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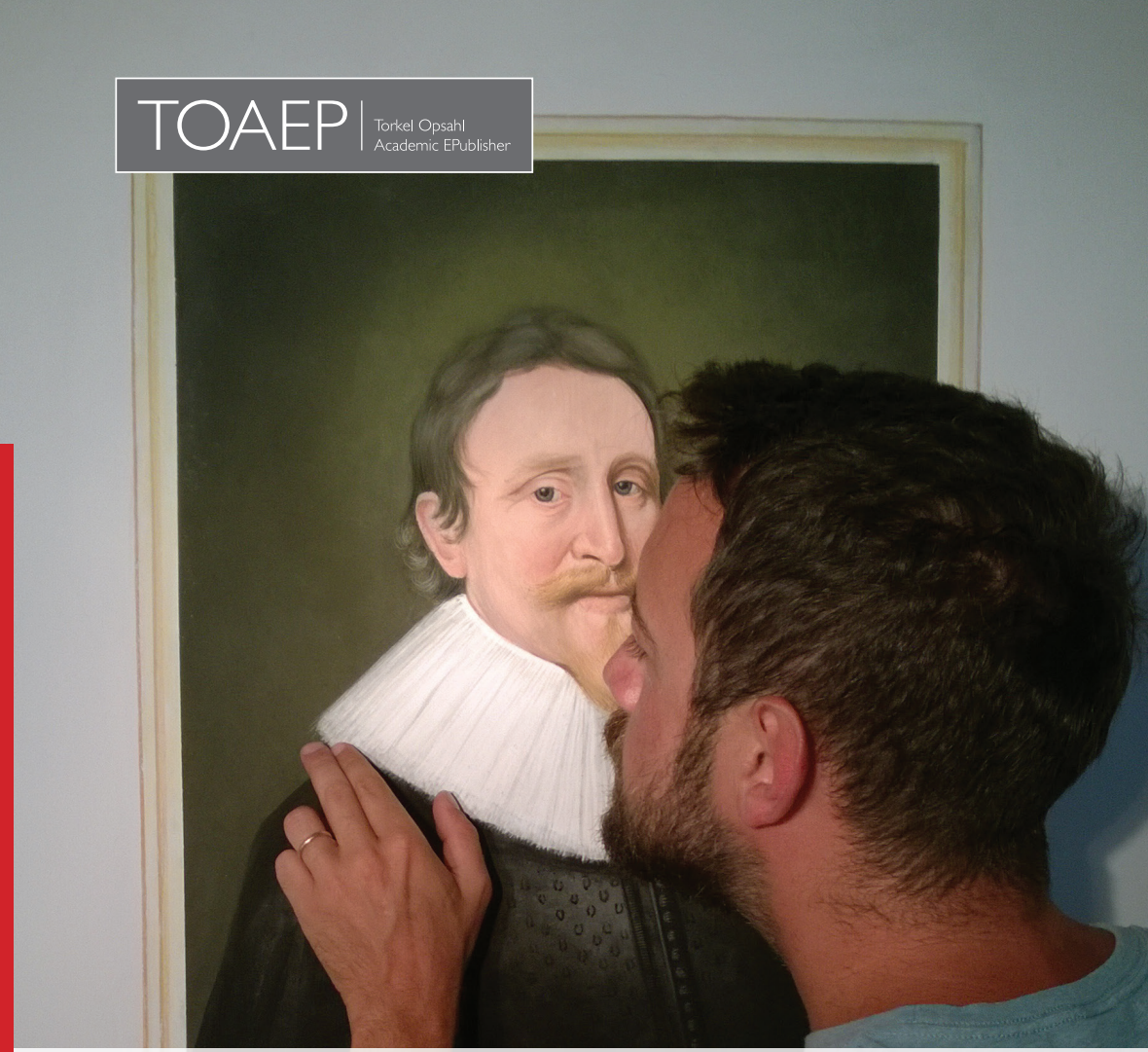
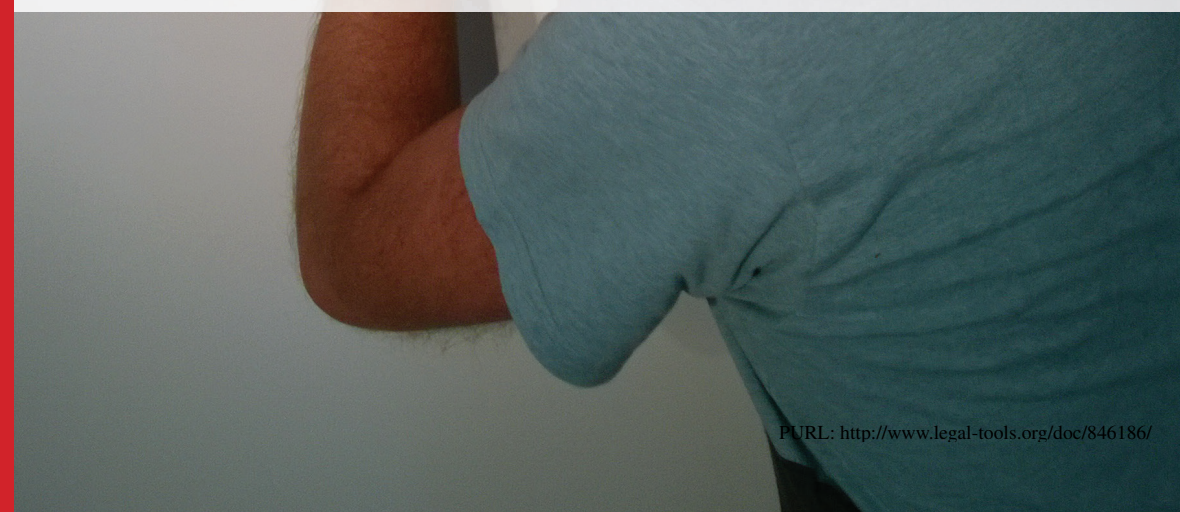


Quality Control in Preliminary Examination: Volume 2

Morten Bergsmo and Carsten Stahn (editors)



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Front cover: *Alberto Gandolfi inspects his fresco of Hugo Grotius in Florence. Trained for years in fresco painting and restoration, including at the Accademia di Belle Arti di Firenze, he employs the fresco techniques used since the 1400s in Florence, including preparing ingredients such as the lime plaster himself. An exceptional level of quality control of the preliminary stages is required for the paintings to stand the test of time. Photograph: © CILRAP 2017.*

Back cover: *Section of a Roman street close to where the Statute of the International Criminal Court was negotiated, paved with 'sampietrini' cobblestones of trimmed, black basalt-cubes. When each stone is precisely cut and placed, they make up a robust and attractive whole, with the ability to withstand pressure and inundation. Preliminary examination is similarly made up of numerous small steps, each of which should be undertaken with proper quality control. Photograph: © CILRAP 2018.*

33

Casting a Larger Shadow: Premeditated Madness, the International Criminal Court, and Preliminary Examinations

Mark Kersten*

33.1. Introduction: Shadow Politics and the International Criminal Court

It has been repeatedly put forward that that the International Criminal Court ('ICC') has a 'shadow'. This notion has been regularly and increasingly invoked in scholarship on the ICC. In their 2012 article entitled *Kenya in the Shadow of the ICC*, Chandra Lekha Sriram and Stephen Brown ponders "whether the shadow of the ICC is likely to deter future atrocities".[1] Kevin Jon Heller has offered an analysis of the "shadow side of complementarity" – the effects of the Court "on the likelihood that defendants will receive due process in national proceedings".[2] Louise Chappell and others have described what they see as the institution's "gender justice complementarity shadow", an effect they argue results from the lack of linkage between the gender justice provisions under the Rome

* **Mark Kersten** is a postdoctoral research fellow at the Munk School of Global Affairs, University of Toronto. This chapter draws on a presentation given by the author on the occasion of the conference, *The Peripheries of Justice Intervention: Preliminary Examination and Legacy/Sustainable Exit*, which took place at the Peace Palace in The Hague, on 29 September 2015. The author wishes to express his gratitude to the inestimable Carsten Stahn for the generous opportunity to present at the conference and write this chapter. He would also like to thank Alex Whiting for his generous and helpful comments during the early stages of planning this chapter.

1 Chandra Lekha Sriram and Stephen Brown, "Kenya in the Shadow of the ICC: Complementarity, Gravity, and Impact", in *International Criminal Law Review*, 2012, vol. 12, no. 2, pp. 219–44.

2 Kevin Jon Heller, "The Shadow Side of Complementarity: The Effect of Article 17 of the Rome Statute on National Due Process", in *Criminal Law Forum*, 2006, vol. 17, no. 3, pp. 255–80, p. 255.

Statute and the Court's foundational principle of complementarity.[3] Even ICC Chief Prosecutor, Fatou Bensouda, has spoken of the Court's shadow, which she describes as its "capacity to set precedents that would meet the global challenges of our times" and something that "should be considered as the most important impact of the court".[4]

This chapter is likewise concerned with the shadow cast by the ICC – but from an altogether different angle. The focus of this chapter is on identifying and exploring novel strategies at the preliminary examination stage of ICC interventions, strategies that could enlarge the ICC's shadow.[5] Above all, it is argued that the Office of the Prosecutor ('OTP') should consider deploying more intrepid strategies at the preliminary examination phase in order to positively influence the behaviour of the Court's potential targets. But what is meant by the ICC's 'shadow'?

Given the diverse use of the term 'shadow' in international criminal law and justice scholarship, it is worthwhile briefly outlining what this chapter means by it. 'Shadow' here is taken to entail the *indirect impression* and *impact* that the ICC has on various actors and, in particular, on those whose behaviour the Court seeks to affect through its actions and decisions. These effects and impressions can exist at any time and at any stage of the Court's interventions – including prior to the opening of an official investigation.

There are two related reasons reason that likely explain the growing interest in the ICC's shadow rather than a myopic focus on its direct effects. First, the limits of the Court's effects on key issues such as deterring mass atrocities, successfully concluding cases, and ending impunity, are increasingly evident.[6] The ICC's 'bite' has not been as threatening or ef-

[3] Louise Chappel, Rosemary Grey and Emily Waller, "The Gender Justice Shadow of Complementarity: Lessons from the International Criminal Court's Preliminary Examinations in Guinea and Colombia", in *International Journal of Transitional Justice*, 2013, vol. 7, no. 3, pp. 455–75.

[4] See remarks by Fatou Bensouda, Council on Foreign Relations, "The International Criminal Court: A New Approach to International Relations", 21 September 2012 (http://www.legal-tools.org/doc/100ce0-1/).

[5] This chapter employs a broad conception of intervention, wherein the OTP's decision to open a preliminary examination into a given situation already constitutes an intervention on the part of the ICC.

[6] See, for example, Nick Grono, "Justice in Conflict: The ICC and Peace Processes", in Nicholas Waddell and Phil Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in*

fective as some had originally hoped and others had feared.[7] Instead, concern seems to be focused on whether the Court bit off more than it could chew and thus created an expectations gap in what justice and accountability the institution can deliver. Second, there has been something of a 'complementarity turn' in the field of international criminal justice, with scholars and practitioners focusing on how the ICC can galvanize and stimulate domestic and regional accountability processes as a primary motivation of the Court's mandate.[8] As a result, there is a palpable focus on how to increase the shadow of the ICC.

Of course, and as we know from famous childhood stories such as *Peter Pan*, shadows are real but can neither be caught nor physically grasped. They are impressions of light upon surfaces. Importantly, the size and shape of a shadow changes with the angle of the light upon the object casting it. If one were to take a flashlight and point it at a toy-house from a small angle above, the house's shadow will appear diminutive. Increase the angle, and the edifice's impression upon the floor becomes elongated and increasingly striking. At the core of this chapter is an assertion that the ICC's strategies are the light that determines how long and striking the Court's shadow is and can be. Changing the focus of those strategies can have an impact on how effective the Court is at casting its shadow and, ultimately, in achieving desired outcomes.

Africa, Royal African Society, 2008, pp. 13–20; Human Rights Watch, *Unfinished Business: Closing Gaps in the Selection of ICC Cases*, 15 September 2011 (http://www.legal-tools.org/doc/738f10/); Mark Kersten, "The ICC and its Impact: More Known Unknowns", in *Open Global Rights*, 5 November 2014; Mark Kersten, *Justice in Conflict: The Effects of the International Criminal Court's Interventions on Ending Wars and Building Peace*, Oxford University Press, 2016.

7 See discussion of US antagonism to the ICC below, see *infra* Section 33.4.2.

8 See, among others, Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press, 2011; Sarah M.H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan*, Cambridge University Press, 2014; Mark Kersten, "The Complementarity Turn in International Criminal Justice", in *Justice in Conflict*, 30 September 2014; Kirsten Ainley, "The Responsibility to Protect and the International Criminal Court: Counteracting the Crisis", in *International Affairs*, 2015, vol. 91, no. 1, pp. 37–54.

33.1.1. Overview

The chapter proceeds as follows. The second section of the chapter outlines the orthodox view of preliminary examinations that sees this stage of an ICC intervention as a 'legal checklist'. It is posited that this classical understanding has neglected to view the preliminary examination phase as a unique stage during which the OTP can deploy strategies to affect and influence actors in the contexts under examination – namely to induce domestic judicial activity and to deter and prevent mass atrocities. In the second section, the chapter explores four key assumptions that should constitute the foundation for thinking through how to deploy preliminary examinations effectively: 1) that the ICC is predisposed to intervening in ongoing and active conflicts; 2) that the Court is a political, as well as legal, institution; 3) that, generally, the ICC's preference is to have domestic authorities – and not the Court – prosecute international crimes; and 4) that the strategic imperatives and incentives of warring actors and potential targets of ICC interventions are unique at the preliminary examination stage. Together, these assumptions should inform how the OTP deploys preliminary examination strategies as a means to expand the shadow of the Court.

In the third section that follows, the chapter draws on recent historical revelations pertaining to strategies developed by Richard Nixon and Henry Kissinger as an analogy for one particular strategy that should be considered in the OTP's preliminary examination 'toolbox': the 'madman theory' of preliminary examinations, wherein the OTP deploys a brazen communication strategy in order to give the impression that all actors alleged to have committed mass atrocities may be targeted for indictment. It is argued that the 'madman theory' should be employed in the most politically sensitive and precarious contexts. It is further demonstrated that the embers of such a policy can already be seen in how the OTP's 2014 and 2015 preliminary examination reports covered allegations of torture perpetrated by US officials in Afghanistan.

How the ICC can leverage preliminary examinations to affect State behaviour is discussed in the penultimate section of the chapter. Section 33.4. subsequently outlines and discusses relevant weaknesses and drawbacks to the madman approach to preliminary examinations. The chapter concludes by arguing for the need to think creatively about how the preliminary examination stage can be strategically deployed in order to have intended and desired effects on the behaviour of warring parties and the

pursuit of accountability. Doing so might not only increase the likelihood of the Court incurring positive outcomes but also bolster the independence and legitimacy of the institution.

33.2. An Orthodox Understanding of Preliminary Examinations

As a distinctive strategic stage of an ICC intervention, the preliminary examination phase has not received sufficient or sustained scholarly scrutiny.[9] Research on the Court has generally been focused on the institution's impacts. These are typically identified and measured following the opening of an official investigation, once a preliminary examination has already been terminated.[10] Compounding the lack of scholarship on preliminary examinations, the OTP has only begun releasing detailed information regarding its preliminary examinations since 2011.[11] In addition, insofar as it has described them, its orthodox understanding of a preliminary examination presents it as a generally unremarkable 'legal checklist'. According to the OTP itself:

> The preliminary examination process is conducted on the basis of the facts and information available. The goal of this process is to reach a fully informed determination of whether there is a reasonable basis to proceed with an investigation.[12]

Scholars have tended to view the preliminary examination similarly. Pavel Caban, for example, describes preliminary examinations as "the activities of the OTP carried out in order to determine whether a situation, brought to the attention of the OTP, meets the legal criteria established by

9 By way of example, a recently published, impressive and authoritative volume on the ICC includes only three mentions, and no sustained analysis of, the preliminary examination stage. See Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015.

10 There are notable and increasingly common exceptions to this general rule, including the decision on the part of Palestine to join the ICC and the OTP's subsequent to open a preliminary examination into alleged crimes perpetrated in Gaza since June 2014. Another example is the preliminary examination in Colombia.

11 See David Bosco, "The Preliminary Examination Procedure of the ICC Prosecutor", in *American Journal of International Law*, 2015, vol. 109, no. 4.

12 International Criminal Court OTP, *Report on Preliminary Examination Activities 2014*, 2 December 2014, para. 11 (http://www.legal-tools.org/doc/3594b3/).

the Rome Statute to warrant investigation by the ICC".[13] Carsten Stahn has described this conceptualization of preliminary examinations as a "narrow functional/institutional view" which singularly and exclusively sets out "to serve as a means to decide whether or not to open an ICC investigation… that is, the conception of [preliminary examinations] as gateway[s] to investigations".[14]

This legal checklist can be summarized as follows. Prior to preceding to an official investigation, the OTP must ascertain during the preliminary examination stage whether or not three criteria are met: 1) whether the Court has temporal, material, territorial and personal jurisdiction in the situation under examination; 2) whether an official investigation and any consequent prosecutions would be admissible before the Court, based on the principles of complementarity and gravity; and 3) whether the opening of an official investigation is in the "interests of justice".[15]

In addition, the preliminary examination stage is itself divided into four phases used as a "filtering process" to determine which situations should proceed to official investigation. These sub-phases correspond, roughly, to the criteria outlined above. In Phase 1, the OTP must ascertain whether the alleged crimes fall within its jurisdiction. In the second phase, the OTP must consider the evidence provided by relevant actors and "determine whether the preconditions to the exercise of jurisdiction under article 12 [of the Rome Statute] are satisfied and whether there is a reasonable basis to believe that the alleged crimes fall under the subject matter jurisdiction of the Court". In Phase 3, the OTP assesses complementarity and gravity relating to the situation under preliminary examination. Finally, in Phase 4, the OTP must make a determination as to whether proceeding to an official investigation would serve the "interests of justice". As of writing, the OTP currently has seven ongoing preliminary examinations. These are divided amongst Phase 2 (Iraq, Palestine, and Ukraine) and Phase 3 (Afghanistan, Colombia, Guinea, and Nigeria).

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13 Pavel Caban, "Preliminary Examinations by the Office of the Prosecutor of the International Criminal Court", in *Czech Yearbook of Public & Private International Law*, 2011, vol. 2, pp. 199–216, p. 199.

14 Concept Note for Expert Meeting, "The Peripheries of Justice Intervention: Preliminary Examination and Legacy/Sustainable Exit", 29 September 2015 (on file with the author).

15 International Criminal Court, "Preliminary Examinations" (available on the Court's web site).

Based on this checklist approach, the OTP has, in essence, three options with regards to preliminary examinations: 1) to proceed to opening an official investigation, which it has done, most recently, in the case of the 2008 war in Georgia; 2) close a preliminary examination, which was the decision made in Comoros (2014),[16] Honduras (2015)[17] and Venezuela (2006), and the Republic of Korea (2014);[18] or 3) leave a preliminary examination in some 'half-way house', long-term 'purgatory', which the OTP appears to have done in the case with Afghanistan, under preliminary examination since 2007 (see below).

The approach outlined above also represents a highly legalistic conception of what a preliminary examination is. It is a simplistic outlook neglecting, as Christopher Stone observes, that "a preliminary examination is a complex, carefully structured stage of activity".[19] However, preliminary examinations are heavily imbued with politics – and political potential. Indeed, there is an increasing recognition that the legal vocabulary upon which preliminary examinations are based permits the OTP to deploy legal terminology as a means to justify political decision-making. Unpacking these terms unveils the political and un-immutable elements of preliminary examinations. Examples include how the OTP determines admissibility across situations, how it imagines the gravity principle across contexts and through time,[20] and what, precisely, counts as or is meant by, the "interests of justice".[21] For some scholars, such as William

16 See International Criminal Court, "Registered Vessels of Comoros, Greece and Cambodia" (available on the Court's web site).

17 See International Criminal Court, "Honduras" (available on the Court's web site).

18 See International Criminal Court, "Republic of Korea" (available on the Court's web site).

19 Christopher Stone, "Widening the Impact of the International Criminal Court: The Prosecutor's Preliminary Examinations in the Larger System of International Criminal Justice", in Martha Minow, C. Cora True-Frost and Alex Whiting (eds.), *The First Global Prosecutor: Promise and Constraints*, University of Michigan Press, Ann Arbor, 2015, pp. 297–308, p. 290.

20 Alana Tiemessen, "Defying Gravity: Seeking Political Balance in ICC Prosecutions", Justice in Conflict, 22 April 2013.

21 See, among others, Human Rights Watch, *Human Rights Watch Policy Paper: The Meaning of "the Interests of Justice" in Article 53 of the Rome Statute*, 1 June 2005; Linda M. Keller, "Comparing the "Interests of Justice": What the International Criminal Court Can Learn from New York Law", in *Washington University Global Studies Law Review*, 2013, vol. 12, no. 1, p. 1–40; Priscilla Hayner, "Does the ICC Advance the Interests of Justice?", in *Open Global Rights*, 4 November 2014.

Schabas, the lack of definitional clarity of these legal concepts provides a veneer for the OTP to act politically. For Schabas, the language of gravity, for example, "strikes the observer as little more than obfuscation, a laboured attempt to make the determinations look more judicial than they really are […] to take a political decision while making it look judicial".[22] Stahn concurs, observing that the lack of clarity of such terms "has provided an opportunity to the Prosecutor to shape the meaning of the concepts and to develop prosecutorial discretion outside the realm of legal thresholds".[23]

Moreover, a restricted view of preliminary examinations denies what Stahn sees as "the broader analytical features of assessment and the link between [preliminary examinations] and goals of the Statute".[24] These goals, according to the OTP, are two-fold:

> In the course of its preliminary examination activities, the Office will seek to contribute to the two overarching goals of the Rome Statute: the ending of impunity, by encouraging genuine national proceedings, and the prevention of crimes.[25]

Crucially, these are not legal but political goals, insofar as they reflect an aim to shape the decision-making of *political* actors to both initiate "genuine national proceedings" as well as deterring and preventing crimes. Thus, from this brief analysis, we can conclude that the OTP seeks to use preliminary examinations as a means to influence the behaviour of its potential targets. Doing so effectively requires smart – and political – strategies that can expand the reach of the ICC's shadow. But before delving into how this can be achieved, it is worth outlining key assumptions regarding the Court's interventions, interests, and desired impacts that should inform any strategy brought to bear in a preliminary examination.

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[22] William A. Schabas, *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals*, Oxford University Press, 2012, p. 89.

[23] Carsten Stahn, "Judicial Review of Prosecutorial Discretion: Five Years On", in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden, 2009, pp. 247–80, p. 267.

[24] See Concept Note for Expert Meeting, *supra* note 15.

[25] International Criminal Court OTP, *Policy Paper on Preliminary Examinations*, November 2013 (http://www.legal-tools.org/doc/acb906/).

33.3. Preliminary Examinations and Assumptions about the ICC's Desired Impact and Interests

In order to fully appreciate and understand how the ICC can achieve desirable effects through preliminary examinations, it is important to outline key assumptions about the Court's intended impacts and interests. This section delineates four assumptions to consider.

The first assumption is that the ICC is predisposed to intervening in ongoing and active conflicts.[26] The vast majority of situations in which the ICC intervenes in are active wars or very recently concluded conflicts. Moreover, the institution is increasingly expected to act as a 'first responder' in conflicts characterized by atrocities and human rights abuses. In line with its own identified aims noted above, the Court thus has an interest in affecting the behaviour of actors engaged in political violence to refrain from the perpetration of international crimes (that is, prevention and deterrence) as well as taking the prosecution of international crimes seriously – either as an element of conflict resolution itself or as part of its post-conflict transitional justice measures.

A second assumption is that the ICC is a political body. This has already been made clear in the above analysis. Going further, it should be assumed that that the Court must make political decisions that reflect its institutional interests.[27] In particular, the OTP has an interest in taking decisions that are likely to result in: 1) effective co-operation from relevant political actors that allow the OTP to build cases based on strong evidence; 2) the enforcement of any arrest warrants it subsequently issues; and 3) a contribution to its standing in international relations and politics. However, the OTP must negotiate these institutional interests with the political actors upon which it depends for co-operation and relevance. How it negotiates its interests with those actors will determine how it proceeds with its mandate and, importantly, *whom* it targets for prosecution in any given context.[28] The Court's record to date indicates a clear pattern as a consequence of this negotiation: self-referrals by States have solely

26 See Mark Kersten, 2014, see *supra* note 6.

27 *Ibid*.

28 See also Kenneth A. Rodman, "Justice as a Dialogue Between Law and Politics Embedding the International Criminal Court within Conflict Management and Peacebuilding", in *Journal of International Criminal Justice*, 2014, vol. 12, no. 3, pp. 437–69.

resulted in non-State actors and government adversaries being targeted by the ICC, whilst UN Security Council referrals have almost exclusively led to the targeting of State/government actors.[29]

The third assumption is that, in general, the ICC would prefer to prosecute as seldom as possible and that this is particularly true in situations where major political powers are involved. As the Court's first Chief Prosecutor, Luis Moreno-Ocampo, regularly insisted during his tenure, an ideal outcome for the ICC would be to have no case before its judges because States were able and willing to mete justice for international crimes themselves. In addition to this long-term ideal, a more recent issue contributes to the institution's recalcitrance to expand its prosecutorial workload, namely the scarcity of resources offered to the institution. Financing the ICC has become a permanent feature at the yearly Assembly of States Parties' conferences.[30] Moreover, as the OTP's recent report on the Court's 'basic size' suggests, the Office simply does not have sufficient resources to match the worldwide demands and expectations for international criminal justice. The goal of avoiding prosecutions wherever possible is further evidenced in the ICC's apparent turn to positive complementarity as a central objective of the Court's interventions. This is apparent the OTP's reports on preliminary examinations which refer explicitly to effective examinations "obviating the need for the Court's intervention".[31] In short, in both principle and practice, the institution's predilection is to prosecute as seldom as possible by galvanizing States to conduct prosecutions themselves.

The fourth assumption guiding this analysis is that the strategic imperatives and incentives of actors during the preliminary examination stage are substantially different from those that exist once the OTP proceeds to the official investigation stage. This final assumption is worth unpacking.

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29 Alana Tiemessen, "The International Criminal Court and the Politics of Prosecutions", in *International Journal of Human Rights*, 2014, vol. 18, no. 4–5, pp. 444–61; see also Mark Kersten, 2014, see *supra* note 6.

30 See Human Rights Watch, *Human Rights Watch Briefing Note for the Fourteenth Session of the International Criminal Court Assembly of States Parties*, November 2015 (http://www.legal-tools.org/doc/001993/); Elizabeth Evenson and Jonathan O'Donohue, "The International Criminal Court at Risk", in *Open Global Rights*, 6 May 2015.

31 International Criminal Court OTP, *Report on Preliminary Examination Activities (2015)*, 12 November 2015, para. 16 (http://www.legal-tools.org/doc/ac0ed2/).

The lack of clarity regarding whom, if anyone, the ICC will target is most pronounced in the preliminary examination stage. In contrast, once an official investigation is open, the Chief Prosecutor is likely to become locked into a particular prosecutorial strategy and, in some cases, even make clear his or her intentions to prosecute particular sides of a conflict.[32] During the preliminary examination stage, warring parties cannot know *with certainty* whom the ICC will target. It is a stage where anything – and nothing – can happen. States and relevant actors may surmise that the ICC's record of targeting non-State actors following self-referrals and government actors following Security Council referrals will continue to hold true. Crucially, however, they cannot establish beyond doubt whether or not the Court will receive effective co-operation, effective access to relevant territories and evidence, and whether or not they themselves are in danger of being targeted by the ICC. In other words, uncertainty is elevated in the preliminary examination stage. Paradoxically, then, the most likely phase in which the Court could have a significant effect on the behaviour of warring actors may be the preliminary examination stage.

Consider the example of deterrence, an oft-stated aim of the ICC during the preliminary examination stage as well as more broadly.[33] There are poignant critiques of whether deterrence is a logical and possible outcome of ICC decision-making. But let us assume that specific deterrence – the deterrence of potential targets of the ICC – is a worthy aspiration and feasible by-product of ICC action.[34] If there is to be any deterrent effect, it seems likely that it will be heightened during a preliminary examination because of the inherent phase's unpredictability and the OTP's concomitant flexibility in whom to ultimately target. Warring actors and perpetrators cannot know whether or not they will be targeted for prosecution. As a result, they can respond to the signal sent, or the 'shadow' cast,

[32] In the case of Libya, for example, Moreno-Ocampo announced his intended and primary targets – Gaddafi regime officials – almost immediately following his opening of an investigation. This was raised as an issue by defence counsel at the ICC.

[33] See Kate Cronin-Furman, "Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity", in *International Journal of Transitional Justice*, 2013, vol. 7, no. 3, pp. 434–54.

[34] On specific deterrence versus general deterrence, see Payam Akhavan, "Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal", in *Human Rights Quarterly*, 1998, vol. 20, no. 4, pp. 737–816, p. 746.

by the ICC in the preliminary examination stage by ceasing the perpetration of international crimes. If they do so, it is within the Prosecutor's discretion via, for example, an argument relating to the "interests of justice", not to proceed to the official investigation stage and/or not target those actors who responded 'positively' to the impetuses of the OTP's preliminary examination. This is in sharp contrast to the incentives that exist once an arrest warrant has been issued for a particular target. At this point, there is no logical means by which ICC targets can be deterred because the warrants cannot be revoked as a reward for improved behaviour. As David Mendeloff argues, "for coercive threats to be effective they must be accompanied by credible assurances that the threat will be removed in the face of compliance".[35] The judicial sanctions issued via ICC arrest warrants, however, cannot be revoked in exchange for positive changes in the behaviour of targeted actors. The Court's warrants can only expire with the acquittal, conviction or death of the accused.

The potential for a preliminary examination to induce 'positive complementarity', that is, instigating relevant and genuine judicial processes domestically, is less clear.[36] Some suggest that the shadow of the ICC has been effective in galvanizing domestic accountability in situations such as Colombia.[37] In other instances, like Georgia, authorities have been clear that, despite having a functioning judiciary, they will not investigate or prosecute crimes relevant to the Court's jurisdiction, leaving the OTP with little choice but to proceed with an official investigation. In yet other instances, States appear to be interested in outsourcing some of their ICC targets to The Hague whilst prosecuting others domestically. This has been the case in Ivory Coast where the current government of Alassane Ouattara approved the surrender of ousted former President Laurent

35 David Mendeloff, "Punish or Persuade? The ICC and the Limits to Coercion in Cases of Ongoing Violence", 2014 (draft paper on file with the author).

36 See William W. Burke-White, "Implementing a Policy of Positive Complementarity in the Rome System of Justice", in *Criminal Law Forum*, 2008, vol. 19, no. 1, pp. 59–85; Nouwen, 2014, see *supra* note 8; see also International Criminal Court OTP, *ICC Prosecutorial Strategy 2009-2012*, 1 February 2010, para. 17 (http://www.legal-tools.org/doc/6ed914/).

37 See, for example, Amanda Lyons and Michael Reed-Hurtado, "Colombia: Impact of the Rome Statute and the International Criminal Court", May 2010 (http://www.legal-tools.org/doc/17ec15/).

Gbagbo but has fought to ensure that former First Lady Simone Gbagbo is prosecuted and incarcerated domestically.

Still, it should be noted that there is no evidence that the Court is better at galvanizing genuine domestic judicial processes during official investigations than it is in the preliminary examination stage. Even in relatively stable situations where the Court has intervened, judicial actions are beset by serious problems. In Kenya, despite promises to investigate and prosecute allegations of crimes against humanity perpetrated during the 2007-2008 post-election violence via the established of an International and Organized Crimes Division, it has become clear that such crimes will not be investigated.[38] In Uganda, the government of Yoweri Museveni created an International Crimes Division which has prosecuted one (non-ICC indicted) senior commander of the Lord's Resistance Army, Thomas Kwoyelo. The trial has faced serious allegations of unfairness and impropriety.[39] When Caesar Achellam, an Lord's Resistance Army commander of similar seniority, came into the custody of Ugandan officials, he was amnestied and given residence in the military's Gulu-based barracks.[40] Moreover, the government decided that Dominic Ongwen, who had been indicted by the ICC, would not be prosecuted in the International Crimes Division and instead approved his transfer to The Hague.[41]

Based on the above assumptions, it is evident that the preliminary examination stage presents a unique, if under-theorized, opportunity to potentially affect the behaviour of conflict and post-conflict actors. Consequently, there is a need to dedicate more scrutiny as to what strategies the OTP can employ to help to ensure that preliminary examinations are

[38] The author worked during 2014 on a project with the Wayamo Foundation, training potential investigators, prosecutor and members of the judiciary who would be involved and staff the International and Organized Crimes Division. During this time, it was made clear that the Division would not investigate or prosecute crimes relating to the 2007–08 post-election violence.

[39] See, for example, Alexis Okeowo, "Thomas Kwoyelo's Troubling Trial", in *The New Yorker*, 20 July 2012; see also Mark Kersten, "Uganda's Controversial First War Crimes Trial: Thomas Kwoyelo", in *Justice in Conflict*, 12 July 2011.

[40] See Scott Ross, "A Rebel's Escape – An LRA Commander Tells His Story", in *Justice in Conflict*, 31 July 2013.

[41] See "Uganda: International Criminal Court to Prosecute Alleged Perpetrator of Uganda War Crimes", in *UN News Service*, 20 January 2015.

more effective in affecting potentially positive behavioural responses from warring actors. This is particularly important with regards to strategies that can be deployed in the most politically contentious ICC situations – those in which major power interests are involved. One such case, as described below, is Afghanistan.

33.4. A 'Madman Theory' of Preliminary Examinations

33.4.1. Nixon, Kissinger and ICC Preliminary Examination Strategies

The lack of clarity in what the OTP will do, if anything, as well as whom, if anyone, the Court will target is most pronounced in the preliminary examination stage of an ICC intervention. Yet the classical approach to preliminary examinations views the examination phase as a 'waiting room' wherein the OTP performs a legalistic diagnosis and then, after some indeterminate period of time that could range from days to decades, decides between doing nothing and issuing arrest warrants. Instead of this narrow interpretation of preliminary examinations, it would be useful to think through how the OTP can capture and capitalize on the unpredictable nature of preliminary examinations in order increase the likelihood of it having a positive impact on the situations under its purview. One such approach, which this section elaborates and proffers, is an adaptation of the 'madman theory' of former US President Richard Nixon and his national security advisor Henry Kissinger.

In 1969, Nixon was failing in his election promise of ending the US' engagement in Vietnam – either via military means or through peace negotiations. As a result, Nixon and Kissinger began crafting a policy of 'premeditated madness'. As Jeremy Suri writes:

> Frustrated, Nixon decided to try something new: threaten the Soviet Union with a massive nuclear strike and make its leaders think he was crazy enough to go through with it. His hope was that the Soviets would be so frightened of events spinning out of control that they would strong-arm Hanoi, telling the North Vietnamese to start making concessions at the negotiating table or risk losing Soviet military support.

Codenamed 'Giant Lance', Nixon's plan was the culmination of a strategy of premeditated madness he had developed with national security adviser Henry Kissinger. The details of this episode remained secret for 35 years and have never been fully told. Now, thanks to documents re-

leased through the Freedom of Information Act, it is clear that Giant Lance was the leading example of what historians came to call the 'madman theory': Nixon's notion that faked, finger-on-the-button rage could bring the Soviets to heel.[42]

Nixon and Kissinger's plan was 'mad' because in threatening the communist bloc with a nuclear attack, the US putting its own existence at risk. The policy flew directly in the face of Mutually Assured Destruction, the principle whereby the capacity of two or more States to obliterate each other creates a high-tension equilibrium wherein none attacks the other for fear of certain annihilation. James Rosen and Luke A. Nichter usefully summarize the US President's position: "Nixon wanted to impress upon the Soviets that the president of the United States was, in a word, mad: unstable, erratic in his decision-making, and capable of anything".[43]

The OTP can and should consider adapting and bringing to bear such a madman strategy in its preliminary examinations. This would require the OTP to convincingly demonstrate that it was willing to target any and all relevant actors in a conflict: even those with significant political power, even those who are patrons of Western States, and even those who referred the situation to the ICC in the first place. It would also require a willingness on the part of the OTP to convincingly demonstrate it was mad enough to target these actors even if doing so would, on its face, undermine the Court's institutional interests.

As suggested above, the outcomes of referrals, from the opening of preliminary examinations to the issuance of arrest warrants, currently follow predictable trends. Self-referrals translate into the ICC targeting non-State actors and government enemies; Security Council referrals result in government figures being targeted. This leads to the danger of States and the Security Council manipulating the ICC to target only their adversaries, a risk that has received increasing scrutiny as well as condemnation.[44] A madman approach would disrupt this predictability. By

[42] Jeremi Suri, "The Nukes of October: Richard Nixon's Secret Plan to Bring Peace to Vietnam", in *Wired*, 25 February 2008.

[43] James Rosen and Luke A. Nichter, "Madman in the White House: Why looking crazy can be an asset when you're staring down the Russians", in *Foreign Policy*, 25 March 2014.

[44] See, for example, comments by Louise Arbour, "Are Freedom, Peace and Justice Incompatible Agendas?", in *International Crisis Group*, 17 February 2014; see also the report by David Kaye, "The Council and the Court: Improving Security Council Support of the In-

demonstrating a sincere willingness to target any and all warring parties, it would also give the Court the impression a being more independent institution.

While the OTP *should* consider invoking a 'madman strategy' in some situations, attention needs also to be paid to how it could do so. Such a policy would have to be carefully planned and executed through the yearly preliminary examination reports in combination with timely and well-placed communications to the media, to embassies, civil society, and other relevant actors. Notably, there are growing signs that the OTP is willing to embrace a bolder approach to preliminary examinations.

33.4.2. Growing Older, Growing Bolder: The ICC and Preliminary Examinations

Beginning in 2014, the OTP began to "shed new light on a process that has been opaque for much of the court's existence and that has attracted relatively limited scholarly and specialist attention".[45] Indeed, the OTP's 2014 and 2015 preliminary examination reports indicate an increasing willingness on the part of prosecutors to confront an especially thorny issue: allegations of international crimes perpetrated by Western States and, in particular, alleged abuses by US forces, in Afghanistan. This represents a marked change on the part of the ICC in its approach to the US, which has tended to be cautious, if not deferential.[46] This section briefly outlines the historical relationship between the ICC and Washington before demonstrating how the most recent preliminary examination reports signal an increasingly brazen strategy on the part of the OTP towards allegations of US war crimes in Afghanistan.

The issue that dominated the Court's first years of existence was its tumultuous relationship with the United States. While former US President Bill Clinton decided to sign the Rome Statute as one of his last acts in office, the administration of George W. Bush pursued policies to active-

ternational Criminal Court", 2013, University of California, Irvine, School of Law Research Paper No. 2013-127.

45 Bosco, 2015, see *supra* note 11.

46 David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics*, Oxford University Press, 2014.

ly undermine and isolate the Court.[47] The amount of attention and legislation that focused on the ICC during the Bush administration's first tenure is illustrative of just how actively the administration sought to undercut the Court's prospects. The American Service-Members' Protection Act (2002), pejoratively referred to as the "Hague Invasion Act", provided the US President with the ability to deploy "any necessary measures" to free any American citizen detained and surrendered to The Hague.[48] The US also threatened approximately 100 States that it would rescind provisions of aid if they did not sign so-called Bilateral Immunity Agreements.[49] Those agreements drew on Article 98 of the Rome Statute, which prohibits the ICC from issuing "a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State". The most dramatic act of antagonism towards the Court, however, came in May 2002 when John R. Bolton, an American diplomat, later National Security Advisor, delivered a notice to the UN Secretary General, 'un-signing' the Rome Statute. Bolton later called it his "happiest moment" at the US State Department.[50]

These antagonistic policies were often justified by invoking fear that the Court would unfairly target American officials and troops who were disproportionally engaged militarily in contexts where other States either refused to or were unable to intervene. In other words, the Court was painted as an unfair and unnecessary threat to American political interests. In response, there appears to have been some consensus within the Court that if the institution was to survive, it would need to demonstrate that it did not pose a direct threat to the US and that a co-operative relationship with the Court was in Washington's interests.

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47 See William A. Schabas, "United States Hostility to the International Criminal Court: It's All About the Security Council", in *European Journal of International Law*, 2004, vol. 15, no. 4, pp. 701–20; Jason Ralph, *Defending the Society of States: Why America Opposes the International Criminal Court and its Vision of World Society*, Oxford University Press, 2007.

48 US, American Service-Members' Protection Act, 30 July 2003 (http://www.legal-tools.org/doc/b48688/).

49 See Kingsley Chiedu Moghalu, *Global Justice: The Politics of War Crimes Trials*, Stanford University Press, 2008, p. 138.

50 See "U.S. Letter to U.N. Secretary-General Kofi Annan", in *CNN*, 6 May 2002.

In its first years, the ICC demonstrated a policy of 'accommodation' to the US, evidenced, if not by admission of the Prosecutor Luis Moreno-Ocampo than in his decision-making as well as the Court's record.[51] This could be achieved by honing in on situations where US interests were few and by refraining from opening investigations independent of the explicit request of States or the United Nations Security Council. As part of this policy of accommodation towards the US, the ICC initially focused primarily on receiving self-referrals from its States Parties. Such self-referrals were useful for the new Court. In order to encourage self-referrals, "the OTP shifted emphasis from a legalistic approach to a somewhat more political-diplomatic one".[52] Pursuing self-referrals had certain key advantages. At the Rome Conference, many States, including the US, had been wary of establishing a Court with a Prosecutor that was too independent and who would run roughshod in the pursuit of justice. The Prosecutor and his staff were not oblivious to these fears and sought to assuage them. This was achieved, according to former senior ICC staff, by not flexing the Prosecutor's *proprio motu* powers but instead working to receive invitations to intervene from ICC States Parties.[53] In accepting self-referrals from States, the Court could demonstrate that it was sensitive to US interests as well as have a small footprint on the relatively novel conceptualization of the relationship between sovereignty and international criminal justice. After all, a self-referral requires the State in question to voluntarily cede at least partial sovereignty over its jurisdiction for atrocity crimes to the Court.

In many respects, the ICC was successful in tempering Washington's antagonism towards the Court. In sharp contrast to the Bush administration's concerns, "the ICC appeared to be working in ways broadly consistent with American interests".[54] In its first two years, the OTP accepted three such self-referrals: Uganda (2003), the Democratic Republic of the Congo (2004) and the Central African Republic (2004). None was in States where major powers have vested interests and that all were States where the UN had been deeply involved prior to the ICC's inter-

51 Bosco, 2014, see *supra* note 46.

52 Benjamin Schiff, *Building the International Criminal Court*, Cambridge University Press, 2008, p. 225.

53 Confidential interviews cited in Kersten, 2016, see *supra* note 6.

54 Bosco, 2014, see *supra* note 46, p. 107.

vention. One aim in selecting these situations appears to be to improve relations between the US and the Court. If the more co-operative and closer relationship that the ICC has enjoyed with the United States since Bush's second term is any indication, the Prosecutor was certainly able to achieve just that.[55]

But the improvement of the Court's relationship with the US coincided with deteriorating relations with other States. At precisely the same time as relations between Washington and the ICC began to improve, allegations arose that the Court was biased against African States.[56] Until the OTP opened an official investigation into Georgia in late 2015, no State outside the African continent had been investigated by the Court. While assessing the validity of the criticism of the ICC as a biased institution is beyond the scope of this chapter, it is important to note that there has been increased pressure on the ICC in recent years to investigate not only situations outside of Africa but situations in which citizens of Western States have allegedly perpetrated war crimes and crimes against humanity. A number of public international groups have, for example, prepared what they see as a 'devastating dossier' implicating senior British officials in human rights abuses and international crimes in Iraq.[57] In response, the OTP re-opened a preliminary examination in 2014.[58] In addition, after more than eight years, the OTP has been under pressure to finally decide whether its ongoing preliminary examination in Afghanistan, which includes assessing whether abuses perpetrated by US forces amount to war crimes prosecutable by the Court, should proceed to an official investigation.

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55 See, for example, Marlise Simons, "U.S. Grows More Helpful to International Criminal Court, a Body It First Scorned", in *New York Times*, 2 April 2013.

56 See, for example, Charles Chernor Jalloh, Dapo Akande and Max du Plessis, "Assessing the African Union Concerns about Article 16 of the Rome State of the International Criminal Court", in *African Journal of Legal Studies*, 2011, vol. 4, no. 1, pp. 5–50; Kurt Mills, "Bashir is Dividing Us: Africa and the International Criminal Court", in *Human Rights Quarterly*, 2012, vol. 34, no. 2, pp. 404–47.

57 See Jonathan Owen, "Exclusive: Devastating Dossier on 'Abuse' by UK forces in Iraq goes to International Criminal Court", in *The Independent*, 12 January 2014.

58 International Criminal Court OTP, "Prosecutor of the International Criminal Court, Fatou Bensouda, Re-Opens the Preliminary Examination of the Situation in Iraq", 13 May 2014 (http://www.legal-tools.org/doc/d9d9c5/).

Perhaps responding to this pressure, for the first time in 2014, the OTP's preliminary examination report included a reference to the alleged "enhanced interrogation techniques" waged by US officials in Afghanistan against anti-government forces (who are also under examination by the Court).[59] Indicative of the interests and politics at play, according to a former OTP staff member, the inclusion of the reference to enhanced interrogation techniques was negotiated over a period of several weeks.[60] US diplomats reacted coolly in response to the inclusion of the ICC examining torture allegations, insisting that the Court could not prosecute citizens of States that had not assented to the Rome Statute.[61]

In its 2015 report, the Prosecutor went even further. There, the OTP essentially challenged US officials to open genuine investigations and prosecutions into allegations of torture – those being examined by the ICC as well as those outlined in the so-called 'Torture Memos'. While the report took note of the judicial activity taking place against US citizens allegedly responsible for perpetrating torture in Afghanistan, it also signalled that those efforts have been wholly insufficient and would thus leave the allegations admissible before the Court. Specifically, the report points out that two cases that involved the deaths of detainees in CIA custody "did not result in any indictments or prosecutions" and that 13 Department of Defence investigations "were administrative enquiries rather than criminal proceedings".[62] The message was clear: American officials were not taking accountability for alleged abuses in Afghanistan sufficiently seriously and, if this continues to be the case, the OTP will eventually have little choice but to proceed to an official investigation.

However, in perhaps its most bold and most terse paragraph, the report suggested that it was no longer questioning whether war crimes had been committed by US forces but was focusing on how systematic those crimes were:

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59 International Criminal Court OTP, *Report on Preliminary Examination Activities 2014*, 2014, para. 94, see *supra* note 12.

60 Confidential conversation with former OTP staff member.

61 See David Bosco, "The War Over U.S. War Crimes in Afghanistan Is Heating Up", in *Foreign Policy*, 3 December 2014.

62 OTP, *Report on Preliminary Examination Activities (2015)*, 2015, see *supra* note 31, paras. 128–29.

> The Office is assessing information relevant to determine the scale of the alleged abuse, as well as whether the identified war crimes were committed as part of a plan or policy. The information available suggests that victims were deliberately subjected to physical and psychological violence, and that crimes were allegedly committed with particular cruelty and in a manner that debased the basic human dignity of the victims. The infliction of "enhanced interrogation techniques," applied cumulatively and in combination with each other over a prolonged period of time, would have caused serious physical and psychological injury to the victims. Some victims reportedly exhibited psychological and behavioural issues, including hallucinations, paranoia, insomnia, and attempts at self-harm and self-mutilation.[63]

In short, the OTP has reprimanded the US for not doing enough in pursuing accountability for alleged abuses committed by its citizens in Afghanistan and, taking a step further, has suggested that the perpetration of torture in Afghanistan may not have been the work of 'bad apples' but a *plan or policy* orchestrated at senior levels of the Bush administration.

The 2014 and 2015 reports indicate a growing maturity on the part of the OTP and an evident willingness to challenge major powers via the medium of preliminary examinations. This may not yet reach the level of a strategy of 'premeditated madness' but it is certainly inching in that direction.

33.5. Strategies in the Preliminary Examination 'Toolbox': Thinking through Drawbacks

The above analysis raises important questions: Can the ICC truly leverage preliminary examinations in order to positively influence State behaviour? If so, where does this influence come from and how can it be harnessed? More specifically, can the OTP's bolder strategy with regards to allegations of abuses by US troops in Afghanistan have the intended effect of galvanizing domestic judicial action? If not, how long can the OTP invoke a strategy of premeditated madness without actually pursuing all sides to a conflict before its bluff is called? When should such a policy apply – and when should it be avoided?

63 *Ibid*., para. 130.

The argument set out in this chapter should not be read as being applicable across cases or, in and of itself, a full-proof strategy. Whatever form they take, preliminary examination strategies need to be carefully managed and calibrated to through time and to specific cases. This penultimate section first outlines how the ICC might leverage preliminary examinations to shape State behaviour. It subsequently and briefly explores three limitations or shortcomings that need to be considered when deploying the madman strategy, or indeed any sophisticated strategy to preliminary examinations.

It is increasingly evident that States have a diverse diaspora of positions concerning their engagement with the ICC. Some choose to become States Parties whilst other remain outside of the Rome Statute system. Within those subsets, some are more proactively engaged than others. Moreover, as the relationship between the US and the ICC, as well as that of many African States with Court, clearly demonstrate, the engagement of States with the institution is dynamic and changes with time. Consequently, identifying which States that are potentially receptive to pressures exerted by the ICC via its preliminary examinations would be a useful and necessary endeavour prior to deploying the madman, or any other preliminary examination, strategy.

The ICC is most likely to be able to achieve leverage in the preliminary examination over States that are concerned with the reputational costs of coming under the Court's microscope. Many States, including Western States such as the US and the UK, would likely seek to avoid such judicial scrutiny and political labelling from the Court – what Mahmood Mamdani might call "a perverse version of the Nobel Prize".[64] Importantly, and as demonstrated by the defence of Israel by the US, Canada, and the UK against an ICC intervention into alleged crimes perpetrated in Gaza, States are not only concerned about their own reputations, but those of their allies.

This, of course, still does not mean that the attention placed on States during the preliminary examination stage, even if it does affect their reputation, will necessarily encourage them to act. Alone, the ICC is unlikely to be able to instigate judicial activity or a cessation of atrocities.

64 Mahmood Mamdani, "The Politics of Naming: Genocide, Civil War, Insurgency", in *London Review of Books*, 8 March 2007.

What is needed is the development and entrenchment of strategic partnerships and engagements between the ICC and international and domestic civil society groups, widely respected diplomats and political leaders, human rights advocates, journalists, as well as other bodies such as the United Nations, in order to establish modalities of indirect leverage. To some degree, this is already part of the ICC's embryonic strategies for preliminary examinations. As Stone observes: "By terming these 'preliminary examinations,' disclosing many of them publicly, and publishing updates about them weekly, the prosecutor is inviting others to leverage the OTP's attention to these situations into broader pressure for domestic action".[65] Crucially, pressure should be exerted from multiple outlets: from the OTP towards States under preliminary examination; by external, non-States Parties towards the ICC to ensure that preliminary examinations progress; and from those eternal actors towards States under examination. Fostering such a system of pressure would increase the probability of States under preliminary examination responding to the ICC with genuine investigations. It would also, potentially, lessen the possibility of those States responding by attempting to isolate or undermine the institution.

Nevertheless, even with such a system of pressures, at least three possible issues that a madman approach to preliminary examination raises need to be considered. First and foremost, it is worth repeating: the madman strategy should not be applied to all situations. Some situations will require more restraint while others may instigate a need for the OTP to act hastily. An example of the former is Colombia, where the Court's patient policy appears to have been fruitful in bringing about at least some significant positive outcomes regarding justice and accountability. In other cases, such as Libya, a fast-developing crisis and a clear and looming threat to civilian life, led the OTP to judge it necessary to speedily conduct and conclude its preliminary examination so that it could quickly open an official investigation, capture global attention, and attempt to have an impact 'on the ground'.[66]

Secondly, the more brazen approach encompassed in the madman theory of preliminary examinations should only be applied in those situations that meet two key criteria: 1) there is strong evidence of crimes per-

65 Stone, 2015, see *supra* note 19, p. 293.

66 See Kersten, 2016, see *supra* note 6.

petrated by major powers, and 2) these powers are likely to take the Court's examinations seriously and potentially respond to them by taking judicial action or changing the behaviour of their personnel engaged in warfare. Moreover, the OTP should not go from 'zero-to-sixty', deploying the premeditated madness approach immediately when it opens a preliminary examination. Rather, as indicated by the 2014 and 2015 reports *vis-à-vis* allegations of enhanced interrogation techniques in Afghanistan, the OTP should begin with implicit warnings and only become increasingly intrepid if its signals are ignored.

This second condition also highlights an important limitation, namely that some belligerents and actors will not care about what the ICC does or does not do – at *any stage* of an ICC intervention. A feasible response by States as well as non-State actors to coming under ICC scrutiny is to simply ignore the Court altogether. More broadly, there is an ever-present danger in viewing the ICC as more potent than it actually is. Preliminary examination strategies should be tailored not only to specific situations, but also to the *types* of actors the Court is attempting to affect or influence.

Finally, there is at least some risk of crying wolf and having the OTP's bluff called if the madman theory is deployed but States fail to respond positively to ICC signals and the Court never actually targets those it has threatened. This is the most significant potential drawback of this approach to preliminary examinations and would have to be managed by the OTP from the very outset of the preliminary examination.

These issues and potential limitations can and should be taken into account as part of a broader toolkit for preliminary examinations, one that would be managed and applied contextually with the aim of positively affecting conflicts and the behaviour of belligerents rather than just acting as a legal checklist. In other words, strategies should be developed to enhance the shadow cast by the ICC. The analysis and recommendations within this chapter may inspire more questions than answers. But, at the very least, the OTP should consider the madman approach as a viable strategy against which it can measure the merits of other types of approaches. This would help increase the sophistication of strategies employed in the preliminary examination phase in and across various contexts.

33.6. Conclusion: An Opportunity to Think of Preliminary Examinations Creatively

Limiting our understanding of preliminary examinations to a legal checklist whereby the OTP simply determines whether or not to open an official investigation is unsatisfactory. There is a need to think more strategically about how preliminary examinations can help to induce positive effects in the situations where the ICC intervenes. Thinking through how this might be done requires examining key assumptions regarding the Court's impacts and interests. This chapter has outlined four: 1) that the ICC is predisposed to intervening in ongoing or very recently concluded conflicts; 2) that the Court is a political body with its own institutional interests determining the situations in which it intervenes and whom the ICC targets; 3) that, for a diversity of reasons, the institution would prefer that States take the responsibility for prosecuting international crimes; and 4) that the unpredictable nature of the preliminary examination stage of an ICC intervention creates unique incentives for warring parties and potential ICC targets. These assumptions should be considered when crafting strategies to promote what the OTP sees as its two primary (and *political*) objectives in the preliminary examination stage: galvanizing genuine domestic judicial action and preventing/deterring mass atrocities. One such strategy that should, at the very least, receive greater consideration is the madman theory whereby the OTP makes clear, via its yearly reports as well as communications to relevant actors, that it is willing to investigate and prosecute *any and all* parties to a conflict, irrespective of whether doing so undermines its own institutional interests. The OTP has already shown signs of doing so with regards to allegations of US torture in Afghanistan. This holds some promise in alleviating the widespread perceptions of the ICC is anything but an impartial and independent institution.

Much has been written about the bias of the ICC in favour of the powerful over the weak. Whether this is a perception, a reality, or some combination of the two, the Court's seeming selection bias against African States affects the institution's legitimacy as a criminal court as well as an independent international institution. If the ICC is to retain its standing within the broader international community, it seems increasingly clear that the Court will need to take on the alleged crimes perpetrated by officials of powerful States. To this end, Schabas has written of the Court's need for what he calls a "Pinochet moment":

> One of the great and defining moments of international justice in recent times was the arrest of Augusto Pinochet in London in October 1998. Occurring only a few months after the adoption of the Rome Statute, it sent a message that even the friends of the most powerful could be brought to book if a genuinely independent and impartial justice system was in operation […] Fifteen years later, international criminal justice is focussed on global pariahs like Charles Taylor, Saif Gaddafi and Hissene Habre. The friends of the rich and powerful are nowhere to be seen. There are no more Pinochets in the dock […]
>
> [T]he ICC has now become far too deferential to the established order. Mostly it does not operate under a direct mandate from the Security Council, but that may be more illusory than real, because it never strays from the comfort zone of the permanent members […]
>
> Right now international justice needs more Augusto Pinochets […][67]

But what if the Court could both avoid the inevitable political confrontation of issuing arrest warrants for high level, powerful actors *and* receive the benefits of affecting accountability for crimes perpetrated by great powers and their allies? If this is indeed a possibility, expanding the size and veracity of the ICC's shadow by formulating creative, smart, and proactive preliminary examination strategies should be a priority of the OTP.

[67] William A. Schabas, "The Banality of International Justice", in *Journal of International Criminal Justice*, 2013, vol. 11, no. 3, pp. 550–51

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Quality Control in Preliminary Examination: Volume 2

Morten Bergsmo and Carsten Stahn (editors)

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

Volumes 1 and 2 are organized in five parts. The present volume covers 'The Normative Framework of Preliminary Examinations', 'Transparency, Co-operation and Participation in Preliminary Examination', and 'Thematicity in Preliminary Examination', with chapters by Shikha Silliman Bhattacharjee, Cynthia Chamberlain, Matthew E. Cross, Elizabeth M. Evenson, Shannon Fyfe, Gregory S. Gordon, Alexander Heinze, Jens Iverson, Dov Jacobs, Alexa Koenig, Mark Kersten, Shreeyash U Lalit, LING Yan, Asaf Lubin, Christopher B. Mahony, Felim McMahon, Nikita Mehandru, Chantal Meloni, Mutoy Mubiala, Jennifer Naouri, Ana Cristina Rodríguez Pineda, Andreas Schüller, Usha Tandon, Pratibha Tandon, Vladimir Tochilovsky and Sarah Williams.

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