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Quality Control in Preliminary Examination: Volume 1

Morten Bergsmo and Carsten Stahn (editors)

PURL: http://www.legal-tools.org/doc/abd42e/

E-Offprint:

Nino Tsereteli, "Quality Control in the Preliminary Examination of the Georgia Situation", in Morten Bergsmo and Carsten Stahn (editors), *Quality Control in Preliminary Examination: Volume 1*, Torkel Opsahl Academic EPublisher, Brussels, 2018 (ISBNs: 978-82-8348-123-5 (print) and 978-82-8348-124-2 (e-book)). This publication was first published on 6 September 2018. TOAEP publications may be openly accessed and downloaded through the web site www.toaep.org which uses Persistent URLs (PURLs) for all publications it makes available. These PURLs will not be changed and can thus be cited. Printed copies may be ordered through online distributors such as www.amazon.co.uk.

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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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Quality Control in the Preliminary Examination of the Georgia Situation

Nino Tsereteli*

16.1. Introduction

The Office of the Prosecutor ('OTP') of the International Criminal Court ('ICC') made public its preliminary examination into the situation of Georgia on 14 August 2008.[1] Seven years later, on 13 October 2015, the Prosecutor sought the Pre-Trial Chamber's authorization for initiating an investigation.[2] On 27 January 2016, the Pre-Trial Chamber authorized the Prosecutor to proceed with an investigation of crimes within the jurisdiction of the Court, committed in and around South Ossetia, between 1 July and 10 October 2008.[3]

This chapter explores the OTP's preliminary examination in the Georgia situation with a focus on mechanisms of controlling the quality of prosecutorial activities. It begins with clarifying the standards for assessing the quality of prosecutorial activities at the stage of preliminary examination. Then it reflects on the meaning and appropriate modalities of control over the quality of prosecutorial activities and identifies audiences that are entitled to exercise control.

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1 ICC OTP, The Prosecutor's Statement on Georgia, 14 August 2008 (http://www.legal-tools.org/doc/5bcdc2/).

2 ICC, Situation in Georgia, Pre-Trial Chamber I, Request for Authorisation of an Investigation Pursuant to Article 15, 13 October 2015, ICC-01/15-4 (http://www.legal-tools.org/doc/460e78/).

3 ICC, Situation in Georgia, Pre-Trial Chamber I, Decision on the Prosecutor's Request for Authorisation of an Investigation, 27 January 2016, ICC-01/15-12 (http://www.legal-tools.org/doc/a3d07e/); see also ICC, Situation in Georgia, Separate Opinion of Judge Péter Kovács, 27 January 2016, ICC-01/15-12-Anx-Corr (http://www.legal-tools.org/doc/28b159/).

There may be disagreement as to what kind of control is appropriate and by whom, due to differences in views on the source of the OTP's legitimacy. Some would derive the OTP's legitimacy from the delegation of powers by States, which are consequently entitled to exercise control over it. According to an alternative logic, however, whoever is affected by the decisions of the institution has a legitimate interest in knowing how and why that institution makes those decisions. This contribution displays how these two modes of logic empower different sets of actors and apply in practice, with emphasis on the preliminary examination into the Georgian situation. This chapter will show that some of the existing mechanisms of control rely predominantly on delegation, while others on the justifiability of giving voice to those affected by the decisions made by the institution in question.

The understanding of 'control' adopted in this contribution does not presume a hierarchical relationship between the entity that exercises control and the entity that is subject to control, where the latter follows the preferences of the former. Instead, it is suggested that the existing mechanisms of control (for example, persuasion, criticism or contestation) are capable of influencing the quality of prosecutorial activities, without necessarily threatening prosecutorial independence.

This chapter identifies three sets of actors entitled to control the OTP and, consequently, three types of control – political, social and judicial. Mechanisms employed may be formal or informal. They may operate *ex ante* (to prevent certain developments by signalling dissatisfaction) as well as *ex post* (to sanction misconduct). It is essential to address risks and benefits of involving a multiplicity of controlling entities, the ways in which they constrain the OTP as well as the ways in which they check and balance one another.

The focus here is on external control, but not on internal control or self-control by the OTP. Also, this chapter will examine quality control as regards decision-making in specific situations and does not cover quality control as regards formulation of general policies and strategies of the OTP.

One of the key aims is to understand the role of transparency in securing control. This chapter looks at how the degree of transparency varies (in terms of the type and information that the institution makes available and in terms of the size and identity of permitted audience) and how that affects the respective abilities of various audiences to exercise control.

Below, in Section 16.2., this chapter will first unpack the notions of quality and control, before identifying the existing standards for assessing the prosecutorial activities as well as the existing mechanisms of controlling their quality. Section 16.3. goes on to examine how those mechanisms function in practice, taking the situation in Georgia as an example, followed by some concluding remarks in Section 16.4.

16.2. Unpacking the Notion of 'Quality Control'

16.2.1. Defining 'Quality'

'Quality' is associated with responsible, acceptable, desirable behaviour of the Prosecutor. It is difficult to come up with standards of behaviour that would be acceptable for all relevant stakeholders. This is, at least partly, due to the absence of agreement on the values or goals of the ICC, both in general and at specific stages of proceedings. Depending on whether one views a preliminary examination as means of deciding whether to open an investigation or as an instrument of encouraging and stimulating national jurisdictions,[4] one will expect either a detached, passive presence of the Prosecutor for a short period of time or a more proactive and prolonged engagement. When the Prosecutor's goals are ambiguous, it is difficult to understand the choices he or she makes (especially in the absence of explanations). It invites accusations of lack of consistency in the Prosecutor's decision-making and speculations about improper motivations.

Generally, standards for assessing prosecutorial activities may be *substantive* (related to the quality of decisions, namely their legal appropriateness and their practical feasibility) and *procedural* (related to the qualities of the decision-making process, such as its fairness, transparency and inclusiveness, as well as both the decision-maker's responsiveness[5] and the timeliness of engagement).

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4 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 (highlighting two competing ways of approaching preliminary examinations, a gateway approach and consequentialist approach; under the former approach, preliminary examinations are only aimed at determining whether the initiation of an investigation is warranted; the latter approach accepts other rationales for preliminary examinations, such as positive complementarity and deterrence).

5 Mirjan R. Damaška, "What is the Point of International Criminal Justice?", in *Chicago-Kent Law Review*, 2008, vol. 83, no. 1, p. 349 (noting as regards the *ad hoc* tribunals that "little effort was made to explain to the local public and legal profession the unfamiliar as-

While the Prosecutor should ideally fulfil all these standards, this may prove difficult in practice. The Prosecutor may have to prioritize, keeping in mind implications of the choices she makes for the social legitimacy of the institution. In this relation, allowing greater participation and intensive engagement with relevant stakeholders and being responsive to their concerns is desirable and appropriate. It increases the procedural legitimacy of prosecutorial decision-making. The ICC's audiences will also be more likely to accept unfavourable decisions when the decision-maker listens to them.[6] From this perspective, prolonging preliminary examinations so that the Prosecutor can engage with relevant stakeholders may be justified. However, such inclusive decision-making processes will inevitably cause delays.

Ideally, the Rome Statute should contain precise, objective legal rules governing prosecutorial decision-making in all stages of proceedings. The Prosecutor is expected to act in accordance with the requirements of the treaty. Aware of this expectation, the Prosecutor routinely justifies its actions and defends its choices by reference to the relevant legal provisions. She seeks to create appearance of legality, reassuring the relevant audiences that she is acting in accordance with the pre-agreed rules and thereby strengthening the perception of the legal legitimacy of her decisions. This is not difficult due to the numerous gaps in the Rome Statute, which does not specify the modalities and intensity of the Prosecutor's engagement with national authorities in the course of preliminary examination.

Similarly, the Statute does not impose time limits for the completion of preliminary examination. While one may argue that the OTP has to make a decision on opening an investigation within a reasonable time, it is rather difficult to determine what is reasonable in each specific situation. Consequently, in the absence of precise time limits, it is difficult to call the Prosecutor to account for delays. If national authorities claim to be

pects of international criminal procedure" and "even less effort has been spent in dispelling unrealistic local expectation that all episodes of atrocity will be prosecuted, which then became a source of widespread and often unfounded perceptions of bias towards one or another ethnic group").

6 Eva Brems and Laurence Lavrysen, "Procedural Justice in Human Rights Adjudication: The European Court of Human Rights", in *Human Rights Quarterly*, 2013, vol. 35, no. 1, pp. 176–200 (applying social psychology theory of procedural justice to human rights adjudication and emphasizing fundamental importance of procedural fairness in shaping citizens' satisfaction and compliance with the outcome of a legal process).

conducting investigations, preliminary examinations are inevitably longer than otherwise. Due to the shortage of information, it is difficult to see whether the state of national proceedings would have allowed the Prosecutor make the same determination earlier.

Article 53(1) of the Rome Statute envisages criteria for the initiation of investigation (jurisdiction, admissibility and interests of justice). The Prosecutor enjoys considerable discretion in applying these criteria, due to the substantive flexibility in the article.[7] Uncertainty privileges prosecutorial discretion and independence over accountability.[8] On the one hand, such discretion is essential for smooth operation of the system, as it enables necessary flexibility and adaptability to change.[9] It is seen as an indispensable element of prosecutorial independence and thus of the integrity and quality of legal proceedings.[10] On the other hand, it also involves risks.[11] Policy papers and reports issued by the Prosecutor to demystify the process of prosecutorial decision-making only partly alleviate the concerns connected to absence of control over the exercise of prosecutorial discretion. One may doubt whether such general guidelines could fully adapt to the complexity of each situation and narrow the Prosecutor's range of choices.[12] This broad discretion may give rise to suspicions about improper external influences over prosecutorial decision-making. The predominantly informal nature of communications at the

7 Maria Varaki, "Introducing a Fairness-Based Theory of Prosecutorial Legitimacy before the International Criminal Court", in *European Journal of International Law*, 2016, vol. 27, no. 3, p. 776; William A. Schabas, "Prosecutorial Discretion v. Judicial Activism at the International Criminal Court", in *Journal of International Criminal Justice*, 2008, vol. 6, p. 735; Kaveri Vaid, "Discretion Operationalized Through Law: Proprio Motu Decision-making at the International Criminal Court", in *Florida Journal of International Law*, 2013, vol. 25, no. 3, pp. 359, 384.

8 Carsten Stahn, "Judicial Review of Prosecutorial Discretion: Five Years on", in Goran Sluiter and Carsten Stahn (eds.), *The Emerging Practice of the International Criminal Court*, Brill/Nijhoff, 2009, p. 267.

9 Hassan B. Jallow, "Prosecutorial Discretion and International Criminal Justice", in *Journal of International Criminal Justice*, 2005, vol. 3, no. 1, p. 145.

10 *Ibid*., 146.

11 Allison Marston Danner, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court", in *American Journal of International Law*, 2003, vol. 97, no. 3, p. 518.

12 Alexander K.A. Greenawalt, "Justice without Politics? Prosecutorial Discretion and the International Criminal Court", in *New York University Journal of International Law and Politics*, 2007, vol. 39, no. 3, pp. 655–56, 658.

stage of preliminary examinations makes it difficult to verify those suspicions. Even if they are unsubstantiated, the fact that they are raised may have implications for the social legitimacy of the Court.

Prosecutorial decisions may benefit certain actors (powerful as opposed to weak States, governments as opposed to rebel groups and civil society). However, one should not automatically attribute such decisions to external pressure. It will only be possible to make a credible case of prosecutorial bias if the Prosecutor consistently (on more than one occasion) favours a certain actor.

Further, it has to be kept in mind that not all influences are inappropriate and incompatible with prosecutorial independence. Interests and views of governments or other actors may influence prosecutorial activities at two levels – at the level of rules (through their involvement in formulating treaty norms and policies governing these activities) and at the level of decisions in specific situations/cases. The former (control at the level of rules) is generally seen as compatible with prosecutorial independence, while the latter (control at the level of specific decisions) is to be treated cautiously. DeGuzman, for one, calls for greater acceptance of political actors' input (due to their greater comparative legitimacy), so that the ICC can develop a better sense of what these actors (collectively) value and shape its decision-making accordingly to ultimately further strengthen its own legitimacy.[13] Meanwhile, she also rightly warns about the use of the Court by political actors to "further self-interested objectives, such as increasing their powers at the expense of rivals".[14] Such concerns arise not only when governments try to 'use' international courts against rebel forces, but also when international courts are brought into play by one or two (self-interested) States to address one aspect of a broader political dispute they are involved in. In such instances, the inter-

[13] Margaret M. deGuzman, "Choosing to Prosecute: Expressive Selection at the International Criminal Court", in *Michigan Journal of International Law*, 2012, vol. 33, no. 2, p. 292; Matthew R. Brubacher, "Prosecutorial Discretion at the International Criminal Court", in *Journal of International Criminal Justice*, 2004, vol. 2, no. 1, pp. 93–94 (arguing that the ICC should take into account extra-legal/political factors to increase chances of enforcement and that ignoring political realities would amount to "a form of suicide").

[14] DeGuzman, 2012, p. 292, see *supra* note 13.

national courts may become what Judge Bruno Simma called "ancillary theaters of conflict".[15]

16.2.2. Defining 'Control'

16.2.2.1. Rationale of Control

The Rome Statute empowers the Prosecutor to obtain and analyse information in order to determine whether there is a reasonable basis to proceed with actual investigation.[16] It may request information from governments, inter-governmental and non-governmental organizations and other reliable sources.[17] It also may carry out field missions.[18] The determination made by the Prosecutor will have consequences for national decision-makers and affected communities. The Prosecutor may end up opening an investigation *proprio motu*, even in the absence of State Party or Security Council referral. The drafters intended to reinforce prosecutorial independence by introducing such an option.[19] However, acceptance of prosecutorial empowerment hinged on the availability of mechanisms of *control*, providing governments and other stakeholders with an assurance that the prosecutor would not abuse power/discretion and act arbitrarily.[20]

One may argue that mechanisms of control may threaten independence. First, control by external political actors should be rejected to preserve the external independence of the Prosecutor and insulate her from undue political influence. Second, one may also be cautious about judicial control in light of the division of roles between judges and the Prosecutor,

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15 Bruno Simma, "Mainstreaming Human Rights: The Contribution of the International Court of Justice", in *Journal of International Dispute Settlement*, 2012, vol. 3, no. 1, p. 16.

16 The Rome Statute of the International Criminal Court, 17 July 1998, Article 15(2) and (3) ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/); ICC, Rules of Procedure and Evidence, 9 September 2002, Rule 48 ("In determining whether there is a reasonable basis to proceed with an investigation under article 15, paragraph 3, the Prosecutor shall consider the factors set out in article 53, paragraph 1 (a) to (c)") (http://www.legal-tools.org/doc/8bcf6f/).

17 ICC Statute, Article 15(2), see *supra* note 16.

18 Field missions were carried out in Colombia, Georgia and Guinea. For comments on this and other preliminary examination activities, see Morten Bergsmo, Jelena Pejić and ZHU Dan, "Article 15", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court, A Commentary*, 3rd edition, 2016, C.H. Beck, Hart, Nomos, p. 733.

19 Danner, 2003, pp. 515, 524, see *supra* note 11; Vaid, 2013, p. 360, see *supra* note 7.

20 Jenia Iontcheva Turner, "Accountability of International Prosecutors", in *Social Science Research Network*, 2014, at p. 6.

as well as the limits of judicial review.[21] However, such apprehension of overreach (either by political or judicial actors) is not such as to justify rejecting control altogether. In fact, the existence of mechanisms of control (and especially judicial control) can be useful for the Prosecutor him- or herself, as approval or validation helps avoid subsequent challenges and increase overall legitimacy.[22] While the need for such mechanisms is relatively undisputed, questions arise: What kind of control is appropriate? By whom? With what consequences?

16.2.2.2. The Meaning of Control

The ability to control an institution can be understood as the ability to pressure it into adopting a certain course of action, by means of threat, use of sanctions, or otherwise. Where sanctioning is neither appropriate nor feasible, control may take the form of persuasion and if that fails, contestation. This requires both the audiences' exposure to the activities of the court in question and the existence of channels of communication, both formal and informal. Importantly, one may distinguish between the *entitlement* to exercise control and the *ability* to effectively control powerful actors.[23]

Control may be exercised both as regards the development of the institution and as regards decision-making in specific situations. It may be exercised *ex ante* and *ex post* – that is, it may be concerned with prevention of abuse of power as well as with holding an institution or official to account, if such abuse takes place.[24] In the first place, legal constraints may be introduced to ensure that the institution acts in a certain way. This makes the law an instrument of controlling behaviour.[25] If institutions or officials engage in improper actions, control will take the form of demanding explanations and imposing sanctions.[26]

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21 Stahn, 2009, p. 255, see *supra* note 8.

22 *Ibid*., pp. 257–58.

23 Ruth W. Grant and Robert O. Keohane, "Accountability and Abuses of Powers in World Politics", in *American Political Science Review*, 2005, vol. 99, no. 1, p. 39.

24 Turner, 2014, see *supra* note 20 (discussing accountability as means of sanctioning misconduct, but also addressing prevention of misconduct).

25 Richard Mulgan, "Accountability: An Ever Expanding Concept", in *Public Administration*, 2000, vol. 78, no. 3, p. 564.

26 *Ibid*., p. 564 (suggesting that control is broader than accountability and that the latter represents one but not the only means of securing the former); Andreas Schedler, "Conceptualizing Accountability", in Andreas Schedler, Larry Diamond and Marc F. Plattner (eds.),

The entitlement to control (which may also be understood as an entitlement to having one's position taken seriously) emerges from the delegation of power (by States) or from being affected by the exercise of power. The entities entitled to control may include both governmental and non-governmental actors, even though the basis of their empowerment may be different. One may expect that when delegating powers to international courts, States will seek to maintain instruments of influence over judicial processes and outcomes. They can influence courts, among other ways, through influencing their composition and available resources, as well as through direct or indirect participation in proceedings and controlling the docket.[27] However, they may be interested in delegating authority to independent courts,[28] so that these courts are trustworthy for third party audiences whom they intend to convince of the legitimacy of their actions.[29] If that is the case, States will make courts institutionally insulated from political pressures and given them some discretionary space.[30] The courts in question will be legally required to resist those empowering them and consequently, deviation from the preferences of governments will not constitute abuse of powers.[31] In the absence of formal mechanisms of influence, States may still seek to influence courts informally.

16.2.2.3. Types of Control: Political, Social, Judicial

Scholarly discussions refer to different typologies of control mechanisms, some applicable specifically to the ICC, others more generally to interna-

The Self-Restraining State, Power and Accountability in New Democracies, Lynne Rienner Publishers, Boulder/London, 1999, pp. 15–17 (highlighting two elements of account giving, answerability and sanctions).

27 Erik Voeten, "International Judicial Independence", in Jeffrey L. Dunoff and Mark A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, Cambridge University Press, Cambridge, 2013, p. 423.

28 *Ibid*., p. 426 ("all ICs continue to have control mechanisms that offer governments at least the theoretical possibility to influence judicial behavior. Yet, to make any sense of these developments in the 1990s and 2000s, it must be true that at least some governments at some times believe that delegating authority to an independent IC suits their interests just fine").

29 Karen J. Alter, "Agents or Trustees? International Courts in their Political Context", in *European Journal of International Relations*, 2008, vol. 14, no. 1, p. 55 (disagreeing with the Principal Agent theory due to its assumption that States have special hierarchical powers over international courts and suggesting that States are not always "hidden puppet-masters" of international courts).

30 *Ibid*., pp. 39, 55.

31 Grant and Keohane, 2005, p. 32, see *supra* note 23.

tional courts. Some categorizations (political/social/judicial, external/internal) are centred on the identity/character of entities that seek to exercise control. Others are based on the nature of control mechanisms (formal/informal).

Stahn differentiates between formal and informal models of supervision.[32] He highlights several means of control, such as political control (by the Assembly of States Parties ('ASP')), control through process-based checks and balances (enabling States, victims and NGOs to influence the process of prosecutorial decision-making) and judicial review.[33] He points out that scrutiny has essentially remained focused on political control (for example, reporting to the ASP) and informal accountability (for example, consultations with States Parties and NGOs on prosecutorial policy).[34] He also hints at the distinction between generalized scrutiny (exercised by the ASP, among other ways, through budgetary control) and case-specific scrutiny (for example, judicial scrutiny of specific prosecutorial decisions).[35]

Danner distinguishes between formal accountability (exercised by the ICC judges and the ASP) and pragmatic (mostly informal) accountability (implemented by States, including non-States Parties and NGOs). She points out that through their reactions to prosecutorial decisions and their choices as to whether to co-operate with the Prosecutor, these entities can force the Prosecutor to account for its decisions in a way that will significantly enhance or hamper his/her effectiveness.[36] The Prosecutor will be compelled to keep State interests in mind, since their co-operation may be critical for the success of an investigation.[37]

Turner is concerned with the 'accountability' dimension of control. She identifies internal bureaucratic mechanisms of control within the OTP (or internal oversight) and external, judicial and political mechanisms of control (including judicial and political mechanisms).[38] She primarily

32 Stahn, 2009, p. 248, see *supra* note 8.

33 *Ibid*., pp. 259–64.

34 *Ibid*., p. 248.

35 *Ibid*., pp. 259–61.

36 Danner, 2003, pp. 511, 525, see *supra* note 11.

37 *Ibid*., p. 528.

38 Turner, 2014, see *supra* note 20.

focuses on ways of sanctioning prosecutorial misconduct, but she also considers ways of preventing such misconduct.[39]

Bergsmo also mentions internal, informal control and conceptualizes it as the encouragement of constant questioning and critical engagement inside the OTP.[40]

Helfer and Slaughter distinguish between formal and informal/political mechanisms of control (available to the States), operating *ex ante* and *ex post*.[41] Governments' formal responses may be unilateral (for example, by way of removing itself from the jurisdiction of the court) or collective.[42] Political (mostly informal) responses may range from identifying errors to non-compliance.[43] According to Alter, stakeholders (governments, NGOs, legal scholars) can influence international courts by seeking to convince judges and, if rhetorical efforts fail, by challenging the sources of judicial authority, questioning their neutrality and expertise, or even ignoring their rulings.[44]

Bovens distinguishes between formal/mandatory/vertical control (where an actor is legally compelled to give account) and social accountability (with no hierarchical relationship and formal obligation to render account).[45]

Based on the above scholarly discussions, a few distinctions will guide this chapter's assessment of quality control. The first distinction is between several types of control: political, judicial and social. Each may rely on different standards of assessment. Each may employ both formal and informal channels of communication, even though some are predominantly formal (for example, judicial control), while others are predominantly informal (for example, the Prosecutor's interactions with governments and civil society during a preliminary examination). In some in-

39 *Ibid*.

40 Morten Bergsmo, "On 'Communitarian Scholarship' and 'Quality Control in Preliminary Examination'", 13 June 2017 (https://www.cilrap.org/cilrap-film/170613-bergsmo/).

41 Laurence R. Helfer and Anne-Marie Slaughter, "Why States Create International Tribunals: A Response to Professors Posner and Yoo", in *California Law Review*, 2005, vol. 93, no. 3, p. 944.

42 *Ibid*., p. 951.

43 *Ibid*., p. 952.

44 Alter, 2008, p. 47, see *supra* note 29.

45 Mark Bovens, "Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism", in *West European Politics*, 2010, vol. 33, no. 5, pp. 946–67.

stances, the Prosecutor may be mandated to account, while in other instances, no such obligation exists. Control may be generalized (involving budgetary issues or general strategies) or related to the specific situations/cases.

Political control may be exercised by States collectively (mainly through the ASP) or individually. While non-States Parties (such as the Russian Federation) are not represented in the ASP, they may seek control through individual engagement with the Prosecutor. Individual control may be secured either through formal means (for example, by contesting admissibility) or informal/pragmatic means (for example, by withholding co-operation). Social control (exercised by NGOs and/or by affected communities) can assure that the Prosecutor acts in the interest of the public/affected communities or advances values of justice or fairness, instead of pursuing the political interests of States or its own narrow institutional interest. NGOs and affected communities may also be engaged through formal and informal channels.[46] Judicial control is a form of formal control over the Prosecutor's decision-making.[47] The ICC judges perform a filtering function.[48] The Prosecutor's determination to initiate an investigation *proprio motu* (which he or she makes upon completion of preliminary examination) is subject to the authorization of the Pre-Trial Chamber. Under Article 15(3), the Prosecutor is obliged to request the Pre-Trial Chamber's authorization for opening an investigation. However, it appears that the Chamber has no power, control or information about the activities of the Prosecutor, unless a request for authorization under Article 15 is made.

While mechanisms of control are meant to improve the quality of preliminary examination, their own quality may be a matter of concern as well.[49] Political mechanisms of control may lack transparency,[50] and raise questions regarding the influence that powerful political actors seek to

46 Danner, 2003, p. 534, see *supra* note 11.

47 Stahn, 2009, p. 264, see *supra* note 8.

48 ICC, Situation in the Republic of Kenya, Pre-Trial Chamber II, Dissenting Opinion of Judge Hans-Peter Kaul, 31 March 2010, ICC-01/09-19, para. 12 (http://www.legal-tools.org/doc/338a6f/).

49 Schedler, 1999, p. 26, see *supra* note 26.

50 Yannis Papadopoulos, "Accountability and Multi-Level Governance", in Mark Bovens, Robert E. Goodin and Thomas Shillemans (eds.), *Oxford Handbook on Public Accountability*, Oxford University Press, Oxford, 2014, p. 284.

exert upon the Prosecutor. There may be concerns about judicial overreach or excessive judicial deference, depending on how one understands the judicial role or scope of review. As regards social control, there may be concerns that what NGOs suggest is too premature or too aggressive.

On the one hand, involvement of multiple 'controllers' (entities in a position to demand explanation) supplies a range of critical perspectives and potentially improves the quality of prosecutorial decision-making.[51] Mechanisms of social and judicial control may function in a mutually reinforcing manner. Victims' submissions to the Pre-Trial Chamber under Article 15(3) may enable judicial control, providing the ICC judges with an alternative perspective to that of the Prosecutor. At the same time, information not shared by the Prosecutor in the course of preliminary examination may be disclosed when he or she files the request for judicial authorization. This means judicial control enables greater transparency and consequently, better social control.

However, a multiplicity of oversight mechanisms may unduly burden or distract the Prosecutor.[52] This needs to be kept in mind by those suggesting the establishment of new controlling mechanisms, rather than improving existing ones. The understanding of what is legitimate and feasible, the interests as well as the preferences of different controllers will vary. They may have different expectations, depending on how much and what kind of information they have. As a consequence, the Prosecutor may face conflicting demands and pressures from a variety of entities.[53] Reconciling these pressures will be challenging. Consequently, the ICC is bound to disappoint some audiences.

16.2.2.4. Transparency and Control

Transparency can be defined as availability of information about how and why decisions are made within a certain institution.[54] This means that the information may be related to the substance of decisions and reasons for

51 *Ibid*., p. 283.

52 Turner, 2014, see *supra* note 20.

53 Danner, 2003, p. 534, see *supra* note 11.

54 Jenny De Fine Licht, Daniel Naurin, Peter Esaiasson and Mikael Gilljam, "When Does Transparency Generate Legitimacy? Experimenting on a Context-Bound Relationship", in *Governance: An International Journal of Policy, Administration, and Institutions*, 2014, vol. 27, no. 1, p. 113; Frederick Schauer, "Transparency in Three Dimensions", in *University of Illinois Law Review*, 2014, vol. 27, no. 1, pp. 1344–45.

making them or to the deliberations and negotiations that form part of the decision-making process and directly feed into the decision.[55] Audience exposure to the process of decision-making can be more costly and constraining for an institution than simply giving reasons for decisions after making them.[56] A simple reason-giving requirement provides the opportunity to elucidate what was actually going on during the process.[57] Therefore, an institution may be inclined to focus on transparency through giving reasons for the decision, instead of exposing the entire process that leads up to that decision.[58]

Most definitions of transparency capture accessibility of information, but not actual exposure of relevant audiences to the content of this information.[59] In practice, even if information is made accessible, it may not reach some audiences due to the lack of capacity or interest on their part.

Transparency is a matter of degree and may vary, in terms of the type and amount of information that is made available as well as in terms of the size and identity of the permitted audience.[60] The amount and type of information disseminated by an institution may be different at different stages of proceedings. Transparency may be voluntary (where an institution proactively disseminates information about its activities) or mandatory (where an institution is obliged to provide information).[61] Ideally, information should be reliable, revealing how institutions actually make decisions,[62] but in practice, this is not always the case. Where the institution proactively disseminates information about its activities, there is a

55 De Fine Licht *et al*., 2014, p. 113, see *supra* note 54.

56 *Ibid*., p. 127.

57 *Ibid*.

58 *Ibid*.

59 Daniel Naurin, "Transparency, Publicity, Accountability: The Missing Links", in *Swiss Political Science Review*, 2006, vol. 12, no. 3, p. 91 (distinguishing between transparency as accessibility of information and publicity as exposure of relevant audiences to the information that is made available); Schauer, 2014, p. 1344, see *supra* note 54 (noting that transparency does not mean the presence of interested spectators or members of the public that request documents available on demand).

60 *Ibid*., pp. 1345–46.

61 Jonathan A. Fox, "The Uncertain Relationship between Transparency and Accountability", in *Development in Practice*, 2007, vol. 17, no. 4, p. 665.

62 *Ibid*., p. 667.

likelihood that transparency will be selective and the institution will conceal the information that may damage its reputation.

As regards the interrelation between transparency and control, scholars diverge in their views. According to one view, transparency may facilitate control, in the sense that once information about institutional practices reaches relevant audiences, they will be in a position to demand explanations and, where appropriate, impose sanctions.[63] However, when an official or institution chooses what to disclose and what to keep confidential, such selective transparency may turn out to have limited value for accountability.[64] According to another view, accountability may increase transparency, since it allows asking officials or institutions what they have been doing and why.[65] According to the third view, transparency and accountability overlap, in the sense that the ability to demand information and explanations amounts to *soft* accountability.[66] Accountability may, however, additionally involve sanctions.[67]

To understand how transparency works during preliminary examination, it is necessary to establish what is made available and to whom. As regards the former element, the institution may disclose how and/or why it makes decisions. A separate question is whether information sharing is voluntary or mandatory, whether the information is disseminated in a manner that it actually reaches audiences and whether the quality of the information disseminated is satisfactory.

The OTP pronounced its general commitment towards transparency, both in terms of reason-giving and in terms of allowing audiences exposure to the decision-making process, thereby enabling control. The OTP made initiation of preliminary examination public and undertook to publicize its activities through interaction with stakeholders, issuance of public statements, periodic reports, and information on high-level visits to con-

63 Naurin, 2006, pp. 91–92, see *supra* note 59 (pointing out that higher risks of publicity may imply higher risks of accountability, even though this link is not automatic one; also noting that accountability involves something more than having one's actions publicly exposed, specifically 'paying the price' for misconduct).

64 Albert Meijer, "Transparency", in Mark Bovens, Robert E. Goodin and Thomas Shillemans (eds.), *Oxford Handbook on Public Accountability*, Oxford University Press, Oxford, 2014, p. 516.

65 Schedler, 1999, p. 20, see *supra* note 26.

66 Fox, 2007, p. 668, see *supra* note 61.

67 *Ibid*.

cerned States, "in order to promote a better understanding of the process and to increase predictability".[68] It also undertook to provide reasoned decisions about initiating an investigation or not.[69]

However, the commitment towards transparency is constrained by the requirement to protect confidentiality.[70] It needs to be kept in mind that despite the obvious advantages of transparency, the Prosecutor may have good reasons for not publicizing too much too early in the course of preliminary examination. This may be explained by the need to avoid unnecessary stigmatization or creating expectations that cannot be fulfilled.

16.3. Quality Control in the Preliminary Examination of the Georgian Situation

This section will assess *how political, social and judicial mechanisms of control* functioned in the course of preliminary examination in Georgia. Specific emphasis will be placed on the case-specific mechanisms of control.

16.3.1. Political Control

Both Georgian and Russian authorities cooperated with the Prosecutor throughout the preliminary examination. While the Russian Federation is not a party to the Rome Statute, its nationals can be prosecuted by the ICC for crimes committed within Georgia.[71] Georgia and Russia were not in a position to preclude initiation of an investigation by the Prosecutor in view of the power of the latter to initiate an investigation under Article 15, even in the absence of referrals. The two States could, however, delay the initiation by the Prosecutor of an investigation by claiming that they were conducting genuine national investigations. It appears that both took the prospect of the ICC intervention seriously. Both tried to use existing

68 ICC, *Policy Paper on Preliminary Examinations*, November 2013, paras. 94–95 (http://www.legal-tools.org/doc/acb906/); ICC, *OTP Strategic Plan June 2012-2015*, 11 October 2013, para. 86 (http://www.legal-tools.org/doc/954beb/); ICC, *OTP Strategic Plan 2016-2018*, 6 July 2015, para. 54 (http://www.legal-tools.org/doc/7ae957/).

69 ICC, *Policy Paper on Preliminary Examinations*, 2013, para. 15, see *supra* note 68.

70 ICC, Rules of Procedure and Evidence, 9 September 2002, Rules 46–49 (http://www.legal-tools.org/doc/8bcf6f/).

71 ICC Statute, Article 12(2), see *supra* note 16 (allowing exercise of jurisdiction by the ICC if the territorial state or the state of alleged perpetrators' nationality are state parties or have recognized the ICC's jurisdiction).

channels of communication with the OTP (visits of the OTP delegation and submission of reports[72]) to advance certain factual/accountability narratives.

The Russian investigation focused on the alleged attacks by Georgian armed forces.[73] Russian authorities excluded alleged crimes by South Ossetian forces (attacks against ethnic Georgians to secure their removal from South Ossetia and destruction of their homes to prevent their return) from the scope of their investigation.[74] They limited their examination of 600 Georgian nationals' allegations against Russian military servicemen to a superficial verification, only to conclude quickly and unconvincingly that these allegations were groundless.[75]

The Russian Government sought to avoid ICC intervention altogether, as demonstrated by its insistence on conducting genuine investigations into the alleged crimes by Georgian forces. However, in case the ICC did decide to step in, the Russian Government wanted to make sure that Russian nationals were beyond its reach. It overemphasized the allegations against Georgian military servicemen and downplayed the seriousness of allegations against the two other groups involved (Russian and South Ossetian forces).[76] This can be read as a warning that if the ICC did not share the Russian narrative and targeted Russian nationals (including South Ossetians), the Russian Federation would withhold cooperation. The reaction of the Russian government to the initiation of the ICC inves-

72 ICC, Situation in Georgia, Corrected Version of Annex J to Request for Authorisation of an Investigation Pursuant to Article 15, 18 November 2015, ICC-01/15-4-Corr, paras. 2–5, 8 (according to this document, the OTP received 12 submissions from the Government of Georgia between 6 October 2008 and 24 March 2015, including eight submissions on the status of relevant national proceedings. It also received five submissions from the Russian Federation regarding its investigation, between 2008 and 2012) (http://www.legal-tools.org/doc/d040fd/).

73 OTP, *Report on Preliminary Examination Activities 2014*, 2014, para. 148 (http://www.legal-tools.org/doc/3594b3/).

74 *Ibid*.

75 OTP, *Report on Preliminary Examination Activities 2012*, 2012, para. 133 (referring to eighty applications from six hundred Georgian citizens) (http://www.legal-tools.org/doc/0b1cfc/).

76 ICC, Request for Authorisation of an Investigation Pursuant to Article 15, 2015, para. 306, see *supra* note 2 ("The Investigative Committee informed the Prosecution repeatedly that it found no evidence of the involvement of Russian servicemen in the commission of alleged crimes committed in the context of the August 2008 armed conflict").

tigation confirms this reading of events. The spokesperson of the Russian MFA, Maria Zakharova stated on 29 January 2016:

> Russia submitted more than 30 volumes of materials from the criminal case to the ICC to prove the crimes committed by Saakashvili's regime against the Ossetian people and Russian peacekeepers; however, the ICC Prosecutor placed the blame with South Ossetians and Russian peacekeepers, took the aggressor's side and started the investigation against the victims of the attack…Russia is disappointed by the decision of the ICC judges to support Bensouda's position.[77]

A few days later, in an interview with *Rossiskaya Gazeta*, the Chairman of the Investigative Committee of the Russian Federation declared that the ICC turned the facts of the case upside down by targeting South Ossetian and Russian forces, not Georgian forces.[78] He was particularly unhappy about the ICC's statement that Russia controlled South Ossetian forces even prior to the direct intervention of its own forces.[79] Keeping the promise that they would reconsider their attitude towards the ICC,[80] in November 2016, in a symbolic move, the Russian Federation withdrew its signature from the Rome Statute, calling the ICC "one sided and inefficient".[81]

In contrast to Russian authorities, Georgian authorities claimed to focus on all allegations, those related to the commission of war crimes and crimes against humanity by South Ossetian and Russian forces against ethnic Georgians as well as those related to attacks against Rus-

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77 The Ministry of Foreign Affairs of the Russian Federation, "Briefing by the Foreign Ministry Spokesperson Maria Zakharova", Moscow, 29 January 2016 (http://www.legal-tools.org/doc/afeaf2/).

78 Interview with Aleksandr Bastrikin, "About the Investigation Initiated by the International Criminal Court into the 2008 Events of South Ossetia", Rossiskaya Gazeta, Federal Issue no. 6889, 2 February 2016 (http://www.legal-tools.org/doc/922194/).

79 ICC, Request for Authorisation of an Investigation Pursuant to Article 15, 2015, para. 72, see *supra* note 2; ICC, Decision on the Prosecutor's Request for Authorisation of an Investigation, 2016, para. 27, see *supra* note 3.

80 The Ministry of Foreign Affairs of the Russian Federation, "Briefing of the Russian Foreign Ministry Spokesperson Maria Zakharova", see *supra* note 77 ("In this regard and in the light of the latest decision, the Russian Federation will be forced to fundamentally review its attitude towards the ICC").

81 Shaun Walker and Owen Bowcott, "Russia Withdraws Signature from the International Criminal Court Statute", in *The Guardian*, 16 November 2016 (http://www.legal-tools.org/doc/a01c8f/).

sian peacekeepers by members of the Georgian armed forces.[82] This may be taken as an indicator that Georgian authorities took their responsibility to investigate and prosecute seriously. Focus on all allegations, including the ones against the Georgian military, shows that they cared about the credibility of the investigation and wanted to avoid accusations of one-sidedness. However, the Georgian government may also have had a few additional, implicit reasons for insisting on all encompassing national proceedings, all of which have to do with uncertainty about the consequences of the ICC intervention and the choices the ICC would make. First, it may have been sceptical about the prospect that the ICC would prosecute Russian nationals, because that would mean antagonizing Russia. Second, even if the ICC investigation covered Russians nationals, the Georgian Government may have feared that the OTP would target Georgian nationals only to maintain the image of impartiality. Third, the Georgian Government may have been concerned that the ICC intervention would create a narrative of the conflict, one which they would not entirely agree with. Due to these reasons, the Georgian authorities may have been motivated to insist on investigations and prosecutions at the domestic level.

Prior to the change of government in late 2012, the Georgian authorities claimed that the evidence accumulated was sufficient to identify suspects.[83] The new government of Georgia (in power since late 2012) renewed the commitment to carrying out genuine investigations and prosecutions. In May 2013, the Georgian Prosecutor's Office set up an eight-member group to handle the investigation.[84] In 2013 and 2014, the new Prime Minister and Minister of Justice emphasized that Georgian authorities would investigate the alleged crimes at the national level to fulfil Georgia's international obligations. Minister of Justice, Thea Tsulukiani said: "We should not make this case subject of hearing at international tribunal. We should tackle our problems and investigate it by ourselves in frames of those international commitments that we have undertaken.".[85]

82 OTP, *Report on Preliminary Examination Activities 2014*, 2014, para. 146, see *supra* note 73.

83 ICC, Request for Authorisation of an Investigation Pursuant to Article 15, 2015, para. 295, see *supra* note 2.

84 "The Prosecutor's Office Sets up Group to Probe into August War", in *Civil Georgia*, 14 May 2013 (http://www.legal-tools.org/doc/0aef13/).

85 "Ivanishvili on August War Probe", in *Civil Georgia*, 10 April 2013 (http://www.legal-tools.org/doc/02b820/).

In a letter to the OTP dated 17 March 2015,[86] the Georgian Government claimed that investigative authorities could file charges against a number of individuals allegedly responsible for war crimes and crimes against humanity, but chose not to. The letter explains this was due to "a fragile security situation" in the occupied territories and adjacent areas and fear of "aggressive and unlawful reactions" if prosecutions were to be initiated, as "the persons implicated in the commission of the crimes subject to Georgia's domestic proceedings might be directly involved or affiliated with the ongoing violence". The letter also raised concern about "security and safety of witnesses of alleged crimes" living in close proximity to the occupied territories". They argued that these threats tipped the balance in favour of non-prosecution, at least until these concerns disappeared. The Georgian investigation (including into the attacks against ethnic Georgians) was "indefinitely suspended".[87]

This letter raises a few concerns and questions. In the statements made in 2013 and 2014, Georgian authorities did not invoke security concerns to justify non-prosecution, notwithstanding the fact that the security situation was equally alarming. In 2014, the Georgian government presented a charging decree against one of those bearing the greatest responsibility to the ICC.[88] It also committed to submitting an additional report showing that it had completed some investigations and providing updates on prosecutions related to the "ethnic cleansing" of Georgians and investigations into the attack on peacekeeping forces.[89] While security concerns may be serious, the sudden emergence of this argument, in the absence of any significant prior discussion (including about how this problem could be solved), leaves the impression that this was only a convenient reason used to shift the burden to the ICC. Importantly, it appears that the Georgian Government is not against prosecution *per se*. The ICC may be seen as a more effective forum or a more appropriate one, in terms of neutrality and impartiality, when compared to national authorities. It may also be

86 ICC, Situation in Georgia, Annex G to Request for Authorisation of an Investigation Pursuant to Article 15, 13 October 2015, ICC-01/15-4-AnxG (http://www.legal-tools.org/doc/a007a3/).

87 ICC, Request for Authorisation of an Investigation Pursuant to Article 15, 2015, para. 15, see *supra* note 2.

88 ICC, Separate Opinion of Judge Péter Kovács, 2016, para. 48, see *supra* note 3.

89 *Ibid*., paras. 49–50.

seen as an institution that gives greater voice and exposure to the concerns of victims compared to national investigations.

It seems that while shifting the burden of investigation to the ICC, the Georgian Government continues to express its views about which crimes should be investigated and who should be prosecuted by the OTP. As an example, on 16 October 2015, the current Minister of Justice, Ms. Thea Tsulukiani stated that the Ministry had raised the issue with the Prosecutor about having the alleged torture and killing of Georgian POWs covered by the investigation.[90]

16.3.2. Social Control

Georgian civil society has been actively engaged with the OTP, since the latter opened the preliminary examination into the situation of Georgia. Georgian NGOs provided the OTP with information about the crimes allegedly committed.[91] They also presented their views about the quality of national investigations. They started calling for the initiation of an investigation by the ICC early on, both in direct communications with the OTP[92] and indirectly, in various speeches (including those at the ASP sessions[93]) and reports.[94]

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90 "Investigation into Torture of Giorgi Antsukhelidze, Kakha Khubuluri, Ushangi Sopromadze and 23 other Georgian PoWs should be primary focus of the ICC's investigation", in IPN, 16 October 2015 (http://www.legal-tools.org/doc/ec2eca/).

91 See, for example, Tinatin Khidasheli (ed.), *August Ruins: Report of the Georgian Non-Governmental Organizations on Violation of Fundamental Human Rights & International Humanitarian Law: August War, 2008*, Open Society Georgia Foundation, Tbilisi, 2009 (http://www.legal-tools.org/doc/1743a5/).

92 OTP, *Report on Preliminary Examination Activities 2012*, 2012, para. 139, see *supra* note 75 (Referring to an open letter of 24 April 2012 of a network of Georgian and International NGOs that emphasized the failure of the Russian and Georgian investigative authorities and recommended opening an investigation).

93 Already in 2009, at the eighth session of the ASP, a representative of Georgian Coalition for War Crimes Documentation declared that "more than a year after the end of the conflict, very little has been done to bring those responsible before justice" and emphasized that the initiation of an investigation by the ICC would have a profound effect on the ground. "Statement on Behalf of the Georgian Coalition for War Crimes Documentation: 8th Assembly of States Parties to the Rome Statute of the International Criminal Court" (http://www.legal-tools.org/doc/c19ef4/). See also the speeches of the representative of the Georgian Young Lawyers' Association, Natia Katsitadze at the tenth and eleventh sessions of the ASP in December 2011 (http://www.legal-tools.org/doc/751830/) and November 2012 (http://www.legal-tools.org/doc/55121a/).

In anticipation of the accusation that civil society discounted the prospect of effective national investigations too quickly, NGO representatives note that their initial communications with those authorities provided sufficient grounds for suspicions about their willingness and ability to investigate.[95] National investigative authorities reportedly made no information available to the victims or the general public about their activities or progress made, if any.[96] There were considerable delays in granting victim status to individuals who suffered as a result of the August 2008 conflict.[97]

In principle, the strategy of calling for the OTP examination might have been justified in the sense that it could induce national authorities to pursue investigation more proactively. This would make no difference if the states in question wanted to shift the burden to the OTP, but could be effective if the national authorities sought to avoid the initiation of formal investigation by the ICC.

Aside from providing feedback to the Prosecutor throughout the preliminary examination (mostly indirectly and informally), victims used formal channels of communicating their concerns once the preliminary examination was completed and the Pre-Trial Chamber requested authorization to open an investigation. Under Article 15(3) of the Rome Statute, "Victims may make representations to the Pre-Trial Chamber". This allows affected communities to act as counterweights to the Prosecutor. In

94 Norwegian Helsinki Committee, "Unable or Unwilling? Georgia's Faulty Investigation of Crimes Committed During and After the Russian-Georgian war of August 2008", 2011 (http://www.legal-tools.org/doc/a3f185/). Norwegian Helsinki Committee, "Waiting for Russian Justice: The Ineffective Investigation of Crimes Committed During the August 2008 Armed Conflict between Russia and Georgia", 2012 (http://www.legal-tools.org/doc/5be38d/).

95 Interview with Tamar Abazadze, lawyer at the Georgian Young Lawyers' Association, 5 July 2017, Tbilisi, Georgia ("you may ask: do not you think that it was too early for the Georgian civil society to claim ineffectiveness of national investigations and demand initiation of investigation by the ICC in 2009 or 2011? In my view, our insistence on the ICC investigation may be explained by the lack of trust in the national authorities that is based on our early experience of communicating with them on these issues. Our initial communication between 2009 and 2011 with the Georgian Prosecutor's Office did not give us reasons to conclude that national investigation was effective. The same can be said about the Russian investigation"). The interview was conducted in Georgian and subsequently translated.

96 See the speeches of Natia Katsitadze, *supra* note 93.

97 Interview with Tamar Abazadze, lawyer at the Georgian Young Lawyers' Association, 2017, see *supra* note 95.

the Georgian situation, the victims generally agreed with the parameters set out by the Prosecutor in her request. However, they had a few concerns. Specifically, some claimed to have suffered from crimes which fell outside the time-frame proposed by the Prosecutor. Victims also emphasized that there were crimes not mentioned in the Prosecutor's request.[98] Additional concerns regarding the scope of investigation were voiced at the fourteenth session of the ASP. The GYLA chairperson called for judges to expand the scope of the investigation to cover the unlawful deprivation of liberty of ethnic Georgian civilians and the ill-treatment of Georgian prisoners of war.[99] The civil society also believed that the territorial scope of the future ICC investigation was to include the region of Abkhazia and also that the ICC was to look into the role of Russian armed forces together with Ossetian forces.[100]

16.3.3. Reflections on Political and Social Control and their Interplay

What forms do political and social control take in practice? How are the two types of control related? Ability to control may be understood as the ability to influence. It can be exercised through interaction. It appears that political control is, for the most part, exercised through persuasion. However, if a government fails to convince, it may criticize specific decisions of an institution or question its authority more broadly. The communication of the Russian Federation with the OTP exemplifies this pattern. The Georgian government similarly sought to influence the OTP's understanding of the situation. It has not contested the OTP's authority at any point, and it has pronounced its commitment to fulfil its obligations as a state party to the Rome Statute. Nevertheless, this commitment did not materialize in effective investigations and prosecutions.

Georgian NGOs sought to control the OTP by advancing their own assessments (on the quality of national investigations) and by trying to convince the OTP to initiate an investigation. While the OTP is free to not follow, such calls can arguably force it to at least explain its reluctance to initiate an investigation. It appears that for several years the affected

98 ICC, Situation in Georgia, Pre-Trial Chamber I, Report on the Victims' Representations Received Pursuant to Article 15(3) of the Rome Statute, 4 December 2015, ICC-01/15-11, paras. 24–26 (http://www.legal-tools.org/doc/eb0a8b/).

99 Speech of the GYLA Chairwoman, Ana Natsvlishvili, 14th ASP Session, 2015 (http://www.legal-tools.org/doc/12202b/).

100 *Ibid*.

communities were uncertain of the prospects of an ICC investigation. Their scepticism about the prospects of an effective national investigation turned out to be justified in the end.

It is arguably preferable that the mechanisms of political and social control are equally strong, that they balance each other and reveal each other's weaknesses. This would help improve the quality of control and ultimately, also the quality of prosecutorial activities.

16.3.4. Prosecutor's Response to Competing Social and Political Pressures

The Georgian situation shows that the Prosecutor may be criticized by different actors for different reasons. The Prosecutor has been criticized for targeting certain groups and not others,[101] for focusing on certain crimes and not others,[102] and for the timing of making a determination as to whether an investigation is warranted.[103] The ICC's definition of the parameters of the situation subject to investigation (including temporal parameters) has also been questioned.[104] In a politically charged situation, the Prosecutor faces the challenge of not only acting independently and impartially, but also of appearing independent and impartial. This requires providing a credible explanation of the choices he/she makes. It also calls for reliance on the materials provided by more or less credible third parties.[105]

The Georgian situation also exemplifies how the OTP may face pressure from the civil society claiming that the situation is ripe for ICC

[101] See, for example, The Ministry of Foreign Affairs of the Russian Federation, "Briefing of the Russian Foreign Ministry Spokesperson Maria Zakharova", see *supra* note 77.

[102] ICC, Report on the Victims' Representations Received Pursuant to Article 15(3) of the Rome Statute, 2015, para. 26 (referring to additional crimes not included in the Prosecutor's Request), see *supra* note 98.

[103] NGOs believe that the investigation should have been opened earlier.

[104] ICC, Report on the Victims' Representations Received Pursuant to Article 15(3) of the Rome Statute, 2015, para. 24, see *supra* note 98.

[105] ICC, Corrected Version of Annex J to Request for Authorisation of an Investigation Pursuant to Article 15, 2015, paras. 15–35, see *supra* note 72 (pointing out that the OTP examined the information from three international and regional organisations that conducted fact finding assessments, the International Independent Fact-Finding Mission on the Conflict in Georgia (IIFFMCG), the UN and the OSCE and also thoroughly reviewed the information provided by the European Court of Human Rights).

investigation while governments insist that it is not.[106] While national and international observers were sceptical about national authorities' willingness and ability to investigate and prosecute, for the OTP, national authorities showed sufficient progress to prevent the initiation of an investigation by the ICC, at least until 2015, according to the OTP annual reports. While acknowledging in its 2012 report that neither investigation has yielded any results four years after the events,[107] the OTP took note of the obstacles encountered in the course of the investigation (the lack of access to the crime scene and the lack of cooperation, invoked by Georgian authorities,[108] and the lack of cooperation and immunities of senior Georgian officials, invoked by the Russian Federation[109]) and inquired about the steps taken to overcome those obstacles. It was also understanding of delays caused by the change of the Georgian government and several changes in the leadership of the Georgian Prosecutor's office.[110]

The OTP reports leave the impression that the main purpose of the interactions between the Georgian authorities and OTP was to ascertain the existence of genuine national proceedings, so that if there were none, the ICC intervened. There is not much evidence of encouragement by the OTP of national investigative authorities or of its efforts to improve their capacity.[111] However, the OTP's monitoring of national investigations in the course of preliminary examination might have had a catalysing effect, so long as the national authorities were interested in making progress.

106 Fabricio Guariglia and Emeric Rogier, "Prosecutorial Policy and Practice: The Selection of Situations and Cases by the OTP of the ICC", in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, p. 354 (highlighting the possibility of pressures from multiple sides).

107 OTP, *Report on Preliminary Examination Activities 2012*, 2012, para. 135, see *supra* note 75.

108 *Ibid*., para. 136; OTP, *Report on Preliminary Examination Activities 2014*, 2014, para. 147, see *supra* note 73.

109 ICC, Request for Authorisation of an Investigation Pursuant to Article 15, 2015, para. 317, see *supra* note 2; OTP, *Report on Preliminary Examination Activities 2012*, 2012, paras. 133–36, see *supra* note 75.

110 OTP, *Report on Preliminary Examination Activities 2014*, 2014, para. 147, see *supra* note 73.

111 An exception may be found in the OTP, *Report on Preliminary Examination Activities 2013*, November 2013, para. 175 (indicating that on 6-7 June 2013, the OTP accepted the invitation of the Georgian Chief Prosecutor to give a presentation to national investigators and prosecutors on crimes falling under the ICC jurisdiction) (http://www.legal-tools.org/doc/dbf75e/).

Assuming that the two governments wanted to avoid ICC intervention, the need to show progress arguably pushed the investigations forward. According to the OTP, it issued ten formal requests for information to the two governments, six to the Government of Georgia, four to the Government of the Russian Federation.[112] The OTP received twelve submissions from the Government of Georgia between 6 October 2008 and 24 March 2015, including eight submissions on the status of relevant national proceedings.[113] The OTP received five submissions from the Russian Federation regarding its investigation between 2008 and 2012.[114] The OTP issued several warnings that it would seek authorization for investigation if no progress was shown and explained to the national authorities the level of specificity and substantiation of evidence that is required to demonstrate that genuine national investigations and prosecutions are ongoing.[115] The OTP appears to have addressed delays in the Georgia investigation and in fulfilling the reporting obligations between the end of 2012 and early 2014.[116] It informed the Chief Prosecutor's Office of Georgia that, due to their failure to submit the updated information about the national proceedings, the OTP would seek authorization for initiation of investigation.[117] Consequently, the Georgian Prosecutor's Office submitted an updated report in November 2014 and supporting materials in the month thereafter.

It is difficult to argue that national proceedings are genuine and credible when no charges are brought for several years. Despite delays, it was not until 2014 that the OTP used a more explicit language in its annual report on preliminary examinations. It pointed out that "both sets of investigations have suffered from significant delays" and "six years after the end of the armed conflict, no alleged perpetrator has been prosecuted,

[112] ICC, Request for Authorisation of an Investigation Pursuant to Article 15, 2015, para. 39, see *supra* note 2.

[113] ICC, Corrected Version of Annex J to Request for Authorisation of an Investigation Pursuant to Article 15, 2015, paras. 2, 5, see *supra* note 72.

[114] *Ibid*.

[115] OTP, *Report on Preliminary Examination Activities (2015)*, 12 November 2015, para. 262 (http://www.legal-tools.org/doc/ac0ed2/); OTP, *Report on Preliminary Examination Activities 2014*, 2014, para. 152, see *supra* note 73.

[116] ICC, Request for Authorisation of an Investigation Pursuant to Article 15, 2015, paras. 296–99, see *supra* note 2.

[117] *Ibid*., para. 301.

nor has there been any decision not to prosecute".[118] Consequently, the OTP warned that it would reach a decision on whether to seek authorization to open an investigation in the near future.[119] Any further delay in this regard would undermine the ICC's legitimacy. Indefinite suspension of proceedings by Georgian authorities simplified the task by making at least some of the potential cases (most importantly, attacks against ethnic Georgians and their forced displacement) automatically admissible on account of inactivity (while admissibility of others – namely, alleged attacks against Russian peacekeepers – remained contested by Russia).

The OTP's move is an indicator that the ICC is willing to engage with situations even at the risk of antagonizing powerful non-States Parties, such as Russia. The Georgian situation is clearly not an easy one to investigate. While the cases the OTP currently focuses on are strong evidentially and the Georgian Government appears willing to co-operate, the investigation is likely to be complicated due to the lack of co-operation of Russia/South Ossetia and the lack of access to the crime scenes. Interestingly, the ICC investigation at this point does not appear to cover the crimes allegedly committed by Georgian military servicemen. It also does not appear to be planning to prosecute Russian political or military leadership for attacks against ethnic Georgians and their forced displacement. Its reports indicate that there is conflicting information about the participation of Russian soldiers in the commission of attacks against ethnic Georgians and it does not indicate the existence of a State or organizational policy.[120] This means that the OTP's main focus is on the third group, the South Ossetian forces.

16.3.5. Judicial Control

Due to its policy of inviting voluntary referrals of territorial states to trigger the ICC jurisdiction, the OTP did not have to use its *proprio motu* powers.[121] Consequently, it managed to avoid formal judicial review re-

[118] OTP, *Report on Preliminary Examination Activities 2014*, 2014, para. 154, see *supra* note 73.

[119] *Ibid*.

[120] OTP, *Report on Preliminary Examination Report (2015)*, 2015, paras. 245–47, see *supra* note 115.

[121] Jan Wouters, Sten Verhoeven and Bruno Demeyere, "The international criminal court's office of the Prosecutor: navigating between independence and accountability?", KU Leuven, Institute of International Law, July 2006, Working Paper No. 97, p. 16 (http://www.legal-tools.org/doc/58bd4a/) (pointing out as regards the Prosecutor's *proprio motu* powers

quired only in the absence of such referrals. The procedure for the authorization of an investigation under Article 15(3) was under-utilized for some years. In the absence of any referrals by Georgia, the Prosecutor had to file a request for authorization to initiate the investigation. This created an opportunity to clarify the scope of judicial review for this procedure.

16.3.5.1. Major Disagreements in the Pre-Trial Chamber's Decision

The Decision of the Pre-Trial Chamber of 27 January 2016 (authorizing investigation into the situation in Georgia) reveals disagreements over the role of the Pre-Trial Chamber under the Article 15 procedure and over the appropriate scope of judicial review. The majority view is that judicial examination "must be strictly limited" in the sense that it "serves no other purpose than to prevent the abuse of power on the part of the Prosecutor".[122] The majority referred back to previous jurisprudence, claiming that the material presented by the Prosecutor did not need to be "conclusive" and the Pre-Trial Chamber was not supposed to disregard available information, unless it was "manifestly false".[123]

Judge Kovács disagreed: "I fail to understand how the Chamber can prevent the abuse of power on the part of the Prosecutor if the exercise of its supervisory role is strictly limited". He saw this as a "self-imposed restriction", not mandated by Article 15(4) of the Rome Statute. He believed that, in accordance with the mentioned provision, the Chamber had a duty to reach its own conclusion on whether there was a reasonable basis to proceed with an investigation. He emphasized that "judicial control entails more than automatically agreeing with what the Prosecutor presents" and that it calls for "an independent judicial inquiry", "a full and proper examination" of the supporting material relied upon by the Prosecutor as well as the victims' representations.[124] Judge Kovács argued that "being at the early stages of the proceedings does not justify a marginal assessment" and that despite a "low evidentiary standard", the assessment

that "it is in the use of proprio motu powers that his real force resides" but "before actually resorting to using those powers", the Prosecutor has to increase the legitimacy of his office).

[122] ICC, Decision on the Prosecutor's Request for Authorisation of an Investigation, 2016, para. 3, see *supra* note 3.

[123] *Ibid*., paras. 25–27.

[124] ICC, Separate Opinion of Judge Péter Kovács, 2016, paras. 4–6, see *supra* note 3.

should be carried out thoroughly,[125] and result in a clear and well-reasoned decision, securing the transparency of the judicial process and guaranteeing a considerable degree of persuasiveness.[126]

The majority asserted that it was "unnecessary and inappropriate for the Chamber to go beyond the submissions in the request in an attempt to correct any possible error on the part of the prosecutor".[127] Judge Kovács argued that "it is not only necessary, but also appropriate to go beyond the submissions of the Prosecutor, lest the Chamber automatically agrees with the Prosecutor".[128] He noted that the "Article 15 procedure imposes a duty on the Chamber to reach its own conclusions on whether an investigation is warranted or not and not merely examine the Prosecutor's conclusions.[129] Judge Kovács criticized the "truncated presentation of law and facts" and the obvious inconsistency in the Prosecutor's assessment of the relevant factors.[130] He pointed out that according to the Prosecutor, information about indiscriminate/disproportionate attacks against civilian targets by Georgian and Russian forces was limited and contradictory.[131] However, "when faced with similar difficulties in the context of the attack against peacekeeping forces, the Prosecutor did not refrain from drawing conclusions on the commission of war crimes".[132]

The Pre-Trial Chamber largely concurred with the Prosecutor's assessment of complementarity. As regards admissibility, Judge Kovács argued that the majority excised a lot of relevant facts, which he believed were necessary for an accurate admissibility assessment, judicial reasoning, and more importantly, transparency to the public and to interested states. He pointed out that the majority followed a "short-cut approach" and did not explain the "flaws" of Georgian and Russian national investigations which was decisive for accurate Article 17 admissibility determinations.[133]

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[125] *Ibid*., para. 11.

[126] *Ibid*., para. 12.

[127] *Ibid*., para. 35.

[128] *Ibid*., para. 20.

[129] *Ibid*., para. 20.

[130] *Ibid*., para. 19.

[131] ICC, Decision on the Prosecutor's Request for Authorisation of an Investigation, 2016, para. 34, see *supra* note 3.

[132] ICC, Separate Opinion of Judge Péter Kovács, 2016, para. 22, see *supra* note 3.

[133] *Ibid*., paras. 41–60.

Another disagreement is connected to the status of the proceedings conducted by the *de facto* regime in South Ossetia. The Pre-Trial Chamber agreed with the Prosecutor's submission that any proceedings undertaken by the *de facto* authorities of South Ossetia are not capable of meeting the requirements of Article 17 of the Statute, due to South Ossetia not being a recognized state.[134] Judge Kovács, on the other hand, believed that the majority oversimplified the issue and focused only on the fact that South Ossetia was not a recognized state.[135] He took the view that depriving non-recognized entities of the possibility of lodging admissibility challenges, so far as they are able and willing to genuinely investigate and prosecute, would result in widening the impunity gap.[136] He supported a case-by-case assessment without any automatic effect on the legal status of the non-recognized entity.[137]

The final point is that the majority appears uninterested in the broader context (pre-history) of the situation. While Judge Kovács appears to be calling for a better understanding of the local context.[138]

16.3.5.2. Reflections on the Quality of Judicial Control

The 26 January 2016 decision discloses a disagreement on the type of review to be exercised by the Pre-Trial Chamber. The two alternatives may provisionally be labelled as 'substantive' and 'procedural'. In case of substantive review, the Pre-Trial Chamber as a controlling body reaches its own conclusions. As a consequence, it may agree with the Prosecutor in some respects, but disagree in other respects. In case of procedural review, the OTP is deferential in the sense that it does not engage in a thorough examination and instead is willing to accept the Prosecutor's conclusions/determinations, unless it observes some manifest abuse of power on his/her part. This means that the strictness of a review will vary, depending on the quality of prosecutorial submissions. The determination is bound to be made on a case by case basis. Such a deferential stance is based on the understanding that the entity making decisions (in this case, the Prosecutor) is better placed to decide on the issues at stake or is more

134 ICC, Decision on the Prosecutor's Request for Authorisation of an Investigation, 2016, para. 40, see *supra* note 3.

135 ICC, Separate Opinion of Judge Péter Kovács, 2016, para. 65, see *supra* note 3.

136 *Ibid*.

137 *Ibid*., para. 66.

138 *Ibid*., para. 16.

competent than the entity that exercises control (in this case the Pre-Trial Chamber).[139]

Depending on whether one supports substantive or procedural review, the quality of judicial control will either be associated with a detailed and thorough examination of the Prosecutor's determinations in all instances or with a lenient, deferential approach, unless the Prosecutor obviously abuses power. The Prosecutor previously argued that the Pre-Trial Chamber need not engage in an in-depth analysis of the information presented for the purpose of what he called a "procedural decision" under Article 15(4) of the Statute.[140] According to drafting history, however, states must have called for substantive review as a condition of accepting the Prosecutor's power to initiate an investigation *proprio motu*. Judge Hans Peter Kaul, in his dissent to the decision authorizing an investigation in Kenya pointed out: "Thus, the Pre-Trial Chamber's decision pursuant to article 15(4) of the Statute is not of a mere administrative or procedural nature, but requires a substantial and genuine examination by the judges of the Prosecutor's Request. Any other interpretation would turn the Pre-Trial Chamber into a mere rubber-stamping instance".[141]

It appears that the reference to "abuse of power" in the majority's reasoning is meant to show that the Court will only engage in intensive review if prosecutorial behaviour is manifestly inadequate. This seems to be what this chapter labelled as 'procedural review'. If the review were sufficiently thorough, the Pre-Trial Chamber could have raised a range of questions, including those about non-inclusion of certain crimes and about the territorial and temporal scope of the crimes alleged. It would also have been more explicit in its assessment of the quality of national proceedings. According to the alternative view of Judge Kovács, examination by the Pre-Trial Chamber of prosecutorial submissions should be intensive (even if they do not immediately appear manifestly inadequate) to avoid abuse of power. This resembles what was earlier designated as 'substantive review'.

[139] I am borrowing this distinction between substantive and procedural review from the discussions on the standards of review in the context of international human rights courts.

[140] ICC, Situation in the Republic of Kenya, Pre-Trial Chamber II, Request for Authorisation of an Investigation Pursuant to Article 15, 26 November 2009, ICC-01/09-3, para. 110 (http://www.legal-tools.org/doc/c63dcc/).

[141] ICC, Dissenting Opinion of Judge Hans-Peter Kaul, 2010, para. 19, see *supra* note 48.

If one compares the decisions of Pre-Trial Chamber authorizing the initiation of an investigation in Kenya and Georgia, one will notice a clear difference. In its decision authorizing the initiation of an investigation into the Kenyan situation, the judges examined supporting information to reach their own conclusions. This shows that the judges, once they review the available information may concur with the Prosecutor.[142] However, it is possible that the judges will not find the prosecutorial submissions entirely clear or convincing[143] and make necessary clarifications.[144]

16.3.6. Transparency and Control in the Georgian Preliminary Examination

The OTP made the initiation of a preliminary examination into the Georgian situation public on 14 August 2008.[145] Subsequently, it publicized visits to Georgia and Russia.[146] However, public statements made following such visits were mostly limited to taking note of the two governments' co-operative attitude in providing updates on ongoing investigations.[147] The OTP made its preliminary assessments on jurisdiction and admissibility as well as information about its activities available in its annual reports on preliminary examinations. These reports described modalities and intensity of the OTP's engagement with the relevant stakeholders. They referred to the steps the Prosecutor intended to take,[148] thereby increasing predictability. However, several questions and concerns need to be raised.

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142 ICC, Situation in the Republic of Kenya, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19, paras. 185, 195 (http://www.legal-tools.org/doc/338a6f/).

143 *Ibid*., para. 201 ("the chamber observes that in the Prosecutor's Request the temporal scope of the investigation is not clearly defined").

144 *Ibid*., para. 203 ("it is the responsibility of the Chamber to define the temporal scope of the authorization for investigation with respect to the situation under consideration").

145 OTP, The Prosecutor's Statement on Georgia, 2008, see *supra* note 1.

146 See, for example, "No impunity for crimes committed in Georgia: OTP concludes second visit to Georgia in context of preliminary examination", in *ICC Weekly Update*, no. 39, 28 June 2010 (http://www.legal-tools.org/doc/a446f9/).

147 For criticism on the formulation of press releases, see Human Rights Watch, "ICC Course Correction: Recommendations to the Prosecutor for a More Effective Approach to "Situations under Analysis"", 2011, p. 16 (http://www.legal-tools.org/doc/43aefb/).

148 OTP, *Report on Preliminary Examination Activities 2012*, 2012, para. 140, see *supra* note 75; OTP, *Report on Preliminary Examination Activities 2013*, 2013, paras. 177–78, see *supra* note 111.

The OTP would arguably need to be careful when formulating these reports and statements not to antagonize the states and also to avoid constraining itself in its further assessments. Consequently, one may question whether these reports are reflective of how the OTP actually operates. One may also question whether the information provided therein actually reached the affected communities and even if it did, whether these reports responded to the questions they might have had. The affected communities appear to have suffered throughout the preliminary examination due to uncertainty as to where it was heading and as to why the initiation of investigation by the OTP was delayed. While the two governments may have also been affected by uncertainty, their interest in knowing about the OTP's intentions was mostly connected to their interest in avoiding the ICC intervention altogether. It is logical to think that they had better access to the information than the general public.

On the positive side, reports on the preliminary examinations contained at least some information about ongoing investigations which was not disclosed to the affected individuals and civil society by national investigative authorities directly. As noted above, national investigative authorities provided very limited information to the victims and general public about ongoing investigation. As mentioned in the speeches of NGO representatives at the ASP in 2011 and 2012, Georgian civil society expected that the OTP would "reach out to victims and communities affected by the August war" and provide information about the status of its preliminary examination, including its findings concerning investigations carried out by Georgian and Russian authorities.[149] Calls for taking measures to raise the awareness of the affected communities about the OTP's activities may be seen as a hint that the efforts already undertaken in this regard by the OTP were thought to be insufficient.

16.4. Concluding Remarks

This contribution raises two issues regarding preliminary examinations: that of control of *quality* and that of quality of *control*. The case study reveals some general challenges common to all situations as well as some case-specific difficulties. It is clear that at the stage of preliminary examination, mechanisms of controlling the quality of prosecutorial activity are under-developed. The ICC judges step in to exercise judicial control only

[149] See the speeches of Natia Katsitadze, *supra* note 93.

after the Prosecutor makes a determination as to whether initiation of an investigation is warranted, upon completion of preliminary examination (which in the absence of time limits, may last for years). Until then, control is political and/or social (that is, non-mandatory, largely dependent on the willingness and ability of relevant actors to exercise control) and predominantly informal.

The preliminary examination appears to be an interactive, bi-directional process. This means that while the OTP engages with domestic stakeholders to ascertain if the initiation of an investigation is warranted, those stakeholders have an opportunity to influence prosecutorial decision-making, raise concerns and provide feedback. From this standpoint, the prolongation of preliminary examination is not as detrimental as some might believe it to be. The Prosecutor gains a better understanding of the local context. Moreover, if the Prosecutor engages with the stakeholders and creates the perception of a fair, inclusive process, the likelihood that these stakeholders will accept the outcome of the process (even an unfavourable one) will increase. However, the 'reasonable time' requirement remains relevant. Since the Prosecutor waited for seven years before it decided to initiate an investigation into the situation in Georgia, the questions arise: Was the Prosecutor too slow? Was she too lenient in assessing national authorities' efforts? While I believe that imposition of rigid time limits would deprive the Prosecutor of necessarily flexibility, it is essential for the Prosecutor to provide some reasonable explanation for the delay, especially in response to criticisms.

One may also argue that due to the pressure of some stakeholders (especially the ones upon which the ICC is dependent for co-operation or resources), the Prosecutor may be guided by political considerations, even if he or she makes efforts to maintain the appearance of legality. The fact that the OTP sometimes acts contrary to the preferences of powerful actors may serve as an indicator that it does not happen. Whatever the case, the informal and opaque nature of communications, coupled with the lack of proper explanations by the Prosecutor of the choices he or she makes (for example, his or her focus on some crimes and not on others, on some groups of alleged perpetrators and not on others, his or her definition of temporal framework and other parameters) increases suspicions about motivations behind these choices. The Pre-Trial Chamber's choice of a procedural, deferential model of judicial review further aggravates these concerns.

Publication Series No. 32 (2018):

Quality Control in Preliminary Examination: Volume 1

Morten Bergsmo and Carsten Stahn (editors)

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

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ISBNs: 978-82-8348-123-5 (print) and 978-82-8348-124-2 (e-book).