explicit external control over the OTP's assessment of Article 15 communications at Phase 1. In particular, there is no mechanism allowing judicial review of the Prosecutor's decision to initiate, or decline to initiate, a preliminary examination on the basis of such communications. For example, the sender of an Article 15 communication cannot challenge the Prosecutor's decision not to open a preliminary examination following a Phase 1 assessment by seeking review by the ICC Chambers – as illustrated, for example, in the case of the purported Article 12(3) declaration lodged on behalf of former Egyptian President Morsi.[78] As noted by the Pre-Trial Chamber in that case, in the context of *proprio motu* proceedings under Article 15 of the Statute, the possibility of judicial review is limited to situations where the Prosecutor decides not to proceed based on Article 53(1)(c) of the Statute, that is, based on the interests of justice provision.[79] Decisions taken by the Prosecutor during Phase 1 concerning whether the relevant jurisdictional criteria are met therefore fall outside of the scope of judicial review provided for under the Statute.[80]

Given the number of Article 15 communications continuously received and processed by the Office as well as the nature of the assessment undertaken at Phase 1, the deference afforded to the Prosecutor is in fact more appropriate, considering, among other things, that judicial supervision at this early filtering stage would likely be too burdensome. Further, the absence of judicial oversight does not mean that there are no means available to safeguard the quality and reasonableness of decisions taken by the Prosecutor as Phase 1. Rather, in such circumstances, the maintenance of a certain standard in terms of quality, legal reasoning and coher-

78 See ICC, Pre-Trial Chamber, Decision on 'Request for Review of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt and the Registrar's Decision of 25 April 2014', 12 September 2014, ICC-RoC46(3)-01/14-3, paras. 8-9 ('Decision on Egyptian Request for Review') (http://www.legal-tools.org/doc/bfbb8f/).

79 *Ibid*., paras. 7-8. See also ICC Statute, Article 53(3)(b), see *supra* note 1.

80 See Decision on Egyptian Request for Review, para. 9, see *supra* note 78. By contrast, in the case of referral by a State Party or the UN Security Council, a decision by the Prosecutor not to proceed based on, *inter alia*, Article 53(1)(a) may be reviewed by the Pre-Trial Chamber, upon a request from the relevant referring State or the Security Council. See ICC Statute, Article 53(3)(a), see *supra* note 1.

ence in terms of decisions taken accordingly instead falls primarily on the Office itself.

In this regard, to ensure quality in the internal review and evaluation of Article 15 communications, the Office has notably implemented, as described above, an organized, consistent process for effectively and efficiently filtering and assessing the numerous communications and allegations received under Article 15. This involves: a systematic procedure for the initial filtering and categorization of communications received, independently substantiating allegations received with reliable open sources, applying a standard of proof that is commensurate with the object and purpose of this early stage of analysis, conducting objective and impartial analysis in accordance with the relevant statutory provisions and jurisprudence, and subjecting analysis and conclusions to levels of internal review within the Office.

Such approach, built on a multi-layer framework of centralized review, also ensures the coherence of the decisions taken by the Office and reduces the possibility that similar allegations may be treated differently or in an inconsistent manner, or that conclusions are made on the basis of extemporaneous considerations. Likewise, the fact that the Office has established in clear terms the scope and the limit of its discretion during the Phase 1 process prevents the risk of arbitrariness in decisions taken on 'borderline situations'.

In addition, the quality of this internal process is potentially further enhanced by the Office's consultation with external actors during this process. In particular, at Phase 1, the Office frequently engages directly with communication senders and, where appropriate, other relevant actors, to explain the process, discuss allegations and submissions, and seek additional information or clarifications where necessary. After a decision is taken, senders of dismissed communications can also seek to convince the Prosecutor to reconsider a decision by submitting additional information – a possibility which is always noted in the Office's final response to senders of dismissed communications.[81] As past practice has shown, senders in fact often do take advantage of this option and follow-up with additional information. Overall, such direct exchanges and dialogues serve to improve the quality of the analysis and decisions of the Office, allowing senders and other relevant stakeholders in the process to provide views

[81] See generally *ibid*., Article 15(6); RPE, Rule 49(2), see *supra* note 7.

and input which may better inform or assist the Office's analytical and decision-making process at Phase 1. Furthermore, such engagement gives communication senders and other relevant actors the possibility to be heard and to better understand the Office's approaches and positions.

The Office also further engages in a number of other activities in order to enhance transparency in the Phase 1 process, which also potentially provide a means towards further quality control. These efforts may contribute to a system of diffuse control over the decisions and choices of the Office in this important early stage of the process.

Most importantly, the Office conveys its decisions and reasons for such decisions directly to the senders of Article 15 communications. In accordance with the new approach implemented in 2017, the Office has also begun providing more detailed explanations regarding the specific legal reasoning and considerations underlying its decisions on WFA communications. In cases where such types of communications are dismissed, more clarity and specificity regarding the reason for the dismissal may better enable senders to understand the particular issues on which they can provide additional information in any further communications on the same situation in order to seek reconsideration of a decision.

In terms of public reporting, the Office makes public announcements when preliminary examinations are opened and, in a limited number of cases, has issued public statements explaining decisions not to open a preliminary examination. Further, the Office's efforts in the last several years to publicly explain its filtering process in general and more recently to outline the policy considerations that the Office may consider in 'borderline situations', can be seen as an attempt to shape the Prosecution's discretion in a clear and transparent manner, as to promote greater public understanding of and predictability in the Office's selection of situations for preliminary examinations.

All of these various measures undertaken by the Office to share information concerning the Phase 1 process and decisions taken ultimately have the effect of subjecting its policies, decisions and reasoning to public discourse and scrutiny. In this regard, while not subject to judicial oversight, the Office may nonetheless be held accountable for the quality and consistency of its work processes, analysis and conclusions at Phase 1 by a variety of actors and entities through their reactions to and feedback on the Office's practices and selection choices at this stage. Further, more generally, such external feedback may provide useful input that may be

taken into account by the Office in order to improve the Phase 1 process as well as to further inform its selection of situations for preliminary examination.[82]

8.6. Conclusion

The OTP possesses a significant degree of autonomy in carrying out its Phase 1 activities and selecting situations for preliminary examination on the basis of Article 15 communications. This arrangement, however, is appropriate given the need to efficiently and effectively manage and respond to the hundreds of communications received per year.

Furthermore, despite the absence of a formal mechanism of external oversight, the quality and coherency of the decisions taken by the Office at Phase 1 are ensured in part internally through the Office's implementation of a consistent assessment process guided by sound and transparent legal criteria and relevant policy considerations, and subject to levels of internal review.

Additionally, in conducting its Phase 1 activities, the Office does not work from the shadows. Rather, it engages with communication senders and other relevant stakeholders and conveys its decisions to the relevant audiences. In doing so, the Office has taken increasing steps to make the Phase 1 process and decisions taken at this stage more understandable to communication senders and, in certain circumstances, also to other relevant stakeholders and the general public. Through such efforts, the Office demonstrates the seriousness of its review process and explains why certain alleged situations have moved forward to Phase 2, while others have not. Moreover, through such transparency, the Office exposes its decisions, and the reasoning underlying them, to external scrutiny and importantly provides senders of communications as well as other interested parties with the opportunity to seek reconsideration of decisions, such as through the submission of new facts or information.

Overall, this approach ensures a level of accountability and enables individuals, NGOs, and other actors to play a meaningful role in the process, while at the same time preserves the necessary level of prosecutorial

[82] For other considerations on how external input can contribute towards enhancing quality at the Phase 1 stage, see Matilde E. Gawronski, "The Legalistic Function of Preliminary Examinations: Quality Control as a Two-Way Street", in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 1*, Torkel Opsahl Academic EPublisher, Brussels, 2018, chap. 7.

independence and discretion in the ultimate selection of situations for preliminary examination.

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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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