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

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

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Politics, Power Dynamics, and the Limits of Existing Self-Regulation and Oversight in ICC Preliminary Examinations

Asaf Lubin*

Should the normative framework that governs the International Criminal Court's ('ICC') oversight concerning preliminary examinations undergo a reform? The following chapter answers this question in the affirmative, making the claim that both self-regulation by the Office of the Prosecutor ('OTP') and quality control by the Pre-Trial Chamber ('PTC') currently suffer from significant deficiencies, thus failing to reach the optimum point on the scale between absolute prosecutorial discretion and absolute control. The chapter demonstrates some of these inadequacies using the example of the preliminary examination concerning the situation in Palestine. The chapter first maps out the legal structures and mechanisms that regulate the preliminary examination stage. The chapter then explores a number of key areas in which the OTP has considerable independence, and concerning which sufficient quality control is critical to ensuring the legitimacy of the preliminary examination process, and of the Court itself. This review includes an analysis of the Court's potential for politicization, the problems faced by the OTP when attempting to articulate generalized prioritization policies and exit strategies, the regulation of evidentiary standards at the preliminary examination stage, and the role of transparency in the preliminary examination process. The chapter concludes with four suggestions for potential reform of the existing control mechanisms over prosecutorial discretion in preliminary examinations: (1) re-phasing

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of the preliminary examination phase and the introduction of a Gantt-based review process and a sliding scale of transparency requirements; (2) redefinition of the relationship between the OTP and PTC at the preliminary examination stage; (3) redrafting the existing OTP policy papers on Preliminary Examinations and Interests of Justice, as well as adopting a new policy paper on Evidence, Evidentiary Standards, and Source Analysis; and (4) introducing a 'Committee of Prosecutors' as a new external control mechanism.

19.1. Introduction

In her famous speech at Sanders Theater, before the gathered masses attending the 1993 Harvard Law School Class Day Program, then recently confirmed Attorney General Janet Reno presented a stirring account of the role and mandate of criminal prosecutors. "We cannot forget the need to use the law as a shield, but we must remember other forces of the law", she told the cheering crowd of young law students, stressing the point that "the prosecutor who thinks that they have done their job when they get a conviction and see somebody sentenced […] have another think coming". In her speech, Reno was underlying the need, indeed the ultimate duty of prosecutors, "to look beyond the narrow aspects of the courtroom".[1] This obligation is perhaps magnified in the international sphere, where political pressures[2] and economic costs,[3] as well as mandate constraints and juris-

[1] Text of speech given by Janet Reno, United States Attorney General, Harvard Law School Class Day Program, 9 June 1993.

[2] See, for example, M. Cherif Bassiouni, "The Philosophy and Policy of International Criminal Justice", in Lal Chand Vonrah *et al.* (eds.), *Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese*, Kluwer Law International, The Hague, 2003, p. 107 ("political manipulation will derive from *realpolitik*, which will use international criminal justice as a tool to achieve its goals"); see also Felix Olick, "Ocampo remarks spark fury over 'politics' around Kenyan ICC cases", in *Standard Digital*, 9 February 2014 (citing criticism by lawyers over what they perceived to be an infiltration of "international politics" into the Court, following a statement made by former prosecutor Ocampo that diplomats had attempted to exert pressure on him as he launched his investigation into Kenya: "There were some diplomats asking me to do something more to prevent Mr. Kenyatta or Mr. Ruto to run in the elections. I said, it's not my job. Judges in Kenya should do that. And if they authorise them to run, people will vote. And if people vote for them, we have nothing to say"); David Bosco analysed the Court's dependence and interdependence, noting that:

> on paper at least, the International Criminal Court is a striking advance for the legalist worldview against the traditional concept of sovereignty […] the ICC is designed to be

dictional limitations,[4] prove a constant hindrance to formal criminal prosecution.

The preliminary examination stage, briefly introduced in the Rome Statute, has the potential to be a procedural vessel by which the Prosecutor may indeed look "beyond the narrow aspects of the courtroom".[5] The

> largely free from political control. The court's prosecutor and its judges are asked to work on the basis of the court's governing statute, a set of carefully defined crimes, and the court's rules of evidence and procedure […] Yet the Rome Statute also made clear that the court would be entirely dependent on state resources to succeed. Negotiators gave the court no enforcement tools of its own. Investigations on national soil require official permission and access. To apprehend suspects, the court leans on state police and military forces. Financially, the court relies on annual dues from members […] If the court needs support of states in general, those major powers that enjoy global reach and influence are particularly important. These states have the economic, diplomatic, intelligence, and military resources needed to help turn the court's writ into reality either directly or via pressure on those whose cooperation is essential in particular cases.

See David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics*, Oxford University Press, Oxford, 2014, pp. 3–4.

3 See, for example, William W. Burke-White, "Regionalization of International Criminal Law Enforcement: A Preliminary Exploration", in *Texas International Law Journal*, 2003, vol. 38, p. 738 ("The monetary costs of international criminal law enforcement have been and will continue to be a significant hindrance to the effective operation of international tribunals"); Pierre-Richard Prosper, former U.S. Ambassador-at-Large for War Crimes, Statement before the House International Relations Committee on the U.N. Tribunals for Rwanda and the Former Yugoslavia and the ICC, 28 February 2002 ("the process [of international criminal justice as seen through the work of the Tribunals], at times, has been costly, has lacked efficiency, has been too slow"); Patricia M. Wald, "To Establish Incredible Events by Credible Evidence: The Use of Affidavit Testimony in Yugoslavia War Crimes Tribunal Proceedings", in *Harvard International Law Journal*, 2001, vol. 42, p. 536 (Wald, a former US judge at the ICTY, noted that the "United Nations is understandably anxious to bring to closure the ICTY and the tribunal for Rwanda (ICTR), which together consume almost ten percent of the total UN budget").

4 See, generally, Awa Njoworia Valerie Adamu, *The Jurisdictional Limitations of the Statute of the ICC: The International Criminal Court, Jurisdiction and the Crimes Under the Jurisdiction of the Court*, LAP LAMBERT Academic Publishing, Saarbrücken, 2012.

5 This echoes what Professor Mirjan Damaška coined as the 'didactic function' of the ICC, and the role of international criminal law actors as 'moral teachers'. As Damaška explains, international criminal courts should "look beyond the effect of their decisions on potential criminals. Instead, they should aim their denunciatory judgments at strengthening a sense of accountability for international crime by exposure and stigmatization of these extreme forms of inhumanity. This exposure is apt to contribute to the recognition of basic humanity. To the extent that international criminal courts are successful in this endeavor, humanitarian norms would increasingly be respected – the low probability of their violations be-

preliminary examination stage, as Carsten Stahn writes, could thus be understood not purely in a technical sense, as a 'filter' for determining when to launch an investigation, but rather taking into account its broader virtues underpinned "in its alert function and its communicative power towards the creation of a broader 'international system of justice'".[6] This approach is further reflected in the declared goals of the preliminary examination stage. As the OTP clarified in its 2013 Policy Paper on Preliminary Examinations, "in the course of its preliminary examination activities, the Office will seek to contribute to the two overarching goals of the Rome Statute: the ending of impunity, by encouraging genuine national proceedings, and the prevention of crimes".[7] These goals are clearly more far-reaching than the expeditious indictment of a carefully drawn up list of alleged perpetrators.[8]

ing visited with criminal punishment notwithstanding". Mirjan R. Damaška, "What is the Point of International Criminal Justice?", in *Chicago-Kent Law Review*, 2008, vol. 83, no. 1, p. 329, p. 345.

6 Carsten Stahn, "Damned if you do, damned if you don't: Challenges and Critiques of ICC Preliminary Examinations" (on file with the author). See also Grotius Centre for International Legal Studies, "Preliminary Examination and Legacy/Sustainable Exit: Reviewing Policies and Practices" (hereinafter 'Grotius Centre Report'), para. 5:

> [T]he OTP may have more leverage over States during preliminary examinations than during investigation, due [to] the scope of choice/discretion involved and the unpredictability of the outcome. OTP action might have most effects on actors on the ground at this stage, since unlike in the context of arrest warrants, the Office was not yet 'locked in'. It was argued that in situations where the context is right, preliminary examinations could be used to facilitate choices in relation to peace and justice. Preliminary examinations could be used to facilitate a number of goals: prevention of atrocity crimes, shape the agenda of peace negotiations, or serve as catalyst for complementarity and/or transitional justice. Preliminary examinations could also have a certain deterrent effect due to their element of surprise, their 'watchdog function' (that is, the fact of 'being watched'), and the structural relationship between the OTP and the state concerned (that is, monitoring, putting pressure, providing reward for behaviour). These factors make preliminary examinations a powerful instrument […].

7 ICC Office of the Prosecutor, *Policy Paper on Preliminary Examinations*, para. 93 (http://www.legal-tools.org/doc/acb906/).

8 At the same time, however, it is important to clarify that the ICC will not open a preliminary examination "merely with the purpose of prevention or 'positive complementarity'", and in that regard the need for the information relating to the situation must substantiate some form of initial basis for a potential investigation. See Grotius Centre Report, see *supra* note 6, para. 8.

It should thus come as no surprise that for the ICC Prosecutor, Fatou Bensouda, preliminary examinations have proved to be "one of the most remarkable efficiency tools" the OTP has at its disposal.[9] But the efficiency of the preliminary examination stage hinges on balanced, impartial utilization by the Prosecutor that is conducive to both political stability and the legitimacy of the Court.[10] This is a matter of concern to some since, during a preliminary examination, significant latitude is in the hands of the Prosecutor, who already enjoys "extremely wide" discretion "when compared to national courts and even *ad hoc* tribunals".[11] This

9 Fatou Bensouda, "Reflections from the International Criminal Prosecutor", in *Case Western Reserve Journal of International Law*, 2012, vol. 45, no. 1, p. 509. Phakiso Mochochoko, the Director of the Jurisdiction, Complementary and Cooperation division had hinted the same: "The Office of the Prosecutor can make a substantial contribution, in proactively collecting information and monitoring situations under preliminary examination". See Phakiso Mochochoko, "Open Debate of the United Nations Security Council on Peace and Justice, with a special focus on the role of the International Criminal Court: Address on behalf of the Prosecutor", 17 October 2012 (http://www.legal-tools.org/doc/a7d99b/).

10 As noted by Damaška, "as the interdisciplinary literature on norm acceptance through persuasion suggests, there exists a necessary condition for [international criminal courts] success in performing [the] socio-pedagogical role [that is their 'didactic function']: they should be perceived by their constituencies as a legitimate authority. Lacking coercive power, their legitimacy hangs almost entirely on the quality of their decisions and their procedures". See Damaška, see *supra* note 5, p. 345.

11 Antonio Coco, "Article 13(c)", in Mark Klamberg (ed.), *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, Brussels, 2017, fn. 183 (http://www.legal-tools.org/doc/aa0e2b/). One reflection of this concern can be found in the January 2017 resolution by the African Union, which welcomed notifications by Burundi, South Africa, and The Gambia of withdrawal from the ICC and further adopted a withdrawal strategy for the Union. The Resolution also included calls for reforming the ICC, given the dissatisfaction of the AU with the Court and what they perceive as an inequitable international criminal justice system. For further reading see Emmanuel Igunza, "African Union backs mass withdrawal from ICC", in *BBC News*, 1 February 2017. See also Russian Federation, "Decree on the Intention not to become a Party to the Rome Statute of the International Criminal Court", 16 November 2016 (http://www.legal-tools.org/doc/02c22f-1/):

> Unfortunately the Court failed to meet the expectations to become a truly independent, authoritative international tribunal. The work of the Court is characterized in a principled way as ineffective and one-sided in different fora, including the United Nations General Assembly and the Security Council. It is worth noting that during the 14 years of the Court's work it passed only four sentences having spent over a billion dollars. In this regard the demarche of the African Union which has decided to develop measures on a coordinated withdrawal of African States from the Rome Statute is understandable. Some of these States are already conducting such procedures.

project on "Quality Control in Preliminary Examination" thus asks contributors the following research question: in light of the above considerations, how can we ensure greater awareness and improvement of quality in the work of the OTP at the preliminary examination stage?

To answer this question, I begin by adopting a definition of 'quality control' that is similar to that introduced by Morten Bergsmo in the 2013 CILRAP-project on 'Quality Control in Fact-Finding', tweaked to accommodate the unique features of preliminary examinations. For the purposes of this chapter, a quality control approach "invites consideration of how the quality of every functional aspect" of a preliminary examination can be improved including "work processes to identify, locate, obtain, verify, analyse, corroborate, summarise, synthesise, structure, organise, present, and disseminate" law and facts as they relate to each specific situation under prosecutorial review, and to the decision as to whether or not to open an investigation.[12] In line with this definition, the chapter looks at only one institutional component that may serve to ensure greater quality awareness and ultimate improvement: effective control mechanisms over prosecutorial discretion in the review of situations in the pre-investigation phase.

The topic of controlling prosecutorial discretion, both in the domestic and the international planes, has been the subject of significant scholarship.[13] Judge Gerard E. Lynch summarized this literature by suggesting

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[12] Morten Bergsmo, "Foreword by the Editor", in Morten Bergsmo (ed.), *Quality Control in Fact-Finding*, Torkel Opsahl Academic EPublisher, Florence, 2013, p. viii (http://www.toaep.org/ps-pdf/19-bergsmo).

[13] For domestic analysis see, for example, Stephanos Bibas, "Prosecutorial Regulation Versus Prosecutorial Accountability", in *University of Pennsylvania Law Review*, 2007, vol. 157, no. 4, p. 1002 (noting that "[m]uch management literature bemoans excessive corporate hierarchies and praises the recent trend toward flattening and slimming layers of bureaucracy […] General Electric, for example, became leaner and more flexible by slimming down from twenty-nine to six levels […] In contrast, prosecutors' offices have nowhere near six levels of review. Many prosecutors' offices are at the other extreme of the spectrum, with virtually no effective oversight in most cases. Rather than being regulated to death, even line prosecutors express frustration with the lack of coordination. Because the problem is the opposite one, the solution is as well"); John H. Langbein, "Controlling Prosecutorial Discretion in Germany", in *University of Chicago Law Review*, 1974, vol. 41, no. 3, p. 439; Sara Sun Beale, "Prosecutorial Discretion in Three Systems: Balancing Conflicting Goals and Providing Mechanisms for Control", in Michele Caianiello and Jacqueline S. Hodgson (eds.), *Discretionary Criminal Justice in a Comparative Context*, Carolina Academic Press, Durham, 2015, p. 52 (looking at prosecutorial discretion in the U.S.,

that while critics of broad discretion wish to see clear self-executing rules that would "prevent officials from applying subjective and potentially biased standards", defenders of discretion claim that such a view would be "intolerable if pressed to extremes". Discretion, they argue, is "part of the function of the criminal law, that must in turn be moderated by sensible officials who understand that not every case that falls within the literal terms of the law is meant to be punished". Yet, even were we to accept some measure of prosecutorial discretion as inevitable, it would not follow that "the discretion should be exercised without public accountability, or that some form of review of the resulting decisions should not be permitted".[14]

This chapter seeks to examine what model of prosecutorial control was adopted by the drafters of the Rome Statute in the context of preliminary examinations, and where this model has proved ineffective in the work of the ICC to date. The chapter proceeds in the following order. Section 19.2. briefly summarizes the normative framework that governs the preliminary examination stage, with a particular focus on prosecutorial independence.

Section 19.3. maps out the existing control mechanisms over OTP activities at the preliminary examination stage, looking at both internal oversight in the form of self-regulation, or 'office common law', and external oversight in the form of mandatory review by the PTC. Particular emphasis will be given to development of oversight mechanisms as part of the Court's evolution and on particular cases during which this oversight was put to the test.

Germany, and France the author concludes "all three national systems have structural mechanisms designed to provide a degree of democratic accountability. The issue in both is how to balance the need for accountability with the commitment to prosecutorial neutrality and independence, especially in cases involving the investigation of politically prominent suspects who are members – or opponents – of the current government"); CHEN Siyuan, "The Limits of Prosecutorial Discretion in Singapore: Past, Present, and Future", in *International Review of Law*, 2013, vol. 5, p. 1. For analysis of prosecutorial discretion in the ICC, see DONG Jingho, "Prosecutorial Discretion at the International Criminal Court: A Comparative Study", in *Journal of Politics and Law*, 2009, vol. 2, no. 2, p. 109; 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, p. 510.

14 Gerard E. Lynch, "Prosecution: Prosecutorial Discretion", in *Encyclopedia of Crime and Justice*, 2002.

Section 19.4. will discuss the difficulties with which the currently existing oversight framework is faced, using the Palestinian preliminary examination as a case study. The section will focus on three key issues related to preliminary examinations that are exemplified in the Palestinian case: (1) the potential for the politicization of the Court; (2) the problems faced by the OTP when attempting to articulate generalized prioritization policies and exit strategies; and (3) the regulation of evidentiary standards at the preliminary examination stage.

Finally, as mentioned at first, Section 19.5. will suggest four areas for potential reform, including (1) re-phasing of preliminary examinations and the introduction of a Gantt-based review process and a sliding scale of transparency requirements; (2) redefinition of the relationship between the OTP and PTC at the preliminary examination stage; (3) redrafting existing OTP policy papers on Preliminary Examinations and Interests of Justice and the adoption of a new Policy Paper on Evidence, Evidentiary Standards, and Source Analysis; and (4) introducing a 'Committee of Prosecutors' as a new external control mechanism.

19.2. Normative Framework

19.2.1. Legislative Structures

It is obvious that the drafters of the Rome Statute "did not anticipate the significance that is now attached to Preliminary Examinations".[15] If anything, the drafters assumed that preliminary examinations would be a far weaker process with a much shorter leash, since the general obligation to co-operate under Part 9 of the Statute only applies to investigations and cases.[16] As a result, the Rome Statute stipulates only general and largely

[15] William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford, Second Edition, 2016, p. 46. See also, Stahn, see *supra* note 6, p. 3 ("When the Rome Statute was drafted, hardly anyone contemplated how important preliminary examinations would become in the operation of the ICC").

[16] See Rome Statute of the International Criminal Court (last amended 2010), Article 86 (http://www.legal-tools.org/doc/7b9af9/). Surprisingly, the preliminary examination stage is now considered by some to have provided the OTP more power than any other stage. See Grotius Center Report, see *supra* note 6, para. 5:

> Several participants argued that PEs have a certain intrinsic value that goes beyond investigations. The point was made that the OTP may have more leverage over States during PEs than during investigation, due the scope of choice/discretion involved and the unpredictability of the outcome. OTP action might have most effects on actors on

vague factors that must be considered during the preliminary examination phase as detailed in Article 53(1):

> The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
>
> (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed.
>
> (b) The case is or would be admissible under Article 17; and
>
> (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.
>
> If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.[17]

The term 'preliminary examination' itself is introduced in the Rome Statute only indirectly. Article 15(6) refers to the procedural obligations of the Prosecutor when exercising her *proprio motu* powers to review a potential situation.[18] The Prosecutor is called to "analyse the seriousness of the information received" and "seek additional information from States,

the ground at this stage, since unlike in the context of arrest warrants, the Office was not yet 'locked in'. It was argued that in situations where the context is right, PEs could be used to facilitate choices in relation to peace and justice.

17 Rome Statute, *ibid.*, Article 53(1).

18 *Ibid.*, Article 15(6) ("If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall information those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence"). Article 42(1) of the Statute, in laying out the mandate of the OTP, also makes an implied mention of preliminary examinations, noting that: "The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court".

organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate".[19] On the basis of this information, gathered over the course of this stage, coined by the Statute as a preliminary examination, the Prosecutor is instructed to decide whether there is "reasonable basis for an investigation".[20] Although this is not expressly stated, it is inferred from Article 53 that the preliminary examination stage is required not only in *proprio motu* decisions, but in fact in all scenarios, including those where the review is triggered by the United Nations Security Council or by a referral from a State Party.[21] Furthermore, the practice of the OTP has been to open a preliminary examination, "as a matter of policy", in all situations where a declaration pursuant to Article 12(3) is made by a non-State Party.[22]

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19 *Ibid.*, Article 15(2). Note that the creation of this pre-investigation stage is unique to the ICC, compared with the *ad hoc* tribunals which had specific jurisdiction over a single situation. As further explained by Ambos and Stegmiller, the

> preliminary examination stage is an important and necessary innovation compared to the pre-trial procedure of former International Criminal Tribunals (the International Military Tribunals in Nuremberg and Tokyo, the ICTY and ICTR, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia and the Special Tribunal for Lebanon). Contrary to these *Ad Hoc* International Criminal Tribunals that all possessed jurisdiction over a specific situation, limited in temporal and territorial terms, the ICC does not have such jurisdictional limitations. Instead, the ICC must pre-investigate and select its own situations. Even in the case of *prima facie* pre-defined situations, by way of a SC or State referral.

Kai Ambos and Ignaz Stegmiller, "Prosecuting international crimes at the International Criminal Court: is there a coherent and comprehensive prosecution strategy?", in *Crime, Law and Social Change*, 2012, vol. 58, no. 4, p. 421.

20 *Ibid.*, Article 15(1), (2), (6).

21 Schabas, see *supra* note 15, p. 829 ("This is implied by Article 53 because it is necessarily the basis for the decision of the Prosecutor about whether or not to proceed with an investigation. The consequences of this scheme is that an investigation under Article 53 cannot begin until the Prosecutor has carried out a preliminary examination."). ICC OTP, *Report on Preliminary Examination Activities*, 14 November 2016, para. 10 (http://www.legal-tools.org/doc/f30a53/) ("As required by the Statute, the Office's preliminary examination activities are conducted in the same manner irrespective of whether the Office receives a referral from a State Party or the Security Council or acts on the basis of information on crimes obtained pursuant to article 15").

22 *Ibid.*, pp. 358–359 ("as a matter of policy the Prosecutor responds to Article 12(3) declaration by conducting a 'preliminary examination' in accordance with Article 15, treating the declaration in the same way as it treats a referral by a State Party or by the Security Coun-

Rule 48 of the Rules of Procedure and Evidence establishes that in determining whether there is "reasonable basis to proceed with an investigation" the Prosecutor shall consider the three factors set out in Article 53(1)(a) to (c).[23] Based on this rule, the OTP has adopted a four-phased 'filtering process' which is flexible enough, according to the Office, to allow for engagement in a "holistic approach" throughout the preliminary examination stage.[24]

Phase 1 consists of a 'pre-preliminary examination', which encompasses the analysis of communications to conclude whether the information available is serious enough to warrant the launching of a preliminary examination, and whether such examination would not be frivolous. Of all phases, there is the least amount of public information available about the general procedures and structures adopted by the OTP at this phase, as well as statistics regarding the number and nature of Phase 1 processes launched or closed.[25]

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cil. However, unlike a referral the Article 12(3) declaration does not entitle a non-party State that has made the declaration to contest a decision by the Prosecutor not to proceed").

23 Rules of Procedure and Evidence of the International Criminal Court, as amended on 22 May 2013, ICC-ASP/1/3, U.N. Doc. PCNICC/2000/1/Add.1, Rule 48 (2000).

24 *2016 Preliminary Examination Report*, see *supra* note 21, para. 15 (by "holistic approach" the OTP intends that while each phase focuses on a distinct statutory factor, the analysis itself is not formalistically rigid). See also Schabas, see *supra* note 15, p. 400 ("The first phase consists of a general analysis of the seriousness of information provided to the Court. Situations that are outside the jurisdiction can be quickly weeded out. No doubt there are many frivolous submissions, filed by cranks or by well-meaning but ill-informed activists, perhaps searching for a bit of publicity rather than out of any serious hope that prosecutions could result. Phase two, which is really the formal beginning of the examination, deals with the precondition for the exercise of jurisdiction set out in Article 12 of the *Statute* and whether a reasonable basis exists to think that the alleged crimes are within the Court's subject-matter jurisdiction. Already attention is given to whether or not potential cases may exist. The third phase concerns the admissibility of potential cases, applying the two main criteria of complementarity and gravity. Finally, phase four examines whether the 'interest of justice' may nevertheless tip the balance against prosecution. An internal report that analyses the relevant factor s and concludes with a recommendation is then submitted to the Prosecutor, who decides whether there is a reasonable basis for an investigation").

25 It is in this context that Amitis Khojsteh, "The Pre-Preliminary Examination Stage: Theory and Practice of the OTP's Phase 1 Activities", in Morten Bergsmo and Carsten Stahn (eds), *Quality Control in Preliminary Examination: Volume 1*, Torkel Opsahl Academic EPublisher, Brussels, 2018, chap. 8 offers some unique insight into this under-researched and under-discussed phase.

Phase 2, the formal initiation of a preliminary examination, correlates with Article 53(1)(a) and involves an examination of the preconditions to the exercise of jurisdiction by the Court, including territorial or personal, temporal and subject-matter jurisdiction.

Phase 3 correlates with Article 53(1)(b) and focuses on the admissibility of potential cases in terms of complementarity and gravity.

Finally, Phase 4 correlates with Article 53(1)(c) and involves the consideration of the interests of justice prior to the formulation of a final recommendation to the Prosecutor on whether a reasonable basis to initiate an investigation exists.[26]

As of the date of writing, the OTP is reviewing 8 ongoing preliminary examinations. Three (Gabon, Palestine, and Ukraine) are at Phase 2, four (Colombia, Guinea, Iraq/UK, and Nigeria) are at Phase 3, and one, concerning Afghanistan, is pending authorization from the Pre-Trial Chamber III to initiate an investigation.[27] This growing list of situations includes some of the most politically fraught and highly publicized con-

[26] Originally the OTP delineated only three phases of the Preliminary Examination process. See OTP, "Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications (September 2003)" (http://www.legal-tools.org/doc/f53870/):

> The first phase of analysis is an initial review to identify those communications that manifestly do not provide any basis for further action. Following this determination, acknowledgements will be sent, either providing reasons for the decision not to proceed or else advising that further analysis will be undertaken. Once the initial backlog of communications is cleared, the Office will endeavour to ensure that this first phase is completed and acknowledgements are sent within one month of receipt of any communication sent in a working language of the Court. The second phase of analysis is a more detailed legal and factual analysis of significant communications, carried out by JCCD, with support from the Investigation Division, under supervision of the Executive Committee and the Prosecutor. The most serious situations will proceed to the third phase, advanced analysis and planning. During this phase, the Office may develop an investigation plan, in which case a joint team will be created, led by the Investigation Division and including members of the Investigation Division, Prosecution Division and JCCD. In this third phase, a decision may be taken to initiate an investigation under Article 53 or to seek Pre-Trial Chamber authorization under Article 15(3).

[27] ICC OTP, *Report on Preliminary Examination Activities*, 4 December 2017 (http://www.legal-tools.org/doc/e50459/). The number of situations under phase 1 review is not disclosed by the OTP. On 29 November 2017, the Prosecutor notified the PTC of her "final decision" regarding the preliminary examination pertaining to registered vessels of Comoros, Greece and Cambodia, ending an examination which began with a referral dating 14 May 2013 from the Government of the Union of Comoros.

flicts and hotspots around the world, and thus stands in stark contradiction to the limited number of predominantly African cases currently on the ICC docket. While some of these situations relate to alleged crimes that are relatively recent (for example, those committed in Gabon since May 2016), others concern crimes allegedly committed years ago (for example, the preliminary examination into the situation in Afghanistan which has been ongoing since 2007, and which concerns alleged crimes committed since 2003).

Some critics have raised the concern that "[t]he OTP's lengthy open-ended analysis of several situations", coupled with "the absence of reporting over long periods", have "strained the credibility of its preliminary examinations" and have made its few public statements appear "more like posturing".[28] For example, concerning the aforementioned preliminary examination in Afghanistan, in its November 2016 update on preliminary examinations, the OTP made the much-anticipated statement that "a final determination" with respect to the situation, which has been ongoing for a decade, will be made "in the very near future".[29] It took an additional year for the Office to conclude the examination and request authorization from the Court to initiate an investigation into alleged war crimes and crimes against humanity committed as part of or with a nexus to the armed conflict in Afghanistan since 1 May 2003.[30]

[28] Human Rights Watch, *ICC: Course Correction: Recommendations to the Prosecutor for a More Effective Approach to "Situations under Analysis"*, 16 June 2011 (http://www.legal-tools.org/doc/43aefb/).

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

[30] OTP, "Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 20 November 2017" (http://www.legal-tools.org/doc/db23eb/). For an analysis of the potential reasons for the delay see David Bosco, "Will the ICC Launch a Full Investigation in Afghanistan?", in *Lawfare*, 8 May 2017. Same criticisms can be raised with regard to the Preliminary Examination on Colombia, which has been open for more than ten years, and some NGOs are criticizing as "unacceptable". See Stéphanie Maupas, "ICC Prosecutor at a Turning Point", in *JusticeInfo*, 7 March 2017; see also Luis Moreno-Ocampo, "The ICC's Afghanistan Investigation: The Missing Option", in *Lawfare*, 24 April 2017.

19.2.2. Prosecutorial Independence and External Review

Interestingly enough, the drafters of the Rome Statute were never concerned with prosecutorial thumb-twiddling of the kind described above; they were far more worried about prosecutorial foot-stomping. This concern may be noted in the debates that led to the introduction of prosecutorial powers *proprio motu* under Article 15 of the Statute. The image of an all-mighty global prosecutor with *proprio motu* powers, a "lone ranger running wild",[31] concerned the US delegation (and many other delegations), as expressed in an official statement circulated towards the end of the Rome Statute negotiations in 1998:

> The United States strongly supports an effective ICC Prosecutor who will be able to exercise independent judgment and who will be perceived as impartial and fair. […] The United States is strongly of the view that the principles of prosecutorial independence and effectiveness are not only fully consistent with, but ultimately will be best served by, the structure proposed by the ICC under which the Prosecutor's authority to embark on an investigation is triggered by a referral by a State or the Security Council. It is our firm view that the proposal for a *proprio motu* prosecutor – one tasked with responding to any and all indications that a crime within the potential jurisdiction of the Court may have been committed – not only offers little by way of advancing the mandate of the Court and the principles of prosecutorial independence and effectiveness, but also will make much more difficult the Prosecutor's central task of thoroughly and fairly investigating the most egregious crimes.[32]

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[31] Danner, see *supra* note 13, p. 513 ("Opponents argued that the Prosecutor could become either a "lone ranger running wild" around the world targeting highly sensitive political situations or a weak figure who would be subject to manipulation by states, NGOs, and other groups who would seek to use the power of the ICC as a bargaining chip in political negotiations").

[32] Statement of the United States Delegation Expressing Concern Regarding the Proposal for a *Proprio Motu* Proecutor (22 June 1998), reprinted in Rod Grams (ed.), *Is a U.N. International Criminal Court in the U.S. National Interest?*, Hearing before the Subcommittee on International Operations of the Committee of Foreign Relations of the U.S. Senate (23 July 1998), pp. 147–150. The International Law Commission further promoted this position. The ILC was of the view that, absent support from a State Party or the UNSC, prosecution of crimes under the Statute should not be undertaken. The ILC assumed the Prosecutor would be vulnerable to political pressure, and that therefore the support of State parties or

Supporters of *proprio motu* powers, on the other hand, were equally concerned with the independence and effectiveness of the OTP, arguing that by limiting the Prosecutor's investigatory capabilities "to situations identified by overtly political institutions like States and the Security Council", the drafters would "decrease the independence and credibility of the Court as a whole".[33] The final wording of Article 15 was therefore a compromise, "one of the most delicate provisions of the Statute" and the product of "extensive debates and divisions of views throughout the drafting process and until the end of the Rome Conference".[34] The proposal was put forward by German and Argentina. While it granted the Prosecutor *proprio motu* powers, it simultaneously put checks on those powers. As was further explained by Judge Fernandez in his separate opinion on the Côte d'Ivoire situation: "there was growing recognition that there were some real risks of abuse of power and that some checks and balances were needed, both in order to prevent arbitrary decisions taken in a solitary fashion by the Prosecutor, and to help insulate the Prosecutor from external pressure".[35]

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the UNSC would prevent "frivolous, groundless, or politically motivated campaigns". Draft Statute of the International Criminal Court in Report of the International Law Commission on the Work of its Forty-Sixth Session A/CN.4/SER.A/1994/Add.l (Part 2), reprinted in *Yearbook of the International Law Commission 1994: Report of the Commission to the General Assembly on the work of its forty-sixth session*, 1997, p. 46.

33 Danner, see *supra* note 13, p. 514.

34 Situation in the Republic of Kenya, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the republic of Kenya, 31 March 2010, ICC-01/09, paras. 17–18. See also Dissenting Opinion of Judge Hans-Peter Kaul to the same judgment, para. 12 (Article 15 was "one of the most fervently negotiated provisions of the Rome Statute"). In favour of the *proprio motu* powers were Thailand, Lesotho, Jordan, Mexico, Costa Rica, Venezuela, Morocco, Australia, New Zealand, the Czech Republic, Romania, Trinidad and Tobago, the Netherlands, Norway, Italy, South Africa, Tanzania, Brazil, Denmark, Madagascar, Germany, Sweden, Slovenia, Canada, Chile, Bahrain, Andorra, Greece, Senegal, Azerbaijan, Republic of Korea, Switzerland, Togo, Sierra Leon, Portugal, Burkina Paso, Peru, Uruguay, Namibia and Poland. Opposing the powers were the US, Nigeria, Iran, Kenya, Yemen, Iraq, Indonesia, India, Israel, Libya, Cuba, Egypt, Saudi Arabia, China, Russian Federation, Tunisia, Algeria, Turkey, United Arab Emirates, Pakistan, and Bangladesh. For further reading, see Schabas, see *supra* note 15, p. 396.

35 Situation in the Republic of Côte d'Ivoire, Judge Fernandez de Gurmendi's Separate and Partially Dissenting Opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, ICC-02/11, para. 8. See also, Situation in the Republic of Kenya, see *supra*

Stepping outside Article 15 and looking at the power to launch preliminary examinations more broadly, two primary checks and balances are included in the Statute. The first check concerns the obligation to provide reasoning in cases of dismissal as a matter of general fairness. If the Prosecutor seeks not to initiate an investigation, under Rule 105 of the Rules of Procedure and Evidence she is required to "promptly inform in writing" the State(s) that referred the situation to the Prosecutor under Article 14 or the Security Council in respect of situations covered by Article 13(b). This obligation to notify applies, under Article 15(6), in respect of "those who provided information" for a *proprio motu* preliminary examination. Such notifications must include the reasons for the dismissal/decision not to investigate, while taking into account any potential danger to the safety, well-being, or privacy of victims or witnesses.[36]

A second check on the preliminary examination activities of the OTP was introduced in Articles 15 and 53, in the form of judicial review by the PTC. This judicial review is limited to certain specific scenarios: (a) when the Prosecutor decides to proceed *proprio motu* with an investigation it must seek the authorization of the PTC;[37] (b) in situations of Security Council or State Party referrals, the referring parties are entitled to request judicial review by the PTC of the Prosecutor's decision (in relation to determinations not to open an investigation on the basis of jurisdiction or admissibility);[38] and (c) in the case of a decision by the Prosecutor not to open an investigation, based solely on the conclusion that an investigation would not serve the interests of justice, the PTC may review the decision on its own initiative, and the decision shall be effective only if confirmed by it.[39]

note 34, para. 18 (where it noted that the drafters sought a "balanced approach that rendered the *proprio motu* power of the Prosecutor to initiate an investigation acceptable to those who feared it" by introducing the PTC as a check so to alleviate the "risk of politicizing the Court and thereby undermining its credibility").

36 See Rules of Procedure and Evidence, see *supra* note 23, at Rule 105; Rome Statute, see *supra* note 16, Article 15(6). Note, that no obligation to provide such notification is required in the case of Article 12(3) declarations.

37 Rome Statute, *ibid.*, Article 15(3)-(4).

38 *Ibid.*, Article 53(3)(a).

39 *Ibid.*, Article 53(3)(b).

It is in this context that Articles 15 and 53 are "closely associated" and lay out the full scope of prosecutorial discretion by mapping the Prosecutor's independent role in the selection of situations for prosecution.[40] The PTC, however, may not become engaged following a decision to close an examination launched *proprio motu* (including those launched on the basis of Article 12(3) declarations), or in cases where the UNSC or referring States do not seek to challenge the decision of the OTP to close an investigation (or where such investigations are eventually launched).[41] This significantly reduces the potential scope of judicial review over preliminary examination decisions.[42]

Some have contemplated whether the Assembly of State Parties ('ASP') offers some additional form of control over the Prosecutor. The ASP does elect the Prosecutor and Deputy Prosecutor, and in theory has the power of removing them by a majority vote.[43] Such removal can only occur if serious misconduct or a serious breach of duties has occurred.[44] Additionally, a few scholars have pondered whether the ASP may use its

40 Schabas, see *supra* note 15, p. 394 (noting further that the Prosecutor is "beyond any doubt the most important individual at the Court. She may also be one of the most powerful, perhaps indeed the most powerful, official in any international organization, including the United Nations").

41 The Prosecutor is also subject to judicial review in a case where it seeks to take the testimony or a statement, examine, collect or test evidence of a witness which may not be available subsequently for the purposes of a trial (cases of "unique investigative opportunities"). See Rome Statute, see *supra* note 16, article 56.

42 The PTC may theoretically examine a decision by the Prosecutor not to open a Preliminary Examination under Regulation 46(3) of the Regulations of the Court; however, the PTC has interpreted that power narrowly. See Request under Regulation 46(3) of the Regulations of the Court (ICC-RoC46(3)-01/14), Decision on the 'Request for review of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014', Pre-Trial Chamber II, 12 September 2014 (the Pre-Trial Chamber rejected the request by President Mohamed Morsi and the Freedom and Justice Party of Egypt to review of the Prosecutor's decision not to open a Preliminary Examination, limiting the scope of their review).

43 Judges may only be removed by a two-thirds vote, making the Prosecutor slightly more accountable to the ASP than the judges.

44 Rome Statute, see *supra* note 16, Article 46. This control is made possible through the work of the independent oversight mechanism established in 2009 under the Office of Internal Audit. For further reading see Assembly of State Parties to the Rome Statute, "Establishment of an Independent Oversight Mechanism", ICC-ASP/8/Res.1, adopted by consensus at the 7th Plenary Meeting, 26 November 2009.

significant control over budgetary decisions to micromanage prosecutorial decision-making at the pre-trial stage.[45]

Overall, the regulatory framework under the Statute at the preliminary examination stage grants significant discretion to the Prosecutor, establishes minimal guidelines on specific aspects of preliminary examination proceedings, and offers, at least on paper, only limited institutional checks on the work of the OTP throughout this crucial phase. On a glorified altar of prosecutorial independence and impartiality, the drafters thus willingly sacrificed significant portions of institutional and mandatory control. This observation recalls a sentiment expressed in the seminal work of Kenneth Culp Davis on "Discretionary Justice":

> If all decisions involving justice to individual parties were lined up on a scale with those governed by precise rules at the extreme left, those involving unfettered discretion at the extreme right, and those based on various mixtures of rules, principles, standards, and discretion in the middle, where on the scale might be the most serious and most frequent injustice? […] I think the greatest and most frequent injustice occurs at the discretion end of the scale, where rules and principles provide little or no guidance, where emotions of deciding officers may affect what they do, where political or other favoritism may influence decisions, and where the imperfections of human nature are often reflected in the choices made. I think that in our system of government, where law ends tyranny need not begin. Where law ends discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness.[46]

In his book, Davis makes two important assertions. First, for every agency decision there is "an optimum point on the scale between rule-of-law at one end and total discretion at the other end", and second, that once this optimum level is achieved discretionary power is "confined, structured, and checked" so as to ensure "the greatest amount of discretionary

[45] Danner, see *supra* note 13, p. 524.

[46] Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry*, Louisiana State University Press, Baton Rouge, 1969, p. V.

justice and the least amount of discretionary injustice".[47] In the following section, we will examine what actions both the Prosecutor and the PTC have taken since the ICC opened its doors in order to reach this optimum level. We will examine both internal and external control mechanisms and how they have evolved over time.

19.3. Existing Oversight Mechanisms

In the years since the Court's establishment, a number of mechanisms have been put in place in an attempt to improve the transparency and predictability of the preliminary examination stage and thereby optimize quality controls over the assessment process of the OTP. These mechanisms have evolved, in great part, due to the institutional evolution of the OTP,[48] the surge in Article 15 communications coming before the Court for examination,[49] and the natural transformations resulting from changes in the identity of the prosecutors and prosecutorial staff. Of these mechanisms, the most fundamental is self-regulation by the OTP. This practice involves the self-imposition of a series of internal guidelines and policies, mandatory checkpoints, reporting obligations, and transparency standards to be applied equally across situations.

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47 Frank J. Remington, "Review: Discretionary Justice: A Preliminary Inquiry", The University of Chicago Law Review, vol. 36, 1969, p. 884, p. 889.

48 Jens Meierhenrich, "The Evolution of the Office of the Prosecutor at the International Criminal Court: Insights from Institutional Theory", in Martha Minow *et al.* (eds.), *The First Global Prosecutor: Promise and Constraints*, University of Michigan Press, Ann Arbor, 2015, pp. 100–102 (noting that "between 2002 and 2012, the OTP underwent a number of far-reaching institutional transformations, all of which had profound effect on the everyday life of international prosecution at the ICC", mapping four developments as "critical junctures" in the institutional development of the OTP during that period: (1) the invention of the JCCD, (2) the introduction of joint teams, (3) the creation of ExCom, and (4) the drafting of an Operational Manual).

49 As of the 2016 reporting period, and since it opened its doors in July 2012, the OTP has received a total of 12,022 Article 15 communications. That said, on average the OTP receives 520 communications a year, more than 70% of which are deemed manifestly ill-founded, and only a handful warrant further analysis (44 in 2014; 42 in 2015; and 28 in 2016). For further reading see 2016 preliminary examination report, see *supra* note 21, para. 18; OTP, *Report on Preliminary Examination Activities*, 12 November 2015, para. 18 (http://www.legal-tools.org/doc/ac0ed2/); *idem*, *Report on Preliminary Examination Activities*, 2 December 2014, para. 18, (http://www.legal-tools.org/doc/3594b3/). See Ambos and Stegmiller, *supra* note 19, p. 422 (noting that "only when the number of communications on potential situations increased, a policy with regard to preliminary examinations became a matter of urgency").

In addition to self-regulation, as we have already discussed, the PTC affords a complementary layer of external oversight over the work of the Prosecutor at a number of limited, but nonetheless crucial, junctures throughout specific preliminary examination review processes. The jurisprudence of the Chamber, in a few key decisions, offers further clarity as to the regulatory framework that governs the Prosecutor's assessment of situations. Further, such rulings play a role in conveying to the OTP the Court's level of comfort regarding certain prosecutorial decisions actions, and policies. Self-regulation and judicial review, which together are currently the only substantive control mechanisms at the preliminary examination stage, will be analysed in this section to determine their effectiveness in ensuring quality control over prosecutorial discretion.

19.3.1. Self-Regulation ('Office Common Law')

Under Rule 9 of the Rules of Procedure and Evidence, the Prosecutor is required to put in place "regulations to govern the operation of the Office".[50] In line with this requirement, at a very early stage (June 2003), the OTP issued a comprehensive draft of regulations that included an in-depth discussion on the values, principles, and structures that should govern the preliminary examination stage.[51] On 5 September 2003, the Prosecutor adopted *ad interim* an abridged version of the draft regulations.[52] Howev-

[50] See Rules of Procedure and Evidence, *supra note* 23, Rule 9.

[51] OTP, Draft Regulations of the Office of the Prosecutor (annotated) (3 June 2003), Part 2: The Management of Preliminary Examination, Article 53(1) Evaluation, and Start of Investigation, pp. 14–20 (amongst other things the draft sets three values and principles that must be met at the Preliminary Examination stage: "(a) ensure the efficient and timely implementation of preliminary examinations and evaluations; (b) establish a transparent and rational decision making process during preliminary examinations and evaluations that guarantees accurate, reasonable and consistent results; (c) enable the Chief Prosecutor to base his decision of whether to start an investigation on a reliable basis, both factually and legally". The draft additionally establishes a log of Article 15 preliminary examinations and Article 53 evaluations, and the designation of Article 15 communications and preliminary examinations by the Deputy Prosecutor (Investigations) to teams within the OTP. The Draft also included a process whereby reports are to be handed to the Deputy Prosecutors, and the way in which decisions on whether a reasonable basis to proceed with an investigation are to be made. Finally, the Draft introduced the concept of a "draft investigative plan" which, together with a recommendation, should form the basis of an application by the OTP to the PTC for opening an investigation *proprio motu*).

[52] For a complete history of the development of the draft regulations, see Carlos Vasconcelos, "Draft Regulations of the Office of the Prosecutor", in Morten Bergsmo *et al*. (eds.), *Historical Origins of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPub-

er, it took more than six years for a limited version of those guidelines – excluding most, if not all, of the substantive policies relating to preliminary examinations – to be formally adopted.[53]

The importance of prosecutors developing internal policies has been reflected, for example, in the 1990 UN "Guidelines on the Role of Prosecutors". While this document is aimed at domestic public prosecutors, it nonetheless offers "standards and principles which are generally recognized internationally as necessary for the proper and independent prosecution of offenses".[54] Article 17 of the UN Guidelines, titled "Discretionary Powers", confirms that:

> In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.[55]

lisher, Brussels, 2017, pp. 801-824 (http://www.toaep.org/ps-pdf/24-bergsmo-rackwitz-song).

53 Regulations of the Office of the Prosecutor, ICC-BD/05-01-09, 23 April 2009, Section 3: Preliminary Examination and Evaluation of Information (http://www.legal-tools.org/doc/a97226/) (these regulations adopt most of the language of Articles 15 and 53 as they are, offering little additional information as to OTP policies at the Preliminary Examination stage. That said, Regulation 29 clarifies that the OTP should "produce an internal report analyzing the seriousness of the information, considering the factors set out in Article 53(1), and offering a recommendation on whether there is reasonable basis in opening an investigation").

54 UN Office of the High Commissioner for Human Rights, "Guidelines on the Role of Prosecutors", adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba (September 1990), Article 1.3(d) (http://www.legal-tools.org/doc/15b063/).

55 *Ibid.*, at Article 17. See further, United Nations Office of Drugs and Crime and International Association of Prosecutors, "The Status and role of Prosecutors: A Guide (2014)", p. 17 (noting that "there are tangible benefits in having established policies and guidelines in prosecution services for all to follow in the performance of their duties. Many prosecution services worldwide have established guidelines for many aspects of a prosecutor's practice, some of them being annotated with recent case law, thus providing a legal backdrop for the policy and allowing prosecutors to take direction from the law. The guidelines (often also known as "policy manuals", "desk books" or "codes") provide both prosecutors and managers with a quick reference to common questions that arise during the daily practice of their profession and allow for quick reference and consistent responses to those queries within the prosecution service and outside it. Making reference to a manual can provide not only direction to the individual prosecutor but also protection from accusations of arbitrary conduct if a decision to pursue or not pursue a certain course of action is challenged

It is indeed a common feature across legal jurisdictions that most prosecutorial discretionary decisions "follow a sort of office common law, that is, habits and patterns of disposition that treat like cases alike".[56] Establishing mandatory structures, procedural hoops, and internal frameworks is a necessary step, since it serves as a compass in the organic evolution of prosecutorial habits, and ensures greater predictability and objectivity in the overall work of the OTP. Looking at both the June 2003 Draft Regulations and the September 2003 paper on "Some Policy Issues before the Office of the Prosecutor" with its accompanying annex on referrals and communications,[57] it is clear that the Court's first prosecutor, Louis Moreno-Ocampo, was receptive to the calls for the Prosecutor to adopt a "public articulation of prosecutorial guidelines that will shape and constrain his discretionary decisions".[58]

However, and intriguingly, despite the fact that Ocampo welcomed the development of internal regulations and policies on preliminary examinations, he insisted that the work products of those processes remain confidential. For example, the Draft Regulations established both logging procedures of preliminary examinations by the Deputy Prosecutor for Investigations, and reporting procedures by OTP-designated preliminary examination teams. Under Ocampo's guidelines, both the logs and the progress reports – including the final 'draft investigative plan' incorporating the recommendation as to whether to open an investigation – were to be treated as confidential internal materials not subject to disclosure.[59] At

at a future date. Reference to how the guidelines guided their decisions can provide an articulable, legally sound response to any challenges that may arise and further promotes transparency in the decision-making process") (http://www.legal-tools.org/doc/f782ce/).

56 Bibas, see *supra* note 13, p. 373.

57 See *supra* note 26.

58 Danner, see *supra* note 13, p. 511.

59 Draft Regulations, see *supra* note 51, Part 2, Regulation 3 ("the Deputy Prosecutor (Investigations) shall keep a Log of all Article 15 preliminary examinations conducted (Preliminary Examinations Log). The Log shall be considered an internal document prepared by the Office of the Prosecutor in connection with the investigation or presentation of a case as specified by rule 81(1) of the Rules of Procedure and Evidence, and not be subject to disclosure"); Regulation 8 ("The Deputy Prosecutor (Investigations) shall keep a Log of all Article 53(1) evaluations conducted. The Log shall be considered an internal document prepared by the Office of the Prosecutor in connection with the investigation or presentation of a case as specified by rule 81(1) of the Rules of Procedure and Evidence, and not be subject to disclosure."); and Regulation 6 ("The report prepared by the Preliminary Exam-

most, the Guidelines established that teams engaged in preliminary examination analysis could provide the Prosecutor with "a recommendation" as to how to "explain and communicate" a decision not to open an investigation "to the general public".[60] So in essence, early-term Ocampo laid the foundations for prosecutorial decision-making at the ICC, by introducing the 'black box', as Stephanos Bibas defined it,[61] and providing the general public with a glimpse of the box's contours. It was left for Ocampo at the end of his tenure, and more pressingly for his successor Bensouda, to open this black box, inviting the public to look inside.[62] This is of course a welcome development, as Bibas explains:

> Opening the black box can help to make prosecutors' decisions more legitimate in the eyes of the public as well as ferret out suspicious patterns that might reflect bias or sloth. Opening the black box would also invite more public input, helping to refine patterns of discretion to better track the public's shared sense of justice. The shared sense of justice is contextual, so this process of refining discretion can make justice more reasoned and reasonable than any set of rules alone could.[63]

The 'opening of the black box' and the increase in transparency regarding the preliminary examination process did not happen spontaneously – it was a slow, gradual process whereby the policies of the OTP ma-

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ination Team and the draft investigation plan shall be considered internal documents prepared by the Office of the Prosecutor in connection with the investigation or presentation of a case as specified by rule 81(1) of the Rules of Procedure and Evidence, and not be subject to disclosure").

60 *Ibid.* at Part 2, Rule 11.2.

61 Bibas, see *supra* note 13, at 373 ("even though outsiders see only a black box with no evident law, insiders recognise norms and customs that yield predictable results").

62 One example of this could be the publicity of preliminary examinations. As Seils write: "during the first two years of operations, the OTP indicated that it would not make public which situations were under preliminary examination. This practice was reversed in 2007". Paul F. Seils, "Making Complementarity Work: Maximizing the Limited Role of the Prosecutor", in Stahn *et al.* (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press, Cambridge, 2011.

63 *Ibid.* See also Staphanos Bibas, "Transparency and Participation in Criminal Procedure", *New York University Law Review*, vol. 81, no. 3, 2006, p. 911, pp. 947–948 ("for criminal punishment to communicate consistently and effectively, criminal procedure must be transparent. Other-wise, current and prospective criminals, victims, and the public do not see justice done or hear the law's message").

tured, its statements to the public increased, and its inclination towards greater elaboration of the reasoning behind its decisions became more profound and inherent. This is what has led William Schabas to conclude that the OTP has exemplified "an impressive and unprecedented degree of transparency, at least by comparison with the equivalent bodies in the *ad hoc* tribunals".[64] Current examples of transparency at the preliminary examination stage abound and include the OTP Policy Paper on Preliminary Examinations, annual reports on the status of ongoing preliminary examinations, detailed analysis of decisions to terminate preliminary examinations, reporting to the UNSC and the ASP, and additional statements and engagements (both in official and non-official capacities) by high-level OTP personnel.[65] Each of these examples deserves individual consideration.

19.3.1.1. Policy Paper on Preliminary Examinations

As we have already seen, since its inception, the OTP has been engaged in a process with the goal of developing and advancing its internal policies and guidelines on how to conduct preliminary examinations. Some of these policies, like the June 2006 "Criteria for Selection of Situations and Cases" draft policy paper, were even circulated for comments among external experts and NGOs.[66] Nonetheless, until November 2013, the OTP operated without a public, official and finalized document detailing the

64 William A. Schabas, *An Introduction to the International Criminal Court*, Cambridge University Press, Cambridge, 5th edition, 2017, p. 372.

65 It is important to note that other policy papers by the OTP may reference preliminary examinations. For example, the November 2016 Policy on Children devoted a section to preliminary examinations. Nonetheless, the Prosecutor seems to merely re-echo positions raised in the Policy Paper on Preliminary Examination, rather than establishing new policies or changing course on existing guidelines. See OTP, *Policy on Children*, November 2016 (http://www.legal-tools.org/doc/c2652b/).

66 See Human Rights Watch, "The Selection of Situations and Cases for Trial before the International Criminal Court: HRW Policy Paper", 26 October 2006 (http://www.legal-tools.org/doc/753e9b/); Ambos and Stegmiller, see *supra* note 19, p. 422 ("In October 2010 the OTP published a Draft Policy Paper on preliminary examinations which was widely circulated and invited critical commentary. This Preliminary Examinations Paper is largely based on an earlier (internal) draft paper on situation and case selection of 2006, which was also circulated, albeit not that widely, for comments among (external) experts.").

legal interpretations employed by the OTP over the course of its preliminary examination determinations.[67]

The release of the final policy paper in 2013 reflected a strong interest by Prosecutor Bensouda in the enhancement of the legitimacy of the Court by formulating "standardized, clear, transparent, and predictable working methods".[68] This helped distinguish between Bensouda and her predecessor, under the direction of whom the OTP faced extensive criticism "for failing to be sufficiently transparent in its decision-making processes".[69] The preliminary examination Policy Paper set forth further transparency-increasing policies, including: OTP yearly reports on preliminary examinations, early interaction with stakeholders, information on high-level visits, and the publication of situation-specific reports (both in cases where a decision to open an investigation or close a situation is made, and for ongoing preliminary examinations, providing the public with an interim analysis of specific topics, such as jurisdiction or admissibility).[70]

On the other hand, the Policy Paper raises certain concerns. One element of the Policy Paper worth noting is its distinction between 'general principles' and 'policy objectives'. The former includes independence, impartiality, and objectivity, which serve as three 'overarching principles' that guide the preliminary examination stage. Missing from that list is the principle of transparency, which is only introduced at the end of the Paper as a 'policy objective'. The OTP thus connects transparency with the other stated 'policy objectives' of positive complementarity and prevention of

67 This document saw an early draft edition being circulated in October 2010, with the continuous delays being explained by the need for a robust consultative process with 'partners'. See Thomas Obel Hansen, "The Policy Paper on Preliminary Examinations: Ending Impunity through 'Positive Complementarity'?", p. 3 (on file with the author). As Hansen details there, criticism has been raised about the slow pace at which these policy briefs have been produced.

68 Fatou Bensouda, "Reflections from the International Criminal Court Prosecutor", in *Case Western Reserve Journal of International Law*, vol. 45, 2012, p. 506.

69 *Ibid.*, p. 1.

70 See also OTP, *Strategic Plan 2016-2018*, 6 July 2015, para. 54 ("to promote a better understanding of the process, correct possible misperceptions and increase predictability, the Office will continue to provide information on its preliminary examination activities through, amongst others, the publication of a yearly overview report and related press release, the issuance of situation-specific reports or statements, and where appropriate, undertaking field activities") (http://www.legal-tools.org/doc/7ae957/).

crimes. In essence, what the OTP is acknowledging is that it is not being transparent for the sake of transparency, but rather that it will utilize disclosures when it deems necessary, as a tool to advance other policy objectives.[71] Transparency, in the eyes of the OTP, is a means, not an end.

Moreover, the OTP uses the following terminology when describing its policy objectives. On positive complementarity, the OTP writes:

> The nature of the Office's efforts towards encouraging genuine national proceedings will be dependent on the prevailing circumstances. The Office will engage with national jurisdictions provided that it does not risk tainting any possible future admissibility proceedings. Nonetheless, the Office can report on its monitoring activities, send in-country missions, request information on proceedings, hold consultations with national authorities as well as with intergovernmental and non-governmental organisations, participate in awareness-raising activities on the ICC, exchange lessons learned and best practices to support domestic investigative and prosecutorial strategies, and assist relevant stakeholders to identify pending impunity gaps and the scope for possible remedial measures.[72]

On the topic of crime prevention, the OTP notes:

> The Office will seek to perform an early warning function. For this purpose, it will systematically and proactively collect open source information on alleged crimes that appear to fall within the jurisdiction of the Court.
>
> This will allow the Office to react promptly to upsurges of violence by reinforcing early interaction with States, international organisations and non-governmental organisations in order to verify information on alleged crimes, to encourage genuine national proceedings and to prevent reoccurrence of crimes.
>
> The Office may also issue public, preventive statements in order to deter the escalation of violence and the further

[71] Thus, for example, the OTP "generally makes all preliminary examinations public, except for those that are in Phase I. A situation in Phase 1 may be made public when there is considerable interest, or if the Office receives many inquiries", see Stahn, see *supra* note 6, p. 13.

[72] OTP, *Policy Paper on Preliminary Examinations*, see *supra* note 7, para. 102.

> commission of crimes, to put perpetrators on notice, and to promote national proceedings […].[73]

In essence, the Policy Paper reaffirms the view that the preliminary examination stage, from the perspective of the OTP, is not centred on the prompt conclusion of the examination as to whether a full investigation should be opened. The OTP has grown to realize that it is in fact most effective when it positions situations in the preliminary examination's figurative parking lot.[74] Once placed there, the OTP is free to actively monitor ongoing political developments, relying on the "shadow of the Court",[75] and the threat of an investigation. The fact that it is not yet committed to specific cases against individual perpetrators further allows the OTP to exert its influence equally on all parties to a situation. Coupled with the fact that "there are no timelines provided in the Statute for bringing a preliminary examination to a close",[76] the OTP is empowered to engage in this leverage strategy, which Stahn coins the 'consequentialist approach', for extensive periods.[77] At the preliminary examination stage,

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73 *Ibid.*, paras. 104–06.

74 Kersten used a culinary analogy to describe the phenomenon, noting that of the Court's "long-lasting examinations like Afghanistan and Colombia, it has often been said that they are left on the 'low-heat' of preliminary examination status as a means for the Court to be able to say it is interested and active in those situations and not because it actually is". See Mark Kersten, "How Long Can the ICC Keep Palestine and Israel in Purgatory?", in *Justice in Conflict*, 29 February 2016.

75 See, for example, "We Should at All Costs Prevent the ICC from Being Politicised", Vereinte Nationen, German Review of the United Nations, vol. 62, no. 1, 2014 (where Prosecutor Bensouda explains: "over time, as the ICC encourages national systems to develop their national jurisdiction and their capacity to try these crimes, people will recognise that the fewer cases we have, the more successful the Court is. "Success" for the ICC should not be gauged by the number of cases we have. Success will be gauged by the deterrent effect of the shadow of the Court in preventing crimes; and by the increase in capacity and ability of national jurisdictions to investigate and prosecute their own crimes. Then the ICC's role will have been fulfilled"); see also, James Verini, "The Prosecutor and the President", 22 June 2016, in *The New York Times* (Ocampo takes a similar position to that of Bensouda, as the author describes – Ocampo believed in the pre-emptive power of prosecution – "the shadow of the court", as he liked to call it. In his inaugural address at The Hague, Moreno-Ocampo said the Court's success would be measured not by how many cases it tried but by how few).

76 *Ibid.*, para. 14.

77 Stahn, see *supra* note 6, pp. 5–6

the OTP becomes in essence a hybrid human rights monitoring body and a fact-finding mission with a forceful whip.[78]

However, as Human Rights Watch has criticized: "using preliminary examinations to influence national authorities or potential violators is no easy task and requires a careful balancing act. While the fact that a situation may come before the ICC initially provides an incentive for authorities to stop crimes or to start their own investigations, that leverage is likely to wane with the passage of time".[79] Some scholars go even further, claiming that there is no empirical evidence to support the proposition that the consequentialist approach is at all effective in achieving the Court's agenda.[80] Stahn summarizes:

> One of the most forceful critiques of the consequentialist approach is the uncertainty regarding the desired effects. The use of preliminary examination as leverage for 'positive complementarity' may trigger unintended political effects: a risk of derailing peace negotiations, rising victim expectations, or 'mimicking' of ICC processes at the national level. Existing experiences show that ICC engagement has promoted complementarity in countries with a strong rule of law culture. It has been less effective in fragile environments. One lesson is that the side effects must be analysed better. The ICC should not open a preliminary examination merely for the purpose of promoting rationales, such as complemen-

78 *Ibid.*, p. 13 ("The OTP has developed the practice of developing annual reports. They are in some respects comparable to country monitoring under human rights mechanisms"), but cf. p. 2 ("ICC preliminary examinations differ partly from human rights documentation by NGOs and fact-finding bodies. They are part of the justice process and address violations specifically through the lens of individual criminal responsibility").

79 Human Rights Watch, "ICC: Course Correction", see *supra* note 28.

80 Seils, see *supra* note 55, p. 998 (as he writes, there is no evidence that publicizing preliminary examinations has "made a difference" in the context of increasing positive complementarity); Geoff Dancy and Florencia Montal, "Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions", *American Journal of International Law*, forthcoming, 2017, pp. 13, 17 ("We contend that the launch of a formal ICC investigation of a particular country is associated with a spike in domestic prosecutions for all human rights violations, and further, that this effect is larger than the impact of the target state's ratification of the Rome Statute or the Prosecutor's decision to begin a preliminary examination. […] Preliminary examinations do not carry costs as high for states, since the Court in this phase is mainly limited to an information collection and assessment role").

> tarity or deterrence. In certain contexts, the rationales of prevention may require respect for peace processes. Using preliminary examination as a catalyst for other rationales requires a deeper commitment to in-depth situational analysis over time.[81]

19.3.1.2. Public Reporting on Preliminary Examinations

Beginning 13 December 2011,[82] the OTP has annually released reports to the public, summarizing the activities conducted during the reported year for each of the preliminary examinations under review.[83] Interestingly, the length of the reports has been increasing (25 pages in 2011, 63 in 2014, 73 in 2017). The increase in length is not anecdotal, nor is it a mere reflection of the rise in the number of preliminary examinations over the course of those years. It is evidence of the current Prosecutor's motivation to effectively disseminate information concerning its monitoring operations and assessments to the general public. It is also a reflection of the significant investment of OTP resources into this reporting. Despite the addition of content and information, in the six years since the first report the format has remained largely the same. These reports consist of an introduction to preliminary examination activities, and a review of each of the situations before the OTP, including examinations that were concluded during the relevant year, organized by phase.

The reports of the OTP serve as a pressure relief valve, providing critics with proof that the OTP remains active. This is done by voluntarily providing information regarding both the factual and legal narratives as they emerge from the assessment, while keeping the situations parked at the preliminary examination stage. Reviewing the reports shows that the OTP adopts an expansive definition of'situation' at this stage, allowing it to expand its monitoring to cover all alleged crimes potentially surround-

81 Stahn, see *supra* note 6, p. 13.

82 Incidentally, this was the day after the election of Fatou Bensouda as Prosecutor.

83 Throughout almost all of Ocampo's tenure as Prosecutor there was no significant reporting on ongoing preliminary examinations, l*et al*one an annual report. In 2006, a single report was published on the activities which were performed during the first three years in operation of the OTP. Preliminary examinations were discussed only briefly in this report, chiefly concerning the importance of gravity when making decisions on case selection (see OTP, *Report on the activities performed during the first three years (June 2003 - June 2006)* (http://www.legal-tools.org/doc/c7a850/)).

ing a particular conflict or tension hotspot.[84] Moreover, knowing that all concerned parties carefully read these reports, statements made in their framework allow the Prosecutor to signal to States its views on certain political developments, in the hopes of guiding their behaviour.[85] The affected States, l*et al*one potential defendants, have very little recourse at this stage to challenge factual or legal characterizations made by the Prosecutor as part of her monitoring. These examples thus indicate that, at the preliminary examination phase, "the balance between prosecutorial discretion and the rights of the defense leans the most toward discretion".[86]

19.3.1.3. Termination of Preliminary Examinations Reports

Another means by which the OTP has increased transparency relates to notification and publication of the reasoning surrounding the termination of preliminary examinations. The first decision to terminate an ongoing preliminary examination came in 2006 and concerned alleged crimes against humanity by the Government of Venezuela, targeting political opponents. The decision issued by the OTP, headed by then Prosecutor Ocampo, consisted of a short five-page letter, signed by Ocampo and mailed to those who submitted the communication to the Court under Ar-

84 Consider, for example, the expansion of the preliminary examination regarding the Situation in Afghanistan to cover CIA operations in Poland, Romania and Lithuania. See 2016 Preliminary Examination Report, see *supra* note 21, para. 199 ("In addition, a limited number of alleged crimes associated with the Afghan armed conflict are alleged to have been committed on the territories of Poland, Lithuania and Romania, which are parties to the Statute. This is because individuals captured in the context of the armed conflict in Afghanistan, such as presumed members of the Taliban or Al Qaeda, were allegedly transferred to detention centres located in those countries.").

85 Consider, for example, the comments of the OTP regarding the recent political appointments and election results in Guinea as part of the 2016 Preliminary Examination Report, *ibid.*, paras. 272, 276 ("in this context, the reappointment of Me Cheick Sako in the position of Minister of Justice signals the continued support of the authorities for the investigation carried out by the Guinean panel of judges […] the Office notes that the appointment in March 2016 of General Mathurin Bangoura, former member of the CNDD indicted in 2015, as Governor of Conakry was perceived by victims and civil society organisations as a troubling signal in the context of Guinean authorities' stated intention to bring to justice the persons allegedly involved in the 28 September case").

86 Carsten Stahn and Dov Jacobs, "The Interaction between Human Rights Fact-Finding and International Criminal Proceedings", in Phillip Alston *et al.* (eds.), *The Transformation of Human Rights Fact-Finding*, Oxford University Press, Oxford, 2016.

ticle 15.[87] The letter notes that the OTP conducted a "crime analysis", which included "preparation of tables of allegations and pattern analysis" as well as "legal research and analysis of the main doctrinal issues".[88] The letter was eventually published online, but no public statement or press release was ever produced to accompany it.

This decision is a stark contrast to the one published by the OTP, led by the present Prosecutor, when the preliminary examination into Honduras was terminated. In that case, the Prosecutor made a general public statement on 28 October 2015,[89] which was immediately followed by a three-day country visit "to announce and explain in detail the conclusions reached by the OTP to Honduran authorities and civil society organisations".[90] The OTP produced a 49-page analysis of the legal issues surrounding its decision, focusing on subject-matter jurisdiction.[91] Additionally, a two-page Questions and Answers document was published in both English and Spanish to facilitate broader dissemination.[92] Finally, the decision was included in the November 2015 preliminary examination report of the OTP.[93] A similar approach was taken by the Prosecutor in the termination decision regarding the situation in the Republic of Korea.[94] In

87 OTP, "Response to Communications Received Concerning Venezuela", 9 February 2006 (http://www.legal-tools.org/doc/c90d25/). The Court took the same approach in its response in Iraq which was issued the same day and consisted of a ten-page letter. OTP, "Response to Communications Received Concerning Iraq", 9 February 2006 (http://www.legal-tools.org/doc/5b8996/).

88 *Ibid.*, p. 2.

89 Office of the Prosecutor, "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the conclusion of the preliminary examination into the situation in Honduras", 28 October 2015 (http://www.legal-tools.org/doc/1d09c8/).

90 See *2015 Preliminary Examination Report*, see *supra* note 49, para. 287.

91 OTP, *Situation in Honduras: Article 5 Report*, October 2015 (http://www.legal-tools.org/doc/54755a/).

92 OTP, "On the decision of the ICC Prosecutor to close the preliminary examination in Honduras" (http://www.legal-tools.org/doc/f0035a/).

93 See *2015 Preliminary Examination Report*, see *supra* note 49, paras. 268–289.

94 On 23 June 2014 the Prosecutor made a public statement that the two maritime incidents in the Yellow Sea of 2010 did not satisfy the requirements for an initiation of an investigation (OTP, "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the conclusion of the preliminary examination of the situation in the Republic of Korea", 23 June 2014 (http://www.legal-tools.org/doc/8d0a96/)). That statement was immediately followed by a 24-page report summarizing the complete legal analysis of the subject-matter jurisdiction, on the basis of which its termination decision was made (OTP, *Situa-*

other words, the OTP has reinterpreted its obligations under Article 15(6) and Rule 105 and committed itself to far broader obligations of notification, transparency, and reasoning.

The very act of giving a public reason for the conclusions of a preliminary examination creates a powerful mechanism of control.[95] Providing a robust legal analysis and argumentation forces the Prosecutor not only to justify its interpretation and logic through the Statute's terminology, but more importantly it sets a principle and a precedent to be relied on in the future (both internally within the OTP, and externally by critics). These are all positive developments. However, there is a fly in the ointment. Recognizing the power of the Prosecutor to produce this detailed legal analysis, which is not subject to adversarial scrutiny or judicial review, risks the development of 'prosecutorial adjudication' at the ICC. The term, first coined by Lynch, involves a situation whereby the Prosecutor becomes a "central adjudicator of facts (as well as replacing the judge as arbiter of most legal issues […])".[96] In the context of international crimes, the Prosecutor additionally becomes the final authority in establishing the pseudo-legal, pseudo-political narrative surrounding the situation under review. This is especially important in cases where the preliminary examination was not launched on the basis of a State referral, and even more so in situations involving non-members of the Rome Statute. In those instances, the relevant countries might be relieved to learn that an investigation will not ensue, but at the same time they are offered no means to challenge any characterizations made by the Prosecutor,[97] which

tion in Republic of Korea: Article 5 Report, June 2014 (http://www.legal-tools.org/doc/ef1f7f/)). The decision was also reported in *2014 Preliminary Examination Report*, see *supra* note 49, paras. 218–245.

95 David Moshaman, "Reasoning as Self-Constrained Thinking", *Human Development*, vol. 38, no. 1, 1995, p. 53 ("reasoning is best construed as a form of thinking in which the thinker purposely constrains processing of information in an effort to realise the epistemic advantages of making justifiable inferences").

96 Gerard E. Lynch, "Screening Versus Plea Bargaining: Exactly What Are We Trading Off?", in *Stanford Law Review*, vol. 55, no. 4, 2003, pp. 1403–04.

97 Note further that in accordance with the policies of the OTP "before making a determination on whether to initiate an investigation, the Office will also seek to ensure that the States and other parties concerned have had the opportunity to provide the information they consider appropriate" (2016 Preliminary Examination Report, see *supra* note 21, para. 12). However, a similar policy is not stated for decisions to close preliminary examinations,

they might not accept, and which, considering the Court's standing, will ultimately be instrumental in framing the political memory and legal reality concerning these situations in future discussion.

19.3.1.4. Press Releases and Reporting to the UNSC and the ASP

The Prosecutor and other high-ranking officials at the OTP and the Court additionally brief the UNSC (regarding situations referred to it under UNSC resolutions)[98] and the ASP.[99] These public statements may place additional constraints upon the work of the OTP by forcing it to answer to other institutions. At the same time, however, it gives an opportunity for the Prosecutor to continue the game of political signalling by openly speaking about ongoing preliminary examinations. One recent example is the May 2017 statement by the Prosecutor made during a routine briefing to the UNSC on the situation in Libya: "I take this opportunity before the council to declare that my office is carefully examining the feasibility of opening an investigation into migrant-related crimes in Libya should the court's jurisdictional requirements be met".[100] This statement further demonstrates how the OTP uses its innate discretion during the preliminary examination stage to expand the reach of situations it reviews to cover as much international activity as possible (including the most hotly contested contemporary human rights abuses, regardless of their immediate connection to the situation under review), thus enabling it to monitor and influence them from within, and thereby win political capital.

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and even if it did, there is surely no requirement to reflect the States' and other parties' positions in the final termination report.

98 See, for example, OTP, *Twelfth Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1970 (2011)* (http://www.legal-tools.org/doc/461c14/); OTP, "Statement of ICC Prosecutor to the UNSC on the Situation in Libya, pursuant to UNSCR 1970 (2011)", 9 November 2016 (http://www.legal-tools.org/doc/f093e8/).

99 See, for example, OTP, "Mrs. Fatou Bensouda, Prosecutor of the International Criminal Court, Address at the First Plenary, Fifteenth Session of the Assembly of States Parties", 16 November 2016 (noting that "beyond increasing the quality of our preliminary examinations, investigations and prosecutions, one of the main goals of my tenure as Prosecutor is to strengthen trust and respect for the Office by ensuring further transparency and predictability in our operations") (http://www.legal-tools.org/doc/4f0ecf/).

100 OTP, "Statement of ICC Prosecutor to the UNSC on the Situation in Libya, pursuant to UNSCR 1970 (2011)", 8 May 2017, para. 29 (http://www.legal-tools.org/doc/a943f7/).

It is further a common feature in the Office's work for the Prosecutor to issue press releases at times of deteriorating security situations, reminding all parties to the conflict that the OTP is watching.[101] Some of these press releases are issued as part of a field mission, an area of activity not originally provided for under Article 15, but one nonetheless undertaken by both Prosecutors.[102] The OTP additionally engages in other forms of outward communication including academic writing, interviews, and lectures.[103]

19.3.2. Judicial Review by the PTC

The drafters' conceptualization of the relationship between the OTP and the PTC did not materialize. As we have seen, the system of checks and balances which they created follows the notion of an over-zealous Prosecutor eager to launch investigations, constrained by an active PTC pro-

[101] See, for example, OTP, "Statement of the Prosecutor of the International Criminal Court, Mrs. Fatou Bensouda, following growing tensions reported in Guinea", 14 October 2015 ("As part of its ongoing preliminary examination, my Office has been closely following developments in the situation in Guinea, including as they relate to the risk of possible violence leading to crimes falling under the jurisdiction of the International Criminal Court. […] I would like to reiterate my call for calm and restraint to all political actors, and their supporters. I wish to reiterate that anyone who commits, orders, incites, encourages or contributes in any other way to the commission of atrocity crimes falling within the jurisdiction of the ICC is liable to prosecution either in Guinea or at the Court in The Hague") (http://www.legal-tools.org/doc/10190c/); OTP, "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the worsening security situation in Burundi", 6 November 2015 ("I recall that any person in Burundi who incites or engages in acts of mass violence including by ordering, requesting, encouraging or contributing in any other manner to the commission of crimes falling within the jurisdiction of the International Criminal Court ("ICC" or "Court") is liable to prosecution before this Court. Should any conduct in Burundi – whether by the Security Forces, militias or any armed group – amount to war crimes, crimes against humanity, or genocide, no-one should doubt my resolve to fulfill my mandate so that the perpetrators do not go unpunished") (http://www.legal-tools.org/doc/65d51f/).

[102] See, for example, OTP, "Statement by the Prosecutor of the International Criminal Court, Fatou Bensouda, on her Office's mission to the Democratic Republic of the Congo from 16 to 20 October 2016" (http://www.legal-tools.org/doc/c374e0/).

[103] See, for example, Bensouda, see *supra* note 9; Fatou Bensouda, "The Office of the Prosecutor of the International Criminal Court: Successes, Challenges and the Promise of International Criminal Justice", UN Audiovisual Library of International Law (available on its web site); Mark Kersten, "A Test of Our Resilience – An Interview with the ICC Deputy Prosecutor", in *Justice in Conflict*, 10 August 2016.

tecting the Court's legitimacy through fighting against politicization.[104] The reality is reversed. The Prosecutor is in no rush to conclude preliminary examinations and proceed to investigations, and the PTC is criticized by its own judges as being in danger of becoming "a mere rubber-stamping instance",[105] likely to "automatically [agree] with what the Prosecutor presents".[106] The PTC has adopted, for example, an approach

[104] See *supra* note 32. See also Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute, see *supra* note 34, para. 32 (noting that the goal of PTC review is "to prevent the Court from proceeding with unwarranted, frivolous, or politically motivated investigations that could have a negative effect on its credibility"). Situation in Georgia, Pre-Trial Chamber I, Decision on the Prosecutor's Request for Authorization of an Investigation, 27 January 2016, ICC-01/05, Separate Opinion of Judge Péter Kovács, para. 9 (noting that "[a]ccording to my recollection, when the idea of providing the Prosecutor with such power in the absence of a State's complaint was first tabled by one member of the International Law Commission ("ILC") in the course of preparing the 1994 Draft Statute for an International Criminal Court (the "1994 ILC Draft"), there was a clear resistance by the ILC working group members, as they thought that the international community was not ready to provide a free hand to a world Prosecutor").

[105] Situation in the Republic of Kenya, Decision Pursuant to Article 15, see *supra* note 34, Dissenting Opinion of Judge Hans-Peter Kaul, para. 19.

[106] Situation in Georgia Decision on the Prosecutor's Request for Authorization of an Investigation, Separate Opinion of Judge Kovács, see *supra* note 104, paras. 6, 11:

> I consider that "judicial control", be it at the article 15 stage or a subsequent stage of the proceedings, is not an empty term. Judicial control entails more than automatically agreeing with what the Prosecutor presents. It calls for "an independent judicial inquiry" of the material presented as well as the findings of the Prosecutor that there is a reasonable basis to proceed with the opening of an investigation. This process requires a full and proper examination of the supporting material relied upon by the Prosecutor for the purpose of satisfying the elements of article 15(4) in conjunction with article 53(1)(a)-(c) of the Statute, as well as the victims' representations, which are referred to in article 15(3) of the Statute. To say otherwise means that the Pre-Trial Chamber will not be exercising what the Majority describes as "judicial control". Nor will the Pre-Trial Chamber be acting in a manner which can prevent the abuse of power on the part of the Prosecutor. […] The degree of seriousness of the Pre-Trial Chamber's examination should not depend on the stage of the proceedings as the Majority Decision suggests. Being at the early stages of the proceedings does not justify a marginal assessment. It just means that the assessment should be carried out against a low procedural standard ("reasonable basis to proceed") and a low evidentiary standard ("reasonable basis to believe") on the basis of the request, the available material and the victims' representations. Still such an assessment should be carried out thoroughly and the decision should demonstrate the thoroughness of the assessment conducted by the Chamber.

whereby its examination of Article 15 requests is "strictly limited".[107] As a result, all three of the Prosecutor's applications to launch investigations under Article 15 to date have been authorized by the PTC.[108] Similarly, the scope of judicial review has been the subject of contestation, even between the Pre-Trial Chambers.[109] Schabas has attempted to explain, in part, the Chamber's difficulty when attempting to conduct a robust judicial review at the preliminary examination stage (looking at the inherent disadvantage of the PTC at the preliminary examination stage, as it lacks adversarial debate):

> [T]he judicial approval of the Prosecutor's application has been relatively perfunctory […] Nothing of [the Court's] inquiry suggests a genuine effort to come to terms with issues of 'politicization' or concerns about prosecutorial abuse. It would be difficult for them to do so given that the hearings take place *ex parte*, that is, without an opposing party. The Prosecutor can hardly be expected to provide the Court with evidence of abusive or improper intent.[110]

Moreover, the OTP adopted the policy of informing relevant State(s) prior to seeking authorization from the PTC to launch an investigation in *proprio motu* situations (with the hope that the relevant State(s) would take steps to simply refer the situation directly).[111] Essentially, despite the

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[107] Situation in Georgia, Decision on the Prosecutor's Request for Authorization of an Investigation, *ibid.*, para. 3.

[108] Schabas, see *supra* note 64, p. 161 ("All three of the applications made by the Prosecutor have been granted by the Pre-Trial Chambers although in each decision judges have penned individual opinions indicating that there is no consensus within the Court about the function of the judicial review provided for in paragraphs 3 and 4 of Article 15").

[109] See the positions of a group of international experts convened on 29 September 2015 by the Grotius Centre for International Legal Studies and the Centre for International Law Research and Policy. Their concluding report notes: "It remains contested to what extent Article 53 review powers apply to *proprio motu* action under Article 15, what qualifies as a 'decision' of the Prosecutor 'not to proceed', triggering powers of judicial review under Article 53 (1) and (2), and to what extent such a decision must be formalised. Differences also exist between how Pre-Trial Chambers have interpreted the scope of judicial review in relation to Article 15 at the end of the preliminary examination, that is, regarding authorization to investigate ongoing and continuing crimes, or only crimes committed until the date of the filing of the request for authorization". Grotius Center Report, see *supra* note 6, para. 21.

[110] Schabas, see *supra* note 64, pp. 162–63.

[111] OTP, *Policy Paper on Preliminary Examinations*, see *supra* note 7, paras. 94–99.

Chamber's leniency in authorizing investigations, the OTP prefers to operate with as little judicial scrutiny as possible and will not shy away from utilizing loopholes in the Statute to do so.

Peculiarly, the PTC has been an active check to the powers of the OTP concerning one type of decision, when responding to attempts by the Prosecutor to delay or close ongoing preliminary examinations. When given a chance to criticize the Prosecutor for either stalling or terminating a preliminary examination, the PTC has been quick to do so.[112] In this regard, it is useful to analyse both the 2006 Central African Republic ('CAR') decision, and the 2014 decision concerning the situation on certain registered vessels of Comoros, Greece, and Cambodia.

19.3.2.1. Central African Republic

The Chamber's involvement in the situation in the CAR offers good insight into both the dynamics between the PTC and the OTP at the preliminary examination stage, and their divergent interpretations of the temporal scope of prosecutorial discretion. On 27 September 2006, almost two years after making its initial referral to the OTP under Article 14, the Government of the CAR requested the Chamber's intervention. This Re-

[112] In fact, this strand of activism by the PTC has been reflected at the investigation stage as well. The first decision ever made by the PTC was a February 2005 decision to convene a "Status Conference" relating to the ongoing investigation into the situation in the Democratic Republic of the Congo. The Chamber, which was frustrated by the slow nature of the investigation of the OTP, relied on a broad interpretation of a general provision contained in Article 57(3)(c) of the Statute to increase its control over the Prosecutor. This in turn led to a minor controversy in which the Prosecutor publicly rejected the purported authority of the Chamber to convene a status conference, claiming that "the system enshrined in the Statute is one where the investigation is not performed or shared with a judicial body, but rather entrusted to the prosecution […] at the same time, the system also includes a closed number of provisions empowering the Pre-Trial Chamber to engage in specific instances of judicial supervision over the Prosecution's investigative activities. The prosecution submits that this delicate balance between both organs must be preserved at all times in order to honour the Statute, and to enable the Court to function in a fair and efficient manner" (Situation in the Democratic Republic of the Congo (ICC-01/04), Prosecutor's Position on Pre-Trial Chamber I's 17 February 2005 Decision to Convene a Status Conference, 8 March 2005, para. 3). The Pre-Trial Chamber by a ruling dismissed the Prosecutor's objections and the Statute Conference took place. For further reading see Michela Miraglia, "The First Decision of the ICC Pre-Trial Chamber: International Criminal Procedure Under Construction", *Journal of International Criminal Justice*, vol. 4, no. 1, 2006, pp. 188–95.

quest was based on the Prosecutor's alleged "failure to decide, within a reasonable time" whether or not to initiate an investigation.[113]

The PTC, in its decision, reaffirmed the right of a referring State to be informed by the Prosecutor of developments concerning a preliminary examination, and the right of the PTC to request that the Prosecutor make such information available.[114] The PTC further made reference to a series of terms used by both the Statute and the Rules constraining the temporal scope of prosecutorial discretion ("reasonable time", "without delay", "promptly", and "in an expeditious manner"). While the PTC did not interpret any of these terms directly, it did recall that "the preliminary examinations of the situations in the Democratic Republic of the Congo and Northern Uganda were completed within two to six months".[115] On the basis of this, the PTC requested that the Prosecutor issue a report no later than 15 December 2006, containing information as to the current status of the preliminary examination, including "an estimate of when the preliminary examination of the CAR situation will be concluded".[116]

The Prosecutor's response was decisive. Although it did provide the PTC and the CAR with a report detailing its activities, it clarified that it was doing so without accepting "the existence of a legal obligation to submit this type of information […] nor adopting any precedent that it may follow in future cases".[117] As we have already discussed, that report did in fact lay the groundwork for the eventual voluntary adoption of this method of reporting in all preliminary examination situations beginning in 2011.[118]

From the Prosecutor's perspective, it was crucial to ensure that the equilibrium in the PTC-OTP relationship not be skewed. Therefore, the

[113] Situation in the Central African Republic, Pre-Trial Chamber I, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, 30 November 2006, ICC-01/05, p. 3.

[114] *Ibid.*, pp. 4–5.

[115] *Ibid.*, p. 4.

[116] *Ibid.*, p. 5.

[117] Situation in the Central African Republic, Pre-Trial Chamber I, Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, 15 December 2006, ICC-01/05, para. 11.

[118] See *supra* Section 19.3.1.2.

Prosecutor stated that the Chamber's supervisory role was limited to "a review of a decision under Article 53(1) and (2) by the Prosecutor not to proceed with an investigation".[119] If the OTP delays this decision, the Prosecutor stressed, "there is no exercise of prosecutorial discretion susceptible to judicial review by the Chamber".[120] Similarly, the Prosecutor refused to commit to any specific deadlines, noting that:

> [T]he OTP, while committed to reaching decisions under Article 53 (1) as expeditiously as possible, submits that no provision in the Statute or the Rules establishes a definitive time period for the purposes of the completion of the preliminary examination. The OTP submits that this was a deliberate legislative decision that provides the required flexibility to adjust the parameters of the assessment or analysis phase to the specific features of each particular situation. That choice, and the discretion that it provides, should remain undisturbed.[121]

The matter was left there, with no resolution of the objection's core issue: whether 'inaction' in the form of a delay in OTP decision-making during the preliminary examination phase (be it intentional or unintentional) constitutes an exercise of prosecutorial discretion subject to judicial review.[122]

19.3.2.2. Registered Vessels of Comoros, Greece, and Cambodia

On 6 November 2014, the OTP announced that, based on the information available to it, there was no reasonable basis to proceed with an investigation of the situation on certain registered vessels of Comoros, Greece, and Cambodia.[123] The situation, which concerned the May 2010 interception of a flotilla that left Turkey with the goal of breaking the maritime block-

[119] Situation in the Central African Republic, Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 November 2006 Decision, see *supra* note 117, para. 1.

[120] *Ibid.*

[121] *Ibid.*, para. 10.

[122] It is worth nothing that since the voluntary adoption of greater reporting and transparency during preliminary examinations, we have not seen any further criticism by the PTC of the OTP for delaying, even in the context of prolonged preliminary examinations such the one related to the situation in Afghanistan.

[123] OTP, *Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report*, 6 November 2014 (http://www.legal-tools.org/doc/43e636/).

ade on the Gaza strip, was referred to the OTP by the Government of the Union of Comoros on 14 May 2013.[124] Based on a detailed report issued by the Prosecutor, dealing with jurisdictional and admissibility issues, the OTP concluded that any potential cases likely to arise from an investigation into the situation would not be of sufficient gravity to justify further action by the Court, and therefore would be inadmissible pursuant to Articles 17(1)(d) and 53(1)(b).[125]

On 29 January 2015, the Representatives of the Union of Comoros filed an application for review of the Prosecutor's decision not to proceed, pursuant to Article 53(3)(a) of the Statute. The application raised two complaints. The first concerned an alleged failure by the Prosecutor to take into account other facts (a complaint the PTC later dismissed). The second concerned alleged analytical errors in the Prosecutor's assessment of gravity under Article 17(1). The PTC issued its decision on 16 July 2015, calling on the Prosecutor to reconsider her decision not to open an investigation.[126] It was the first review of its kind. The PTC identified

[124] This is a unique preliminary examination in the sense that in concerns a single incident, and not a full situation. After the Hamas terrorist organization seized control of the Gaza Strip in June 2007, the Government adopted various measures, including a 3 January 2009 naval blockade on the Gaza Strip. In the days preceding May 31, 2010, a flotilla of six vessels advanced towards the coastline of Israel, with approximately 700 persons on board. The largest of the ships in the flotilla, the *Mavi Marmara*, was the location of the incident that is the sole subject of the preliminary examination. On May 31, 2010, in the early hours of the morning, IDF forces boarded the Mavi Marmara and took control of the vessel. During the boarding and taking control of the ship, the IDF forces encountered violent resistance. When the conflict ended, it was found that nine of the ship's passengers had been shot dead, and fifty-five passengers and nine IDF soldiers had been wounded. The Preliminary Examination was the subject of extensive investigation concluding in two national reports (produced by both Turkey and Israel) and two international reports (produced by a fact-finding mission of the United Nations Human Rights Council and a panel of inquiry appointed by the UN Secretary-General). For further reading, see Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident (http://www.legal-tools.org/doc/f2de32/).

[125] *Ibid.*, para. 150. The OTP focuses its conclusion on the limited nature of these potential cases ("considering the scale, impact and manner of the alleged crimes, the Office is of the view that the flotilla incident does not fall within the intended and envisioned scope of the Court's mandate… in the context of the current referral, it is clear that the potential case(s) that could be pursued as a result of an investigation into this situation is limited to an event encompassing a limited number of victims of the alleged ICC crimes, with limited countervailing qualitative considerations" (*ibid.*, paras. 142–44).

[126] Situation on the Registered Vessels of the Union of the Comoros, The Hellenic Republic, and the Kingdom of Cambodia, Pre-Trial Chamber I, Decision on the Request of the Union

errors in every aspect of the gravity analysis of the OTP, including in its consideration of potential perpetrators, the scale of the crimes, the nature of the crimes, the manner of their commission, and their impact.[127] This decision by the PTC is a troubling one, in terms of both its legal merits and its policy implications.

Within the limits of this chapter, I will not touch on the substantive legal arguments, which have been the subject of extensive criticism. It has been argued that the Judges applied a "bizarre" test for "potential perpetrators" (one which ignores the relative importance of the potential perpetrators), and moreover conflated situational gravity with case gravity in their analysis of the scale of the crimes.[128] Moreover, the majority decision called on the Prosecutor to take into consideration "the attention" that the *Mavi Marmara* incident had attracted (including "fact-finding efforts"

of the Comoros to Review the Prosecutor's Decision not to Initiate an Investigation, 16 July 2015, ICC-01/13, p. 26 (http://www.legal-tools.org/doc/2f876c/).

127 *Ibid.* paras. 20–48.

128 For a complete review see Kevin Jon Heller, "The Pre-Trial Chamber's Dangerous Comoros Review Decision", in *Opinio Juris* 17 July 2015 (noting in particular that "The PTC's approach to "potential perpetrator" gravity would thus seems to be based on a basic misunderstanding of the difference between situational and case gravity". Focusing on the argument raised by the Court that the scale of the crimes is similar to that in the case against Bahar Idriss Abu Garda and Abdallah Banda, Heller writes "here the PTC explicitly compares the gravity of the Comoros situation to the gravity of one case within a situation. The number of victims in the Comoros situation is indeed comparable to the number of victims in the JEM attack on the UN peacekeepers in Darfur. But the Abu Garda and Abdallah Banda case was one of many cases within the Darfur situation; when we compare the number of victims in the Comoros situation to the Darfur situation as a whole, it is clear that the PTC has no basis whatsoever to insist that the "scale" factor counsels in favour of finding the Comoros situation grave enough to formally investigate. The comparison is then between 10 civilian deaths and hundreds of thousands); see also Dov Jacobs, "ICC Judges ask the Prosecutor to reconsider decision not to investigate Israeli Gaza Flotilla conduct", in *Spreading the Jam*, 20 July 2015 (noting that Chamber's interpretation of the "potential perpetrators" test is at odds with the case law of Pre-Trial Chamber II in the Kenya situation); Geert-Jan Alexander Knoops and Tom Zwart, "The Flotilla Case before the ICC: The Need to Do Justice While Keeping Heaven Intact", in *International Criminal Law Review*, vol. 5, no. 6, 2015. But cf. Marco Longobardo, "Everything Is Relative, Even Gravity: Remarks on the Assessment of Gravity in ICC Preliminary Examinations, and the Mavi Marmara Affair", in *Journal of International Criminal Justice*, vol. 14, no. 4, 2016 (suggesting that the "OTP should have properly considered that the admissibility threshold at the stage of preliminary examinations is less stringent than the one embodied in Article 53(2)").

launched by the United Nations).[129] The Chamber's request has the potential of greatly politicizing the Court, and in any event involves the reintroduction of 'social alarm' as a gravity test (a test which was already rejected by the Appeals Chamber in 2006).[130]

Far more troubling than the debates on the merits is the Chamber's overall conceptualization of its standard for review of OTP decisions and the scope of the Prosecutor's discretion under Article 53, to which most of the following analysis is devoted. The majority decision put forward the presumption that Article 53(1)(a)–(b) involve no discretionary power, merely requiring the "application of exacting legal requirements".[131] By doing so, they sought to shift power back to them by allowing the PTC to micromanage precisely this legal application, without being branded as interfering with or infringing on prosecutorial independence. The PTC in essence sought to place itself as a second-tier prosecutor. However, the Chamber's approach may only encourage the OTP to offer less reasoning, as such detailed reporting is not required under the Statute or the Rules. If the OTP provides no robust legal analysis of its decisions, there is nothing to micromanage, and that will be a detrimental blow to transparency and predictability.

Moreover, the majority decision attempted to further narrow the scope of prosecutorial discretion by establishing an extremely low bar for launching investigations. As they wrote in their decision:

> If the information available to the Prosecutor at the pre-investigative stage allows for reasonable inferences that at least one crime within the jurisdiction of the Court has been committed and that the case would be admissible, the Prose-

[129] Situation on the Registered Vessels of the Union of the Comoros, The Hellenic Republic, and the Kingdom of Cambodia, Decision on the Request of the Union of the Comoros, see *supra* note 126, para. 51.

[130] Situation in the Democratic Republic of the Congo, Appeals Chamber Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", 13 July 2006, ICC-01/04 (http://www.legal-tools.org/doc/083c1a/). See also Dov Jacobs, *supra* note 128.

[131] Situation on the Registered Vessels of the Union of the Comoros, The Hellenic Republic, and the Kingdom of Cambodia, Decision on the Request of the Union of the Comoros, see *supra* note 126, para. 14.

> cutor shall open an investigation, as only by investigating could doubts be overcome.[132]

Adopting this model of interpretation of the preliminary examination stage completely overturns the role of the OTP as it has evolved over the years since the Court's establishment. This approach forces the Prosecutor to adopt the position of a legal technician, not a consequentialist, and it urges the OTP to launch more investigations in less time, as (in the Chamber's view) those could assist in 'overcoming any doubts' about the circumstances.[133] Judge Péter Kovács' partly dissenting opinion is telling, as it reflects exactly the dangers of adopting the majority's approach in the dynamic relationship between the OTP and the PTC. He writes:

> I do not believe that the Pre-Trial Chamber is called upon to sit as a court of appeals with respect to the Prosecutor's decisions. Rather the Pre-Trial Chamber's role is merely to make sure that the Prosecutor has not abused her discretion in arriving at her decision not to initiate an investigation on the basis of the criteria set out in article 53(1) of the Statute. This view calls for a more deferential approach when reviewing the Prosecutor's decision on the basis of the criteria set out in article 53(1), and is implied in the text of article 53. It provides the Prosecutor with some margin of discretion in deciding not to initiate an investigation into a particular situation. This interpretation is more in line with the main idea underlying article 53 namely, to draw a balance between the Prosecutor's discretion/independence and the Pre-Trial Chamber's supervisory role in the sense of being limited to only requesting the Prosecutor to reconsider her decision if necessary. To argue that the power of the Pre-Trial Chamber exceeds this point is daring. The Majority does not go in this direction. Instead, it preferred to conduct a stringent review,

[132] *Ibid.*, para. 13.

[133] A similar concern was raised by a group of international experts: "Some concerns were expressed in relation to the consequences of the Comoros decision. It was argued that the decision might have negative side effects on preliminary examinations, since it curtails prosecutorial discretion and might indirectly force the OTP to open investigations in many situations. This might deprive the space for analysis under preliminary examinations, and might ultimately make the OTP more reluctant to open preliminary examinations, since it would inevitably be expected to follow up by an investigation" (see Grotius Center Report, see *supra* note 6, para. 22).

> which clearly interferes with the Prosecutor's margin of discretion.[134]

In an attempt to reassert her prosecutorial discretion, Prosecutor Bensouda applied for an appeal under Article 82(1)(a), claiming the Chamber's decision was a decision on admissibility. By a 3 to 2 vote, the majority dismissed the Prosecutor's appeal, determining that the decision did not in fact concern admissibility (correctly, as it was a review of a pre-trial decision not to open an investigation). The Appeals Court did note that whereas "the Prosecutor is obliged to reconsider her decision not to investigate", she nonetheless "retains ultimate discretion over how to proceed".[135] The Prosecutor, thus, reaffirmed her prosecutorial power *vis-à-vis* the PTC regarding the decision of whether to open an investigation.[136] On 29 November 2017 the Prosecutor notified PTC I of her "final decision", under Rule 108(3), and after carrying out a "thorough review of all submissions made and all the information available, including information newly made available in 2015-2017".[137] The Prosecutor concluded that there was no reasonable basis to proceed with an investigation, and made sure to clarify that, as far as her Office is concerned, this "closes the preliminary examination", subject only to the "Prosecutor's ongoing and residual discretion under article 53(4) of the Statute".[138]

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134 Situation on the Registered Vessels of the Union of the Comoros, The Hellenic Republic, and the Kingdom of Cambodia, Decision on the Request of the Union of the Comoros, Partly Dissenting Opinion of Judge Péter Kovács, ICC-01/13-34-Anx-Corr, paras. 7–8, see *supra* note 126.

135 Schabas had argued similarly, noting that "[i]n the *Gaza Flotilla* situation, the Pre-Trial Chamber 'requested' the Prosecutor 'to reconsider' the decision, according to the terms of Article 53(3)(a). The language seems mild and less than mandatory. Can anything further be done if the Prosecutor 'reconsiders' and decides to maintain her decision? It seems that as long as the Prosecutor bases her decision on the grounds of jurisdiction or admissibility, this is where the matter ends". See Schabas, see *supra* note 64, p. 241.

136 Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Decision on the admissibility of the Prosecutor's appeal against the "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", Appeals Chamber, 6 November 2016, ICC-01/13, para. 59. For further reading see Giulia Pecorella, "The Comoros situation, the Pre-Trial Chamber and the Prosecutor: the Rome Statute's system of checks and balances is in good health", in *International Law Blog*, 30 November 2015.

137 *2017 Preliminary Examination Report*, see *supra* note 27, para. 320.

138 *Ibid*., at para. 344.

19.4. The Palestinian Preliminary Examination and the Limits of Existing Oversight Mechanisms

What is evident from the analysis up this point is that both self-regulation by the OTP and judicial review by the PTC are underperforming in their role of maximization of quality control over prosecutorial discretion at the preliminary examination stage. The PTC has adopted a narrow interpretation of prosecutorial discretion, in accordance with which it is pushing the OTP to avoid consequentialism at all costs. The PTC is thus encouraging or attempting to strong-arm the Prosecutor into focusing its limited prosecutorial resources on launching investigations. The OTP, on the other hand, has adopted a set of regulations that, while introducing a certain degree of transparency and adherence to procedure, nonetheless enhances prosecutorial discretion at the preliminary examination stage. These guidelines further incentivize 'parking' more situations for more extensive periods of time. The OTP is thus at a risk of becoming too involved in the political monitoring game and overcautious in proceeding with investigations or, when appropriate, concluding preliminary examinations.

Davis' 'optimum point' has not been reached, and this lack of balance results in the occasional power struggle between the OTP and the PTC, in addition to insufficient checks on the Prosecutor's evolving consequentialist role at the preliminary examination stage. These limitations of the existing control mechanisms are the subject of this section, and will be exemplified relying on the case study of the preliminary examination in Palestine. In particular, the section will focus on three primary concerns resulting from this lack of adequate oversight: (1) the potential politicization of the Court; (2) issues relating to prioritization policies and exit strategies; and (3) insufficient regulation of evidentiary standards at the preliminary examination stage.

19.4.1. The Preliminary Examination on Palestine: Background

On 1 January 2015, the Palestinians lodged an Article 12(3) declaration with the Registrar of the ICC,[139] stating their wish to accept the Court's jurisdiction over alleged crimes committed "in the occupied Palestinian

[139] Mahmoud Abbas, "Declaration Accepting the Jurisdiction of the International Criminal Court", 31 December 2014 (http://www.legal-tools.org/doc/60aff8/).

territory, including East Jerusalem, since June 13, 2014".[140] The next day, the Palestinians deposited their instrument of accession to the Court with the United Nations Secretary-General (which entered into force for Palestine on 1 April 2015).[141] On 7 January 2015, the Registrar of the ICC informed President Abbas of his acceptance of the Article 12(3) declaration, which was then transmitted to the Prosecutor.

This was not the Palestinians' first attempt to grant jurisdiction to the Court, the first declaration being lodged in 2009. Back then, Prosecutor Ocampo ultimately rejected the declaration in April 2012, based on the inability of the OTP to determine Palestinian statehood for the purposes of the Statute. The Prosecutor stated that it was "for the relevant bodies at the United Nations or the Assembly of States Parties to make the legal determination whether Palestine qualifies as a State for the purpose of acceding to the Rome Statute and thereby enabling the exercise of jurisdiction by the Court under article 12(1)".[142] This statement was problematic in and of itself, ultimately broadening the interpretation of 'statehood' beyond its usual parameters, by essentially empowering the United Nations General Assembly ('UNGA') and the ASP to make determinations that would be binding on an international judicial body.

In 22 November 2012, the UNGA adopted resolution 67/19, upgrading Palestine's status from 'observer entity' to 'non-member observer State'. In 2014, Prosecutor Bensouda published an article in *The Guardi-*

140 *2016 Preliminary Examination Report*, see *supra* note 21, para. 111.

141 United Nations Secretary General, "State of Palestine Accession to the Rome Statute of the International Criminal Court", 6 January 2015 (http://www.legal-tools.org/doc/f7411b/) (note that the UNSG accepted the accession of the Palestinians in his technical and administrative capacity as depository of the Rome Statute. As a later note by the UNSG clarifies "[i]n conformity with the relevant international rules and his practice as a depositary, the Secretary-General has ascertained that the instruments received were in due and proper form before accepting them for deposit, and has informed all States concerned accordingly through the circulation of depositary notifications This is an administrative function performed by the Secretariat as part of the Secretary-General's responsibilities as depositary for these treaties. It is important to emphasize that it is for States to make their own determination with respect to any legal issues raised by instruments circulated by the Secretary-General". United Nations Secretary-General, "Note to Correspondents – Accession of Palestine to Multilateral Treaties", 7 January 2015 (http://www.legal-tools.org/doc/864b39/).

142 ICC Office of the Prosecutor, *Report on Preliminary Examination Activities 2012*, November 2012, para. 201 (http://www.legal-tools.org/doc/0b1cfc/).

an, titled "The truth about the ICC and Gaza".[143] While the situation in Palestine was no longer the subject of a preliminary examination, the Prosecutor still thought it useful to note that her Office had "examined the legal implications of this development and concluded that while this change did not retroactively validate the previously invalid 2009 declaration, Palestine could now join the Rome statute". She further suggested that "is a matter of public record that Palestinian leaders are in the process of consulting internally on whether to [lodge a new Article 12(3) declaration]; the decision is theirs alone and as ICC prosecutor, I cannot make it for them".[144] There is a question of whether or not this type of political signalling and public winking is appropriate for an ICC Prosecutor.

Following the above-mentioned lodging of the declaration and accession to the Statute at the beginning of 2015, the OTP issued a statement on 16 January 2015, confirming that it found the adoption of UNGA resolution 67/19 "determinative of Palestine's ability to accede to the Statute pursuant to article 125, and equally, its ability to lodge an article 12(3) declaration".[145]

A preliminary examination was immediately launched. Based on its policy, the OTP is examining alleged crimes committed by both the IDF and members of Palestinian armed groups as part of the conflict that erupted over the course of the summer of 2014 (Operation Protective Edge), along with specific alleged crimes in the West Bank and East Jerusalem (namely alleged settlement activities, ill-treatment and escalation of violence).[146] The preliminary examination is currently at the jurisdiction phase (Phase 2), and the OTP is reviewing open source materials and reports from individuals, groups, States, IGOs and NGOs. The Office specifically mentions "monthly reports" from the Government of Palestine regarding alleged ongoing crimes and other developments. The OTP is

[143] Fatou Bensouda, "[T]he truth about the ICC and Gaza", in *Guardian*, 29 August 2014.

[144] *Ibid*.

[145] ICC Office of the Prosecutor, "The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine", 16 January 2015 (http://www.legal-tools.org/doc/1dcbe5/).

[146] *2017 Preliminary Examination Report*, see *supra* note 27, paras. 58–66.

also developing and running a number of databases, and conducting field missions.[147]

The Palestinian case study is intriguing because, as the Prosecutor herself notes, "[t]he alleged crimes that have been the subject of analysis to date involve complicated factual and legal assessments, such as in relation to conduct of hostilities issues, thereby necessitating careful analysis in reference to the relevant law applicable and information available".[148] But it is not only that the legal questions lead to significant complications;[149] the facts surrounding the dispute are also unique. As noted by the former Legal Advisor of Israel's Ministry of Foreign Affairs, Alan Baker:

> This unique and *sui generis* situation, including the history and circumstances of the Israeli-Palestinian conflict regarding the territories, as well as the series of agreements and memoranda that have been signed between the Palestinian leadership and the Government of Israel, have produced a special independent regime – a *lex specialis* – that governs all aspects of the relationship between them, including the respective status of each party vis-à-vis the territory.[150]

The combination of legal issues, which lack sufficient clarity in international criminal law jurisprudence especially insofar as they relate to a prolonged situation of belligerent occupation, and the one-of-a-kind nature of the Israeli-Palestinian conflict, poses a series of concerns regarding quality control of this preliminary examination. It goes to heart of the question of how the Court will square issues relating to territorial or personal jurisdiction without making political determinations that should be decided in bilateral negotiations between the parties. Note, in this regard, that in both the 2015 and 2016 annual preliminary examination reports, the Prosecutor maps out a series of alleged crimes "without prejudice to any future determinations by the Office regarding the exercise of territori-

147 *Ibid.*, paras. 72–77; see also *2016 Preliminary Examination Report*, *supra* note 21, paras. 135–44.

148 *2016 Preliminary Examination Report*, *ibid.*, para. 139.

149 Note in this regard, as an example, the fact that the *2016 Preliminary Examination Report* (see *supra* note 21, paras. 130–132) does not explain how the settlements come within the jurisdiction of the Court. See also Stahn, *supra* note 6, p. 14.

150 Alan Baker, "International humanitarian law, ICRC and Israel's status in the Territories", in *International Review of the Red Cross*, vol. 94, no. 888, Winter 2012, p. 1515.

al or personal jurisdiction by the Court".[151] In other words, the Prosecutor is entering this political minefield without a methodology for determining thorny jurisdictional questions as well as interpretive matters as they relate to the novel legal issues at hand. The Palestinian preliminary examination thus offers a useful case study to examine the limitations of extant oversight, insofar as it may become an instance of 'prosecutorial adjudication' where the OTP would apply subjective values in its analysis.

19.4.2. Politicization of the Court

The decision of the Prosecutor to launch a preliminary examination concerning the situation in Palestine encompassed a number of adjudicative decisions. First, as noted by Schabas, "that the Prosecutor considers a declaration by a non-party State pursuant to Article 12(3) as an automatic trigger for a preliminary examination is an innovation, something not provided for in the Rome Statute or anywhere else in the legal instruments applicable to the Court".[152] Moreover, the decision to recognize Palestine as a State for the purposes of an Article 12(3) referral was in itself a highly contentious decision criticized by a number of scholars.[153] Indeed,

[151] See, for example, *2016 Preliminary Examination Report*, *supra* note 21, para. 119.

[152] Schabas, see *supra* note 21, p. 400.

[153] CHAN James, "Judicial Oversight over Article 12(3) of the ICC Statute", FICHL Policy Brief Series No. 11 (2013), Torkel Opsahl Academic EPublisher, Oslo, 2013 (http://www.toaep.org/pbs-pdf/11-chan), pp. 3–4 ("The Palestinian Declaration also sends a message to quasi-States that a declaration can be used to their advantage […] the OTP has allowed the ICC to be used as a forum for questions of statehood. Submissions to the OTP have argued that accepting the Palestine Declaration would create precedent for other non-State entities such as Kosovo or Taiwan to assert political independence"); Zachary Saltzman, "Much Ado About Nothing: Non-Member State Status, Palestine and the International Criminal Court", *St. John's Journal of International & Comparative Law*, vol. 3, no. 2, 2013, p. 207 ("The General Assembly resolution upgrading Palestine to a non-member state status thus has little effect on ICC jurisdiction pursuant to 12(3). The criteria for statehood were either met or not met prior to the General Assembly's vote. The vote did little to change the existing calculus prior to the vote"); XIAO Jingren and ZHANG Xin, "A Realist Perspective on China and the International Criminal Court", FICHL Policy Brief Series No. 13 (2013), Torkel Opsahl Academic EPublisher, Beijing, 2013 (http://www.toaep.org/pbs-pdf/13-xiao-zhang) ("Practice regrettably shows that the ICC Office of the Prosecutor has allowed the Court to be used as a forum for the consideration of political questions of statehood through its discretionary preliminary examination powers. This is a most serious matter from the perspective of China which impacts on the legitimacy of the Court. The protracted and monarchical manner in which the former ICC Prosecutor indulged in his preliminary examination of the Palestinian Article 12(3) declaration for more than three years sets

States do not declare their independence in The Hague, nor are they formed by the Court. The traditional criteria for the recognition of statehood under international law, codified in the Montevideo Convention and rooted in effective control, offer the most widely accepted prescription to be applied at the outset of making any determination regarding statehood.[154] These rules should not, of course, be applied rigidly – they require a case-by-case analysis, as noted by James Crawford:

> It has been argued that international law does contain workable rules for determining whether a given entity is or is not a State. Of course, these rules are not, so to speak, self-executing: as with rules in other areas of international law, their application by international lawyers, or by States and other international persons, requires the exercise of judgment in each case.[155]

What is of concern is, therefore, the *procedure* whereby the determination of Palestinian statehood was made in January 2015. Leaving open the question of whether Palestine is a State in the traditional sense, one should ask: who applied the rules and who exercised judgment in recognizing Palestinian statehood at the ICC? The Prosecutor merely accepted as determinative a UNGA resolution which was nothing more than a symbolic vote upgrading Palestine's representation at the *United Nations* to "somewhere in between the other observers, on the one hand, and member states on the other".[156] Did the delegates voting at the General Assembly realize that they were voting on Palestinian accession to the

a landmark precedent for how the Office might disregard legitimate state interests during the examination of such declarations as well as complaints. There is little, if anything, affected governments can do during such preliminary examination, except to wait for what may be a very long time, even when the complaint is politically motivated. The present authors fail to comprehend how the ICC Prosecutor could spend more than three years examining the Palestinian declaration.").

154 See, for example, J.D. van der Vyver, "Statehood in International Law", in *Emory International Law Review*, vol. 9, 1991, p. 12 (explaining that the declaratory theory, consisting of the Montevideo Convention requirements, is widely accepted).

155 James Crawford, "The Criteria for Statehood in International Law", in *British Yearbook of International Law*, vol. 48, no. 1, 1977, p. 181.

156 Permanent Observer Mission of The State of Palestine to the United Nations, "Status of Palestine" (http://www.legal-tools.org/doc/15678f/).

Rome Statute, and if they were told would they have voted differently?[157] In any event, is it prudent to abrogate this pertinent decision to a single political action by one political arm of the United Nations?

This is of critical importance, because this kind of recognition by the Prosecutor has a norm-setting function. Decisions by the ICC, as an international Court, carry a different status from those of the International Olive Council, for example.[158] As noted by Yaël Ronnen:

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[157] Reviewing the explanation of votes made by those States who either voted in favour of or abstained from UN General Assembly resolution 67/19 is quite telling and contradicts that conclusion. See, for example, UK Secretary of State for Foreign and Commonwealth Affairs, William Hague (abstained), who remarked: "We continue to believe that the prospects for a swift return to negotiations on a two state solution – the only way to create a Palestinian state on the ground – would be greater today if President Abbas had been able to give the assurances we suggested, and without which we were unable to vote in favor of the resolution. In particular, we called on President Abbas to set out a willingness to return to negotiations without preconditions, *and to signal that the Palestinians would not immediately seek action in the International Criminal Court, which would be likely to make a return to negotiations impossible*" (emphasis added) (Jill Reilly, "U.N agrees to recognise Palestine but UK abstains from vote after Hague issues peace deal demands", in *Daily Mail*, 30 November 2012); Japan's Ambassador to the United Nations General Assembly, Jun Yamazaki (voted in favour): "It is not acceptable to use this resolution to act in a way that might negatively affect or hinder direct negotiations with Israel. *We ask for prudence with respect to conduct such as accession to international organizations, action which might negatively affect the prospect for the resumption of negotiations*" (emphasis added) (Permanent Mission of Japan to the United Nations, "Statement by H.E. Jun Yamazaki, At the Debate of the United Nations General Assembly on Agenda Item 36: "The Situation in the middle East" and Agenda Item 37: "The Question of Palestine", 30 November 2012 (http://www.legal-tools.org/doc/1e116d/)); Romania's Ambassador to the United Nations General Assembly Simona Mirela Miculescu (abstained): "Romania does not favor unilateral initiatives, regardless of which side they come from, as they may have adverse effects for the resumption of the peace process negotiations. *The adopted resolution is not facilitating the recognition of Palestine as a state nor its accession to international organisations and treaties*" (emphasis added) (Permanent Mission of Romania to the United Nations, "Romania's participation at the General Assembly Session on the resolution "The Status of Palestine in the United Nations", 29 November 2012 (http://www.legal-tools.org/doc/89c434/)); Deputy Prime Minister and Minister of Foreign Affairs of the Kingdom of Belgium, Didier Reynders (voted in favour): "For Belgium, the resolution adopted today by the General Assembly *does not yet constitute recognition of Palestine as a state in the full sense of the word*" (emphasis added) (Kingdom of Belgium Foreign Affairs, Foreign Trade and Development Cooperation, "Declaration by Minister Reynders following the awarding to Palestine of the status of observer/non-member state", 30 November 2012 (http://www.legal-tools.org/doc/f911f1/)).

[158] Isabel Putinja, "Palestine Becomes Olive Council's Newest Member", in *Olive Oil Times*, 20 April 2017.

> a determination by a legal body such as the ICC (the prosecutor and, at a later stage, the Court) that a state of Palestine exists (either generally or for the purpose of Article 12(3)) would carry significant weight. […] Thus, if the Prosecutor, or later the Pre-Trial Chamber, determines that the Palestinian declaration fulfills the requirements of Article 12(3), they would be assuming an almost unprecedented competence, which incurs onto the political sphere which is the traditional prerogative of states.[159]

This argument will be further borne out to the extent that the Prosecutor proceeds with the preliminary examination, basing its decision on a determination of territorial and personal jurisdiction which will go beyond recognizing a Palestinian State, and which will *de facto* delineate its borders.[160] Although Bensouda emphasizes that any determination will be strictly limited for the purposes of the preliminary examination, the Prosecutor in essence has placed her Office at the centre of any future negotiation between the parties. The determinations of the OTP are likely to be raised in the future by the Palestinians, by Israel, and by other interested parties, for the purposes of making territorial claims or objections. A recent statement by former Prosecutor Ocampo confirms this point. At a visit to Al-Quds University in May 2017, Ocampo acknowledged that the status of Palestine as a State has been indisputably solidified legally and politically as a result of the launching of the Palestinian preliminary examination. He further noted that the Palestinian preliminary examination "was not the goal but only one of the many political and diplomatic means the Palestinian side is wisely utilizing to achieve its legitimate aim of ending the occupation".[161]

As Allison Danner wrote, the ICC Prosecutor sits "at a critical juncture in the structure of the Court, where the pressures of law and politics

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[159] Yaël Ronen, "ICC Jurisdiction over Acts Committed in the Gaza Strip: Article 12(3) of the ICC Statute and Non-state Entities", in *Journal of International Criminal Justice*, vol. 8, no. 1, 2010, p. 22.

[160] William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2010, p. 290 (noting that the "actual limits of the territory of Palestine are also a matter of dispute").

[161] Palestine News Network, "الاستيطان جريمة حرب ستؤدي إلى ادانة اسرائيل :اوكامبو" ("Ocampo: Settlement of War Crimes will lead to Condemnation of Israel", in *Palestine News Network*, 30 May 2017 (translated from the original Arabic).

converge. The cases adjudicated by the ICC are infused with political implications and require sensitive decision making".[162] To avoid as much politicization of the Court as possible, Alex Whiting, former Prosecution Coordinator and Investigation Coordinator at the OTP, recommended that Prosecutors adopt a chess-master's mentality.[163] Given that the positions of the international community, the situation States, and the primary actors (including the victims and the accused) are all frequently in a state of flux, OTP investigations are inherently dynamic. As a result, at "any given time, the prosecutor has to consider and weigh all of the different variables when deciding where to investigate, what resources to dedicate, how fast to go, when there is enough evidence, and when to move to the next phase".[164]

The creation of facts on the ground by the OTP, and categorical determinations by the Prosecutor which will be very difficult to reverse, stand directly opposed to this necessary dynamism.[165] Further complications arise from the preliminary examination on Palestine, since it requires

[162] Danner, see *supra* note 13, p. 510.

[163] Alex Whiting, "Dynamic Investigative Practice at the International Criminal Court", in *Law and Contemporary Problems*, vol. 76, nos. 3–4, 2013, p. 185 ("To employ a cliché, planning and conducting an investigation at the ICC is like playing three-dimensional, or even four- or five-dimensional, chess").

[164] *Ibid.* A similar approach is suggested by Jacob Foster. See *generally*, Jacob N. Foster, "A Situational Approach to Prosecutorial Strategy at the ICC", in *Georgetown Journal of International Law*, vol. 47, 2016.

[165] Valérie Arnould, "The Limits of International Criminal Justice: Lessons from the Ongwen Case", 27 January 2015 (http://www.legal-tools.org/doc/b4fc01/) ("intervention in ongoing conflict exposes the Court to excessive politicisation, as it inexorably gets sucked into political wrangling and opens itself up to political manipulation by states. In the Ugandan case, President Museveni mobilised international justice to legitimise his government's military response to the conflict, divert attention away from the army's own human rights practices, and to depoliticise the northern conflict. Experiences in Sudan, Kenya and Palestine in turn show how the Court may be used as a bargaining chip in political power plays, either between states or domestic elites. This becomes particularly problematic if international justice is used as a substitute to the pursuit of a political or military solution. While it is impossible for the Court to completely act outside of politics, there is a need to reflect more on circumstances where too much politics may end up immobilising the Court and serving the interest of neither justice nor peace. The hard truth which thus needs to be confronted is that rather than ending conflict, international justice is at growing risk of becoming an additional terrain on which wars are fought out. While it would be unrealistic to simply state that the Court should therefore never intervene in ongoing conflicts, at the minimum a more critical reflection of the conditions under which this happens is needed.").

the Prosecutor to apply what was in essence created to be a *jus post bellum* criminal justice mechanism to a lingering, protracted, and drawn out *jus in bello* situation. No other conflict currently under preliminary examination, even other ongoing, volatile situations (for example, Ukraine), has this kind of historically magnified nature, reflected in a state of occupation now entering its fiftieth year. By opening the preliminary examination, the OTP bull has placed itself within the china shop that is the West Bank and Gaza Strip. Every legal interpretation, statement, or declaration must be vetted and thoroughly scrutinized, as each one is likely to make an immediate and lasting political impact.

19.4.3. Prioritization Policies and Exit Strategies

Setting aside the issue of semantics,[166] one key dilemma concerning the inner workings of the OTP involves how to prioritize between situations, and later cases, and also if, when and how to disengage from ongoing preliminary examinations.[167] Many of these questions are left to the dis-

[166] Grotius Centre Report, see *supra* note 6, para. 30 ("It was pointed that some of the existing semantics are open to question. Experience across institutions suggests that disengagement/'exit' is not simply a moment in time, but a complex process in itself. In line of this, it might be more appropriate to speak of 'completion', rather than 'exit'").

[167] At present the OTP "has no exit strategy in place for any of the situations in which it operates" (see Rebecca J. Hamilton, "The ICC's Exit Problem", in *New York University Journal of International Law and Policy*, 2014, vol. 47, p. 5). The Office of the Prosecutor had promised that as part of a Policy Paper on Case Selection and Prioritisation it will include a clearer working definition and structure for "exit strategies", see Strategic Plan 2016-2018, see *supra* note 70, para. 36 ("the Office will define its policy on how it proposes to end its involvement in a situation under investigation, the so-called: "exit strategy" for situations"). The Policy Paper adopted in 15 September 2016 does not even mention the term, l*et al*one provide any meaningful analysis (see Office of the Prosecutor, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016 (http://www.legal-tools.org/doc/182205/)). For the purposes of this chapter, I adopt a definition of 'exit strategy' similar to that of Richard Caplan, it is "a plan for disengaging and ultimately withdrawing" from a situation, "ideally having attained the goals that inspired international involvement originally. If the goals have been attained, an exit strategy may envision follow-on measures to consolidate the gains […] However, if the goals have not been attained and, it is concluded, cannot be attained, then a different set of considerations will govern the formulation of an exit strategy. For instance, if there have been partial gains, are these worth preserving and, if so, how can that be achieved? If there are reputational costs associated with exit, such as perceived loss of credibility, how can these best be contained? If exit will leave others to pick up the pieces, how is the process to be managed without leaving the others high and dry? As these considerations suggest, exit is not merely a technical matter, to be accomplished (ideally) when requirements for sustainability have been achieved. It is also a polit-

cretion of the Prosecutor, given that there are no temporal limitations on preliminary examinations[168] (aside from a general obligation to complete them within a 'reasonable time' regardless of complexity),[169] and that the OTP Policy Paper only instructs in vague terms that preliminary examinations may be terminated depending on "the availability of information, the nature, scale and frequency of the crimes, and the existence of national responses in respect of alleged crimes".[170]

It is important to recall that the ICC has capacity limitations. The ICC is unlikely to act as a first, second, or even third responder to the commission of widespread atrocities, and the most important thing the OTP can do to enhance its positive image is to educate the public on the subject of its inevitable constraints. As clarified by Bibas and Burke-White:

> A system that idealistically promises justice to everyone will disappoint most of them. It must focus on the most intentional and flagrant crimes that caused the gravest harm to the most victims and sowed the most widespread grief and bitterness. Coherent screening policies can pick a handful of strong cases involving the worst crimes, to maximize public satisfaction and historic resolution. They can screen out all but the most serious international crimes and all but the highest-level persons responsible, such as political or military leaders.[171]

ical matter, whose pace may be determined by a host of domestic and international factors that may have little to do with the achievement of sustainable outcomes" (see Richard Caplan, "Exit Strategies and State Building", in Richard Caplan (ed.), *Exit Strategies and State Building*, 2012, Oxford University Press, Oxford, pp. 5–6). Devising an exit strategy at the beginning of the Preliminary Examination stage will entail reviewing all of the above factors to develop both the goals and the risks involved in the particular situation under review.

168 OTP, *Policy Paper on Preliminary Examinations*, see *supra* note 7, para. 89.

169 See *supra* Section 19.3.2.1. in this chapter.

170 It is intriguing to note that the original regulations of the OTP envisioned a one-month maximum deadline for the first Phase, see *supra* note 26.

171 Stephanos Bibas and William W. Burke-White, "International Idealism Meets Domestic-Criminal-Procedure Realism", *Duke Law Journal*, vol. 59, no. 4., 2010, pp. 681–682. Cf. Grotius Centre Report, see *supra* note 6, para. 33 ("Doubts were expressed whether international criminal courts and tribunals should focus strictly on 'big fish', while leaving 'small fish' to domestic courts").

This approach echoes the consequentialist model and has implications for gravity and complementarity considerations by the OTP. At the same time, the OTP must recognize that there are limits to the duration of even prolonged preliminary examinations as well as to their number,[172] not the least of which is its own budgetary constraints.[173] While proposals to set rigid time limits[174] may be counterproductive to the goals of positive complementarity and tailored prosecutorial strategies,[175] there could

[172] Vincent Dalpé, "The ICC-OTP's Approach to Preliminary Examinations: Complementarity in Action or Complete Inaction" (on file with the author) ("one must keep in mind that the ICC barely has the necessary resources to prosecute a handful of individuals every year. The ICC is not a development agency and by no means has the necessary resources to orchestrate the monumental rule of law project that positive complementarity would require. A clear line needs to be drawn between the court's mission to promote rule of law and that of adjudicating crimes of international concern").

[173] Assembly of States Parties, Proposed Programme Budget for 2016 of the International Criminal Court, ICC-ASP/14/10 2 September 2015, para. 135 ("This budget increase does not allow the Office to immediately respond to all the demands placed upon it […] Situations that are under preliminary examination, and for which investigations could be opened, are being postponed as a result of insufficient resources").

[174] Grotius Centre Report, *ibid.*, para. 16 ("Some support was expressed in favour of fixed timelines and greater judicial review of prosecutorial action […] preliminary examinations should be concluded within one year, with the possibility for the Prosecutor to request the Pre-Trial Chamber to extend the time limit, if necessary"). Kersten, see *supra* note 74 ("This issue of how long preliminary examinations should last was raised last year at a conference organized by the inestimable Carsten Stahn and his team at Leiden University. There, a number of participants raised the possibility of adopting reasonable timelines. The most convincing version of this argument, at least in my view, essentially prescribed a general time limitation on how long prosecutors would have to conduct a preliminary examination. Here, somewhere between three to five years would be considered fair, although some suggested a one-year time period (I think this is far too little). After the initial period of time passed, the Office of the Prosecutor would have three options: 1) close the preliminary examination; 2) proceed to an official investigation; or 3) apply to judges for an extension of the preliminary examination for an additional period of time, perhaps somewhere between 2–3 years. During such applications – which, if the record of preliminary examinations to date is any indication, would regularly be filed – those states under scrutiny as well as victims' representatives would be permitted to file their own declarations as to whether to proceed to an official investigation").

[175] Grotius Centre Report, *ibid.*, para. 18 ("other participants remained skeptical towards the idea of specifying time limits for prosecutorial action. Questions were raised about the feasibility of time limits in 'hard' cases. Would the Prosecutor have to proceed with an investigation even if she does not have enough information or should the Preliminary Examination be closed? How should the OTP and Chambers address situations where it is not clear whether an investigation should be initiated? Concerns were expressed that the complexity and fluidity of the situations make it difficult to impose timelines. Difficulties would arise

be other means to regulate generalized temporal considerations at the preliminary examination stage.[176] The Court must devote more resources to developing tailored engagement strategies with affected States at an early stage of preliminary examinations, and to continuously updating those strategies. Moreover, the Court needs to ensure that extending preliminary examination periods does not serve to politically misuse preliminary examinations in domestic PR campaigns.[177] This directly ties into the issue of prioritization, and in light of the increase in referrals to the Court, and the Chamber's pushback in the case of the Registered Vessels of Comoros, Greece, and Cambodia, it has become critical for the Court to have clear, public and defensible prioritization policies.

One area of particular importance, in this context, concerns peace negotiations and their impact on "interests of justice" interpretations and broader exit strategies.[178] For these purposes, 'victims' are defined under the Rules of Procedure and Evidence as "natural persons who have suffered harm as a result of the commission of any crime within the jurisdic-

in particular in situations of continuing or recurring violence (for example, Nigeria and Honduras), or when peace negotiations are ongoing or agreements have been reached and the OTP has to give the state time to proceed with its own investigations and prosecutions").

176 *Ibid.*, paras. 16–17 (the group of experts considered other ways including granting the territorial or personal jurisdiction state (or even the victims) the possibility of asking the PTC to request that the OTP make a decision (similar to the CAR situation). Alternatively, it might be possible to allow the OTP to request PTC rulings on jurisdiction or admissibility at the Preliminary Examination stage, or to establish reasonable timeframes for each phase of a Preliminary Examination assessment).

177 James, see *supra* note 153, pp. 2–3 (noting that the "publicity generated" through activities done at the Preliminary Examination stage "could be politically advantageous" for one of the parties).

178 As explained above, as part of the preliminary examination process, the Prosecutor considers whether, taking into account the gravity of the crimes and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. Rome Statute, see *supra* note 18, Article 53(1)(c).

tion of the Court".[179] Any decision not to open an investigation on the basis of "interests of justice" is subject to mandatory judicial review.[180]

In its 2007 Policy Paper on the Interests of Justice, the OTP adopted a narrow understanding of "interests of justice" incorporating a "presumption in favour of investigations or prosecution" and a standard of "exceptionality" (a course of last resort).[181] Concerning peace processes specifically, the OTP refers to the recognized role of the UNSC in maintaining peace and security and its power to delay investigations and prosecutions by means of a resolution under Chapter VII of the UN Charter (thus stressing that the "broader matter of international peace and security is not the responsibility of the Prosecutor").[182] Concerning the conflict in Uganda, the Juba peace talks were launched two years after the OTP concluded its preliminary examination and opened an investigation. As a result, the negotiations were not considered as part of the Ugandan preliminary examination. On the other hand, both in the context of Colombia and in the context of the Palestine, negotiations may play a role in the Prosecutor's analysis.

The position that interests of peace are distinguishable from interests of justice and fall outside the mandate of the OTP is discouraging. In a world where the UNSC is paralysed due to conflicting agendas among permanent members with veto power, to abrogate all responsibilities to that institution seems unreasonable. The Court must engage in determining whether pursuing criminal justice during a preliminary examination would serve stability. The fact that the PTC is required to review such determinations further justifies the OTP in considering interests of justice rather than ignoring them. The Policy Paper is so limiting that it seems very unlikely that the Prosecutor will ever find an investigation should not be launched under Article 53(1)(c). As Schabas has noted:

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179 Rules of Procedure and Evidence, see *supra* note 23, Rule 85. This definition of victimhood is slightly vague, as the means whereby interests of different groups of victims could be discerned and compared are unclear. Consider the following: will an Israeli settler in the West Bank be considered a victim? Would her interests be ranked differently or the same as the interests of a Palestinian?

180 Rome Statute, see *supra* note 18, Article 53(3)(b).

181 OTP, *Policy Paper on Interests of Justice*, September 2007, pp. 3–4.

182 *Ibid.*, pp. 8–9.

> It is often said that without justice there can be no peace, but the opposite is also a valid proposition: without peace there can be no justice. It is probably unwise to reduce the debate to absolute propositions, whereby one objective, be it justice or peace, trumps the other. Advocates of uncompromising justice build their argument on the rights of victims, whose claim is secured by contemporary human rights norms. But while individual victims are perfectly entitled to see their perpetrators brought to book, like many rights, this must sometimes acknowledge competing interests, including the right to peace. The real issue is whether the Prosecutor, in making determinations under article 53, engages with the peace and justice dialectic or instead positions himself as an advocate for justice, leaving others to defend the interests of peace. The Prosecutor's policy paper takes the latter approach, although a good case can be made for a more holistic perspective. Perhaps future Prosecutors of the Court will attempt to balance the interests of justice and peace in the selection of cases, invoking the 'interests of justice' where deferral of prosecution may be useful in promoting an end to conflict.[183]

The public statements of the OTP in the wake of the signing of a peace accord between Colombia and the FARC-EP were also disconcerting. On 1 September 2016, the Prosecutor welcomed the "historic achievement", noting specifically the Special Jurisdiction for Peace which was supposed to be established and take into consideration the victims "legitimate aspirations for justice".[184] Following the narrow victory of 'no' voters in the October 2016 referendum, all direct references to the Rome Statute were removed from the revised deal. As some have contended, "reaching a peace accord and ending 52 years of armed conflict between the State and the FARC-EP would not have been possible at all without a transitional justice system that prioritizes the needs of Colombians for peace and reconciliation higher than the Rome Statute and the

[183] Schabas, see *supra* note 21, p. 839.

[184] OTP, "Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the peace negotiations between the Government of Colombia and the Revolutionary Armed Forces of Colombia – People's Army", 1 September 2016 (http://www.legal-tools.org/doc/c64dd0/).

increasingly controversial ICC".[185] The Prosecutor ignored these considerations and published a column in the weekly *Semana*, in which she clarified that the OTP would intervene and prosecute cases if Colombia's transitional justice system "fails to effectively prosecute military and guerrilla commanders over war crimes or crimes against humanity".[186]

This precedent is worrisome in the context of the preliminary examination on Palestine. The Israeli-Palestinian conflict has known high and low tides of bilateral negotiations, often supported by the United States as an intermediary. Unlike a final and comprehensive status agreement achieved through bilateral compromise, bringing the Chairman of the Yesha Council or a high-ranking Hamas official to The Hague is unlikely to end the occupation, dismantle a single settlement, or reduce violence in the region; in fact, the reverse is true, it will likely only raise antagonism. The Prosecutor's unwillingness to acknowledge the role her Office might play in derailing such negotiations, and her refusal to recognize that her mandate actually requires her to take these considerations under review,[187] is troubling, as this refusal could, in and of itself, lead to significant political implications.

19.4.4. Evidentiary Standards at the Preliminary Examination Stage

The information available at the preliminary examination stage is neither expected to be "comprehensive" nor "conclusive", compared to evidence gathered during an investigation.[188] According to Regulation 24 of the

[185] Christof Lehmann, "ICC Chief Prosecutor Bensouda Threatens With Intervention in Colombia", in *MSNBC*, 27 January 2017.

[186] *Ibid.*

[187] In this context it might be useful to note that the expression "interests of justice" was proposed by the United Kingdom in an amendment to what was then Article 26 of the draft statute. In an accompanying discussion paper, the UK delegation clarified that "the reference to the "interests of justice" is intended to reflect a wide discretion on the part of the prosecutor to decide not to investigate comparable to that in (some) domestic systems, eg […] there were good reasons to concluded that a prosecution would be counterproductive": see UK Discussion Paper, "International Criminal Court: Complementarity", 29 March 1996, para. 30 (https://www.legal-tools.org/doc/45b7f5/). Based on this Schabas concludes that "had there been an amendment to article 53(1)(c) to the effect that 'the interests of justice shall not be confused with the interests of peace', it would surely not have met with consensus", Schabas, see *supra* note 21, p. 836.

[188] Situation in the Republic of Kenya, Decision Pursuant to Article 15, see *supra* note 34, para. 27; 2016 *Preliminary Examination Report*, see *supra* note 21, para. 11.

Regulations of the OTP, the Office is required to develop and apply "a consistent and objective method for the evaluation of sources, information and evidence", taking into consideration their credibility and reliability while ensuring bias control by inspecting multiple sources.[189] The Prosecutor has full discretion in conducting preliminary examinations and is provided with a broad range of investigatory powers, short of the formal mechanisms utilized by the Office at the investigation stage (including in particular Part 9 co-operation),[190] to conduct her examination:

> According to Article 15(2), the tools available to the Prosecutor at this stage include: received information; additional information from States, organs of the UN, intergovernmental or non-governmental organizations or other reliable sources and 'written or oral testimony' received at the seat of the Court (whereby the ordinary procedures for questioning shall apply and the procedure for preservation of evidence for trial may apply pursuant to Rule 47). Although apparently limited in scope, the sources described under this rule are potentially rich in terms of the information they may in practice be able to provide. Moreover, there is arguably no reason to restrictively interpret the type of non-governmental or governmental organization that may and should be approached by the ICC Prosecutor under this provision. Flexibility and creativity should be employed in this regard, depending on the type of information sought.[191]

Thomas Hansen, relying on OTP Reports, mapped out the "wide range" of activities conducted within this phase. Amongst those he

[189] Regulations of the Office of the Prosecutor, see *supra* note 42, Regulation 24.

[190] For an analysis of different interpretations as to whether Part 9 Cooperation should apply to preliminary examinations, see OTP, *Informal Expert Paper: Fact-finding and investigative functions of the office of the Prosecutor, including international co-operation*, 2003, paras. 22–29 (https://www.legal-tools.org/doc/ba368d/).

[191] *Ibid.*, para. 21. Although the above description refers specifically to the conditions concerning the receipt of information by the Prosecutor acting *proprio motu*, in reality these conditions are not really any different from those when she acts pursuant to a State Party or Security Council referral. "The Prosecutor must always 'analyse the seriousness' of information provided, even when it comes from a State Party or the Security Council, as the Rules of Procedure and Evidence make quite clear. Moreover, she may always seek additional information from various 'reliable sources' and receive written or oral testimony at the seat of the Court" (Schabas, see *supra* note 21, p. 402).

notes:[192] (1) creating databases relating to incidents and crimes under examination; (2) conducting various forms of legal analysis, including in the context of determining the existence of an armed conflict; (3) analysing decisions by national courts, as well as non-criminal domestic processes; (4) verifying information provided in communications, including from other States, and assessing the senders' reliability, using open source information such as international organizations and NGO human rights reports and statements; (5) reviewing legislative developments that may have an impact on the conduct of national proceedings; (6) analysing provisions in peace agreements; (7) shedding further light and filling informational gaps relying on the jurisprudence of regional courts; (8) conducting meetings at both the seat of the Court and in examination countries with various stakeholders (governmental, civil society, victims); and (9) conducting missions to situation countries to undertake outreach and education activities.[193]

The OTP 2016-2018 Strategic Plan on Prosecutorial Strategy notes further that "[t]he high pace of technological evolution changes the sources of information, and the way evidence is obtained and presented in court".[194] As a result, the Strategic Goal 4 of the OTP involves adapting the Office's investigative capabilities and network to "the technological environment" and has included hiring cyber investigators and digital forensic analysts as well as training and capacity building.[195]

The preliminary examination process is opaque inasmuch as the OTP does not have a clearly defined, publicly available policy on eviden-

[192] Hansen, see *supra* note 67, pp. 11–12.

[193] More generally regarding the OTPs methods at the Preliminary Examination phase, see OTP, *Policy Paper on Preliminary Examinations*, see *supra* note 7, paras. 31–32 ("As information evaluated at the preliminary examination stage is largely obtained from external sources, rather than through the Office's own evidence-gathering powers (which are only available at the investigation stage), the Office pays particular attention to the assessment of the reliability of the source and the credibility of the information. The Office uses standard formats for analytical reports, standard methods of source evaluation, and consistent rules of measurement and attribution in its crime analysis. It checks internal and external coherence, and considers information from diverse and independent sources as a means of bias control").

[194] Strategic Plan 2016-2018, see *supra* note 70, para. 3.

[195] *Ibid.*, paras. 23, 59.

tiary standards and the analysis of sources at that stage.[196] It is submitted that the Prosecutor should provide additional information (and actual past examples) of how it corroborates and verifies information, as well as how much weight is given to different source types. This is predominantly because of the extensive weight given to open-source materials – including materials by UN fact-finding missions and monitoring bodies, as well as human rights NGOs. It is also taking into consideration situations whereby the affected States might not co-operate with the Prosecutor during the preliminary examination analysis. This problem was exemplified in the 2014 Report concerning the Situation on Registered Vessels of Comoros, Greece, and Cambodia. The OTP relied on four different reports[197] and seemingly gave all four identical weight. However, Israel has reason to be concerned about legal and factual determinations based on insufficient evidence. As Judge Thomas Buergenthal wrote in his dissenting opinion in the 2004 *Wall Advisory Opinion*, the ICJ supported its findings:

> with evidence that relates to the suffering the wall has caused along some parts of its route. But in reaching this conclusion the Court fails to address any facts or evidence specifically rebutting Israel's claim of military exigencies or require-

[196] For example, in the context of activities conducted in 2017 as part of the Preliminary Examination into Palestine the Office clarifies that it has:

> reviewed and assessed a large body of information from various types of sources, including publicly available information as well as information and materials provided to the Office by relevant individuals, local and international NGOs, international organizations and States. Consistent with standard practice, the Office has subjected such information to rigorous source evaluation, including in terms of the reliability of the sources and credibility of the information received. In this regard the Office has continued to take steps to verify and corroborate a number of relevant factual issues, including, for example, by requesting additional information from relevant actors (2017 Preliminary Examination Report, *supra* note 27, at para. 74).

The Office does not provide any information about the "various types of sources" it collected, the nature of its "standard practice" of "rigorous source evaluation", or the ways by which it verifies sources to determine reliability and credibility.

[197] Namely, (1) the report from the fact-finding mission established by the UN Human Rights Council, (2) the report of the four-member panel of inquiry established by the UN Secretary-General and chaired by Geoffrey Palmer, (3) the report by the national commission of inquiry established by the Turkish Government, and (4) the report of the investigate commission established by the Israeli Government and headed by former Israeli Supreme Court Justice Jacob Turkel.

> ments of national security. It is true that in dealing with this subject the Court asserts that it draws on the factual summaries provided by the United Nations Secretary-General as well as some other United Nations reports. It is equally true, however, that the Court barely addresses the summaries of Israel's position on this subject that are attached to the Secretary-General's report and which contradict or cast doubt on the material the Court claims to rely on. Instead, all we have from the Court is a description of the harm the wall is causing and a discussion of various provisions of international humanitarian law and human rights instruments followed by the conclusion that the law has been violated. Lacking is an examination of the facts that might show why the alleged defences of military exigencies, national security or public order are not applicable to the wall as a whole or to the individual segments of its route. The Court says that it "is not convinced" but it fails to demonstrate why it is not convinced, and that is why these conclusions are not convincing.[198]

Greater contemplation as to the means by which the Prosecutor analyses, verifies, and disseminates information is absolutely critical, especially considering that the OTP acts as a quasi fact-finding mission and human rights monitoring body, at the preliminary examination stage, one that is occasionally known for taking the strategy of "naming and shaming".[199]

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[198] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*, International Court of Justice, 9 July 2004, Separate Declaration by Judge Buergenthal, pp. 243–244.

[199] James Verini, see *supra* note 75 ("Moreno-Ocampo seemed to see the ICC not as a forensic body so much as a "naming and shaming" organization, like Human Rights Watch or Amnesty International. And while it was true that the court's small budget limited the size of his investigations, he was, some say, already more interested in prominence than evidence. A former court attorney told me: "He would see the leader of a state and say: 'There must be evidence out there. Go get it for me.'"). More generally regarding criticism of the OTP as a monitoring body, see Grotius Centre Report, see *supra* note 5, para. 27 ("questions were raised regarding the role of the ICC in terms of monitoring: whether it should monitor domestic trial proceedings until a final judgment is rendered or simply make sure that proceedings are genuine at a given time, with the possibility of reopening the situation if circumstances change. Several participants shared reservations about the idea of long-term monitoring. They highlighted that the scope of Pes is quite different than trial monitoring and raised concerns with regard to resource limitations and the potential prolongation of

Moreover, to the extent that the Court intends to increase its usage of digital evidence, including through the reliance on the collection, storage, (algorithmic) analysis, verification, and promulgation of intercepted communications, bulk data sets, or computerized digital depositories, to name but a few examples, clearer policies must be put in place to ensure both the accuracy of the conclusions and the privacy of individuals.[200] The United Nations Global Pulse, an initiative by the United Nations Secretary-General, focuses on the means by which UN agencies and authorities harness big data safely and responsibly in pursuit of a public good. The Global Pulse's Data Privacy Advisory Group adopted a set of "Privacy and Data Protection Principles" in July 2016, which themselves were an evolution of UNGA resolution 45/95 of 15 December 1989 establishing "Guidelines for the Regulation of Computerized Personal Data Files".[201] The United Nations High Commissioner for Refugees has recently adopted a robust policy on the protection of personal data of persons of concern to the agency. Among the standards to be adhered to are basic principles of personal data processing.[202] The policy also includes guidelines covering data processing by implementing partners and the transfer of data to

Pes. It was suggested that closure, with potential re-opening, might be a more suitable methodology. This power, however, has thus far not been exercised or tested").

200 Note in this regard that the Rome Statute only addresses the protection of the "dignity and privacy of victims and witnesses" (see Rome Statute, see *supra* note 18, at Articles 68(1) and 57(3)(c)). However, such investigative techniques could interfere with the rights to privacy of the accused as well as the rights to privacy of uninvolved third parties (what is commonly known as 'collateral data'), and their right to privacy does not seem to receive statutory protection under the Statute.

201 For further reading, see United Nations Global Pulse, "Privacy and Data Protection Principles" (available on its web site) (the guidelines cover individual privacy protections, data security, lawful collection, right and purpose of use, risk and harm assessment and mitigation, data sensitivity, data minimization, data quality and accountability, data retention, and collaboration with others on data-related matters). UNGA Resolution 45/95 (the precursor to the Privacy and Data Protection Principles) not only adopted the guidelines for the regulation of computerized personal data files across the United Nations, but also called on "all governmental, intergovernmental, and non-governmental organizations to respect those guidelines in carrying out the activities within their field of competence". This would seem to include the ICC.

202 Namely legitimate and fair processing, purpose specification, necessity and proportionality, accuracy, respect for data subjects' rights (including rights to access, correct and delete data, and to object to processing), confidentiality, security, the practice of conducting data protection impact assessments, and rules on retention, accountability and supervision.

third parties.[203] At the very least, the OTP needs to have a similar policy developed which will provide more comprehensive information and assurances as to how its investigative policies, as they relate to new technologies and greater volumes of electronic data, are in compliance with those basic standards.[204]

Further, the question of the evidentiary standard to be met is equally as open-ended and discretionary as the decision on investigative tools and methods. The Prosecutor must show that there is "a reasonable basis to proceed with an investigation".[205] That will of course depend on whether the OTP finds in Phase 2 that there is "reasonable basis to believe" that the criteria under Article 53(1)(a)–(c) are met. The two threshold criteria ("to believe" and "to proceed") "mutually relate" and the "underlying purpose of this check is to control for frivolous or politically motivated charges".[206] This requirement applies equally to all three trigger mechanisms moving a situation from a preliminary examination to an investigation. While the bar is essentially low, "the question how low the threshold

[203] For further reading, see United Nations High Commissioner for Refugees, *Policy on the Protection of Personal Data of Persons of Concern to UNHCR*, May 2015 (http://www.legal-tools.org/doc/6b6aef/).

[204] Certain limited aspects of this novel legal problem were raised in the Special Tribunal for Lebanon, in the context of a challenge by the Defense Counsel of call sequence tablets (CSTs) that the Prosecution sought to bring into evidence. The Prosecution created the CSTs using the call data records ('CDRs') pertaining to the metadata of every mobile phone call and text message in Lebanon between 2003 and 2010. The CDRs were transferred from Lebanese telecommunications providers to the United Nations International Independent Investigation Commission ('UNIIIC') and the Tribunal's Prosecution. Both the Trial Chamber and the Appeals Chamber agreed that the Prosecutor could legally request and obtain the CDRs without judicial authorization because such authorization was not required under their respective governing legal instruments. The Appeals Chamber further held that while there is a compelling case as to the CDRs protection by international standards on the right to privacy, the transfer of the CDRs in the absence of judicial control in this particular case did not violate the right to privacy because the transfer was provided for by (domestic) law, was necessary and proportionate. For further reading see *The Prosecutor v. Salim Jamil Ayyash et al.* (STL-11-01/T/AC/AR126.9, Special Tribunal for Lebanon, The Appeals Chamber, Decision on Appeal by Counsel for Mr. Oneissi Against the Trial Chamber's Decision on the Legality of the Transfers of Call Data Records).

[205] See Rome Statute, see *supra* note 18, at Articles 15(3)-(4) and 53(1).

[206] Mark Klamberg (ed.), *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic Epublisher, Brussels, 2017, p. 188 (http://www.legal-tools.org/doc/aa0e2b/).

actually is remains unsettled in present ICC jurisprudence".[207] Once again, some greater elucidation regarding the interpretations of the necessary evidentiary standard by the Prosecutor could significantly improve quality control of the Office's work.

19.5. Areas for Potential Reform

In this section, I aim to propose a number of potential reforms relating to the internal operations of the OTP, the relationship between the OTP and the PTC, and external oversight over the Office's work during the preliminary examination stage, each of which, I believe, could have a positive impact in helping to ensure greater quality control throughout all phases of the preliminary examination process. While some of the proposed reforms would require, by their nature, the unlikely accord of a wide range of actors in and around the Court (the Prosecutor, the Judges, and the States Parties), others are subtler or more moderate and would therefore be easier to implement. Together, or individually, these proposals should serve as the beginning of a conversation, and are by no means its conclusion.

19.5.1. Re-phasing of the Preliminary Examination Phase

One possible reform that the OTP should consider is restructuring its phasing of the preliminary examination stage. As Stahn wrote, "the phased-based approach involves a certain tension between a sequenced and a parallel consideration of selection criteria. The idea to break preliminary examination down into phases seems to suggest that the analysis is sequenced. It implies that one phase comes after the next. According to this logic, analysis may get stuck at one phase, like jurisdiction, for years, without considering information related to other phases. Given these con-

[207] *Ibid.*, pp. 188–89. For further analysis of the application of the "reasonable basis to believe" standard, questioning whether the ICC Prosecutor may have adopted a "too high a threshold for making this determination and hence proceeding to the next phase of the preliminary examination", see Thomas Obel Hansen, "Policy Choices, Dilemmas and Risks in the ICC's Iraq-UK Preliminary Examination", FICHL Policy Brief Series No. 83 (2017), Torkel Opsahl Academic EPublisher, Oslo, 2017, pp. 2-3 (http://www.toaep.org/pbs-pdf/83-obel-hansen/).

cerns, it might make sense to adopt a more holistic methodology towards the respective situation".[208]

Potential re-phasing could be based on various stages at the preliminary examination that are already sequenced (that is, collection of materials, extraction of information and arrangements in databases, mandated consultation processes, routine internal and external progress reports and reviews, meetings with stakeholders and missions to situation countries). This re-phasing would involve breaking the preliminary examination into each of its sub-components and replicating the natural sequencing. Stepping outside of strictly delimited conception of preliminary examination phases that merely mimic the statutory provisions of Article 53 will allow the Prosecutor to open the 'black box' of the preliminary examination review process once more, this time inviting the public to look even deeper inside.

The more the preliminary examination stage could be broken down to its vital or basic elements, the easier it would be to produce a visual 'Gantt chart' of prosecutorial work to be used internally to enhance results-driven action and quantifiable achievements by the OTP, and provide greater transparency to the ASP in budgeting decisions. Gantt charts are a common practice in business, providing a graphical depiction of a project schedule, from start to finish, that maps flexible beginning and end dates of all elements of a particular project (including resources, milestones, tasks, and dependencies). This could allow for the further formalization of "internal benchmarks and channels of communication"[209] as well as for holding individuals accountable within the OTP. As part of this reform, it is worth considering the introduction of a formal 'exit strategy development' phase, preferably early on in the preliminary examination, which could even be subject to a mandatory dialogue with ASP delegates.[210] In

[208] Stahn, see *supra* note 6, p. 12. As discussed above, the Prosecutor already purports to adopt a "holistic approach" regarding the preliminary examination stage, see *supra* note 24. The Prosecutor claims that the analysis during the preliminary examination stage is not rigid and does not follow the statutory stages inflexibly. That said, very little is known about what the OTP actually means by this. Restructuring the preliminary examination stage would make it possible to put meat on the skeleton of the Office's self-proclaimed holistic methodology.

[209] *Ibid.*

[210] It is important to stress that the comments received from ASP members, under such a potential mandatory consultation, must not be binding on the Prosecutor. In developing an

any event, as previously mentioned, Gantt charts are not to be adhered to religiously. Start and end dates may move or change to ensure flexibility. The original Gantt chart will merely provide a model for preliminary examinations (that could further elucidate what the Prosecutor considers as 'reasonable time' for each of the examination's phases), but will be routinely updated in accordance with the dynamics of any given examination. As such, this proposal does not purport to set strict time frames for preliminary examinations, nor does it find such an endeavour useful.

19.5.2. Redefining the Relationship between the OTP and the PTC

As demonstrated, the PTC needs to more substantively acknowledge the significant margin of discretion of the OTP at the preliminary examination stage, especially in connection with its consequentialist policies. At the same time, it would be useful to consider whether greater judicial review of OTP decisions might be a welcome step. The addition of more procedural structure to the preliminary examination stage, through re-phasing as discussed above, could allow for a PTC review that is far more technical and tailored to analysis of actual abuse of powers or improper intent (addressing Schabas' valid concerns about the effectiveness of judicial review).[211] In fact, insofar as the review is limited to those procedural elements (as opposed to micromanagement of subject-matter determinations, as happened in the *Comoros* decision), it might even be possible to mandate a PTC review of every decision to launch an investigation (and not only those launched *proprio motu* – ending what is an arbitrary distinction between Article 14 and Article 15 judicial review). There is also justification for allowing the Prosecutor, when she deems necessary, to apply to the Court for an advisory opinion on matters related to the preliminary examination stage – a mechanism currently unavailable to her.[212]

early conceptualization of 'exit strategies' (see discussion on the definition of the term at *supra* note 167) at the preliminary examination stage, the OTP should be advised by as many actors as possible in order to map out the key goals and the broader objectives to be achieved in 'consequentially' engaging a particular situation; but the final decision rests with the Prosecutor.

211 See *supra* note 110.

212 Stahn, see *supra* note 6, pp. 14–15 (noting that judicial review in the process of deliberating the question of Palestinian statehood could have been useful, but that "Regulation 46 was not meant to provide a judicial forum for such disputes" – further concluding that this situation is "unsatisfactory". According to Stahn there is need to provide a channel through

Any proposed increase in the role of the PTC at the preliminary examination stage must be considered with great caution. The intention here is not to turn the preliminary examination stage into a quasi-trial and certainly not to establish legal judgments (which might ultimately be perceived as binding on the Court) at an early stage. This is because, at the pre-investigation stage, any engagement with the Court is by default conducted on an *ex parte* basis, with no one representing the affected States or presenting broader counter-arguments to the position of the OTP.[213]

19.5.3. Redrafting Existing OTP Policy Papers and the Adoption of New Policies

Another significant area of reform could be the amendment by the OTP of some of its policies and the adoption of new policy papers, correcting some of the existing flaws in the Court's prosecutorial system, discussed and analysed throughout this chapter. In this regard, the Prosecutor should clarify that transparency is not merely a 'policy objective' but indeed a 'general principle' that guides every preliminary examination. It is true that not everything must be disclosed, and that the question of transparency itself should be subject to discretion. Certain elements in the preliminary examination process might indeed be better served if carried out with some degree of secrecy (consider, for example, sensitive consultations with victims' groups or with the affected States). The question, therefore, is not whether transparency should be uniformly and rigidly applied, but

which judicial guidance can be sought prior to, or during, preliminary examinations. I would further suggest that such guidance not be binding on the Prosecutor, but should nonetheless hold significant weight). At the moment, the only external legal advice available to the Prosecutor comes in the form of thematic experts the OTP may consult with on a routine or *ad hoc* basis (for example, roundtable consultations, academic engagements, and workshops).

213 Some might say that any attempt to involve the PTC will inevitably lead to conclusions that will have far-reaching legal and political consequences not unlike those of the OTP today, and in that case even greater caution is required. One can potentially conceive of means that could introduce structured adversarial PTC proceedings at the preliminary examination stage (beyond what exists today, which is the ability of States to request to submit amicus briefs). For example, the establishment of a "red team" within the OTP (that would be required to submit an alternative account to that of the Prosecutor to the PTC) or a special advocate in the Court that might engage with interested States and could raise their concerns during PTC proceedings. For now, the proposal does not go that far; it merely suggests greater PTC involvement, limited however solely to a technical, rather than substantive, review of procedure.

rather whether transparency should be treated as a general principle to be followed, to the extent possible, with some degree of consistency. Transparency should thus be aspired to, and not seen solely through utilitarian lenses as a means to achieve ever-changing objectives.

If my Gantt chart-based approach is adopted, the question then arises as to whether these charts are shared with the public, a question that goes to the heart of the tension between transparency and efficacy. I would recommend that a generic Gantt chart be disclosed, in order to educate the public about the various sub-stages of the preliminary examination process and to elucidate the time frames envisioned by the Office for each sub-stage as a matter of best practice in an ideal scenario. The disclosure of elements of specific Gantt charts from specific preliminary examinations, on the other hand, should be part of a sliding scale approach to transparency. So, while initially the balance would be tilted against such disclosures, the longer the preliminary examination was ongoing without a determination, the more reasons there would be to increase transparency by providing greater information about specific challenges and time frames.

Further, the OTP should reconsider its Policy Paper on the Interests of Justice, due in part to the political deadlock at the UNSC, which prevents it from offering an effective check on the work of the OTP as it relates to decisions that could hinder stability and the broader maintenance of peace and security. This is of specific importance in the context of decisions relating to peace negotiations and agreements. The drafters of the Rome Statute included this parameter within the Prosecutor's discretionary powers (which reflected the notion that the Court does not operate in vacuum), and it is wrong of a Prosecutor to abrogate this responsibility. Similarly, the OTP should elaborate on its policies regarding the formulation of disengagement plans from situations ('exit strategies').[214]

Finally, the Prosecutor should adopt a new Policy Paper on evidentiary standards and policies related to sources of information, including at the preliminary examination stage. The Prosecutor should use that paper to set out in detail the process whereby it examines open-source materials and what legal weight her Office gives them, including by reference to actual examples from past preliminary examinations which have already

[214] See *supra* note 167.

been closed. The Prosecutor should further introduce standards concerning the collection, access to, analysis, and dissemination of digital communications and digital forensic evidence, predominantly as they relate to data protection and privacy regulation.

19.5.4. External Review Processes

Finally, there is some basis to the contention that the OTP could be checked by other external oversight mechanisms beyond the PTC.[215] In this context, Senior Legal Advisor to the Pre-Trial Division of the ICC, Gilbert Bitti, has suggested the radical idea of "a structural reform of the office of the prosecutor", replacing the Prosecutor with a three-member 'Committee of Prosecutors' ('College de Procureurs'). Bitti claimed that this would "ensure greater credibility of the institution's choices" by enhancing the stability of penal policies within the Office.[216] While such a

[215] Some commentators have suggested that external review processes should even extend beyond the OTP and cover the entire Court. See Morten Bergsmo *et. al.*, "A Prosecutor Falls, Time for the Court to Rise", FICHL Policy Brief Series No. 86 (2017), Torkel Opsahl Academic EPublisher, Oslo, 2017 p. 4 (http://www.toaep.org/pbs-pdf/86-four-directors/) ("Ov-ersight of the ICC cannot be left to States Parties alone […] Immunizing the Court through the good intentions of officials and civil society actors may inadvertently numb the normal sense of vigilance within the organization, on which its self-preservation depends. An unarticulated sense within the Court that it will not be held accountable, that Governments will conceal problematic information from the public, should not be allowed to take hold").

[216] Gilbert Bitti, "Article 53. Ouverture d'une enquête", in Javier Fernandez and Xavier Pacreau (eds.), *Commentaire du Statut de Rome de la Cour pénale internationale*, Pedone, Paris, 2012, vol. II, p. 1173, at p. 1227 ("On peut également envisager, pour assurer une meilleure transparence, et done une plus grande crédibilité des choix de l'institution, une réforme structurelle du Bureau du Procureur. La première chose à afaire serait de remplacer le Procureur par un collège de procureurs, à savoir trois procureurs elus pour 9 ans, non rééligible, et dont le renouvellement se ferait par tiers tous les trois ans. On aboutirait ainsi sans doute aune plus grande stabilité de la politique pénale et donc à une meilleure coherence des choix de politique pénale"). Bitti then proceeds by suggesting that the OTP would be split into two, with the Committee of Prosecutors working alongside a "Commission of Inquiry and Analysis" (Commission D'enquête et D'analyse). The latter will be composed of qualified investigators and analysts under the direction of a senior investigator and a senior analyst that would be of the same rank as the Prosecutors in the Committee. Within six months from a referral or Article 15 communication, the Commission would be required to submit its final report to the Committee of Prosecutors. The Committee would then have six months to make a determination regarding the launch of an investigation, subject to review by the PTC.

dramatic reform may be unnecessary, Bitti's creative idea is certainly one that is worth more than a passing thought.

One could envision a less drastic version of Bitti's proposal through the establishment of an external 'Committee of Prosecutors' that would serve the purpose of guiding the OTP in its exercise of prosecutorial discretion. Such a Committee might include former Prosecutors from the ICC and other international courts and tribunals, along with a regional representation by high-ranking State prosecutors. This Committee could issue reports, guidance, and support at the request of the Prosecutor or, in cases of prolonged preliminary examinations, at their own volition. Such decisions would not replace the Prosecutor's overall discretion or final say, but could further support it by offering more detailed reasoning and greater objectivity to the determinations – thus enhancing the overall legitimacy of the Court.[217]

19.6. Conclusion

Celebrating its fifteenth anniversary, the ICC is at a crossroads. The political reality that embraced the Court with the signing of the Rome Statute in 1998 is not the same political reality in which the Court must manoeuvre today. The Prosecutor faces opposition from African States, increased nationalism in the United States under the current administration, and populist rhetoric across Europe, financial crises that force the Court's primary donors to cut their budget, and grotesque war crimes and crimes against humanity in war zones like Syria with no available means to seek ICC redress.

It is in this context that the Prosecutor's power to engage in preliminary examinations is both a promise and a curse. The OTP should continue to push for crime prevention and positive complementarity, looking "beyond the narrow aspects of the court room", while using the means available to it through Article 53(1) examinations. At the same time, however, the Prosecutor should be fully cognizant of the limits of its own power to effect change, and should ensure that good faith is not confused

[217] The controversy that arose in 2010 following the establishment of the Independent Oversight Mechanism and the debates over its monitoring functions over the OTP, makes me believe this recommendation is likely to endure similar resistance. See, generally, Bertham Kloss, *The Exercise of Prosecutorial discretion at the International Criminal Court: Towards a more Principled Approach*, Herbert Utz Verlag, Munich, 2016, pp. 74–77.

with impotent idealism. A number of politically contentious preliminary examinations are threatening to further degrade public perception of the Court. In trying to achieve Davis' 'optimum point', mechanisms at the preliminary examination stage should be re-conceptualized, first and foremost by the OTP. This chapter has attempted to analyse the limitations of existing mechanisms, and to offer potential reforms which may aid the advancement of quality awareness and improvement throughout the preliminary examination process.

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