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Quality Control in Preliminary Examination: Volume 1

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

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

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On the Magic, Mystery and Mayhem of Preliminary Examinations

Carsten Stahn, Morten Bergsmo and CHAN Ho Shing Icarus*

Herr, die Not ist groß!
Die ich rief, die Geister
Werd ich nun nicht los.

Johann Wolfgang von Goethe,
Der Zauberlehrling (1797)

1.1. The Quality Control Project

Quality Control in Preliminary Examination: Volumes 1 and 2 are part of a wider Quality Control Project that seeks to increase our understanding of how we ensure the highest quality and cost-efficiency during the more fact-intensive phases of work on core international crimes. The *first* phase considered was fact-finding or documentation of violations that may amount to core international crimes outside the criminal justice system. This refers to fact-work undertaken by non-governmental organizations ('NGOs'), peace-keeping forces, humanitarian missions, international organizations, national immigration agencies and human rights commissions, intelligence officers and others. This is a very large and diverse group of actors, and the methods they employ vary greatly. Until recently, this fact-work has been undertaken against international human rights standards. Gradually, it also includes international criminal law. The anthology *Quality Control in Fact-Finding* was published in 2013 on this first phase.

The *third* phase that we will consider in the project concerns actual criminal investigation within the criminal justice system. At the time of

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writing, this part of the project has yet to be undertaken. In between fact-finding prior to criminal justice involvement and criminal investigation is the phase known as 'preliminary examination'. That is the phase which *Quality Control in Preliminary Examination: Volumes 1 and 2* concern.

One of the most critical steps towards criminal justice for core international crimes – be it in national or international jurisdictions – is the exercise of discretion to determine whether there is a reasonable or sufficient basis to proceed to a full criminal investigation, without which there is no prosecution. This pre-investigative stage is known under different names, including 'preliminary examination', which is used generically for the purposes of these two volumes. Criminal procedure regimes usually set a threshold for the assessment of the seriousness of available incriminating information – such as "reasonable basis to proceed with an investigation" in Article 15(3) of the Statute of the International Criminal Court ('ICC'). But apart from that, they tend to give the prosecution sweeping discretion in the conduct of the preliminary examination. As a consequence, preliminary examinations often involve a large degree of uncertainty for those directly concerned, they may extend over a long period of time, or they can easily become a graveyard for reports on or allegations of criminal conduct. Many allegations of core international crimes – typically, but not limited to, international sex crimes – do not make it beyond preliminary examination.

While legal systems depend on the flexibility afforded by discretionary power vested in lawyers, the sheer expanse of discretion in preliminary examination bolsters the power of the prosecutor *vis-à-vis* victims, judges, the public and, in international jurisdictions, the States concerned. Public statements made by the prosecutor pursuant to a preliminary examination – or just keeping it open for several years – can cast shadows of incrimination over suspects, governments and States alike (including non-States Parties). In the case of the ICC, there is almost nothing a suspect or State can do about it, except to prepare for the possible outcome and wait. Many criminal justice systems place such distinct power in the hands of the prosecutor from the moment he or she possesses incriminating information, even when the prosecution service is the weakest link of the system, which has often been the case in international criminal justice. While the war crimes trials and appellate proceedings have enjoyed intense media, government and expert attention in the last 20 years, preliminary examination has received very little. This deficit is problematic as a weak

start often makes crooked and – as we have seen at the ICC – broken war crimes cases, which undermine trust among victims, donors and the public. Human rights defenders also depend on sound preliminary examinations for their sources (during the documentation of violations) to agree to sharing materials with criminal justice actors. To pass from documentation to criminal examination, one must cross the bridge of preliminary examination. This is a critical dimension of the relationship between civil society and the rise of criminal justice for core international crimes.

These two volumes seek to contribute to a better understanding of preliminary examinations, their normative frameworks, and aspects requiring improvement, both in international and domestic settings. The project seeks to contribute to improvement, but it pushes no specific agenda of regulatory reform – be it in the form of procedural provisions, prosecution directives, or formal criteria. The volumes do not specifically recommend that prosecutorial discretion in preliminary examination should be further curtailed by binding regulation, but that its exercise should be more vigilantly assessed by prosecutors and monitored by civil society. Prosecutorial professionalization – as other forms of professionalization in the public sector – requires awareness on the part of prosecutorial leaders of the importance of self-questioning and -improvement. This is a precondition for such professionalization to take proper hold in the practice of criminal justice teams. It is this awareness and culture of quality control, including the freedom and motivation to challenge the quality of work, that this project seeks to advance.

Preliminary examinations have turned into one of the most important activities of the ICC. By July 2018, ten situations were under preliminary examination. Several of them concerned permanent members of the United Nations Security Council. The ICC Office of the Prosecutor ('OTP') has issued a 2013 Policy Paper on Preliminary Examinations and annual preliminary examination reports. Situations such as Palestine or Colombia count among the most complex and challenging areas of inquiry. Human rights fact-finding bodies call on the ICC to consider opening new proceedings. But the ICC faces constraints, in terms of its mandate, jurisdictional limitations, and resources. Attention has shifted from situation to situation. Only limited strategic and long-term thinking has been devoted to broader policy questions concerning preliminary examinations, such as their context, rationale and role, the suitability of the existing legal framework, ICC methodologies, public communication during prelimi-

nary examinations, their impact in and across situations, and lessons learned from specific case studies.

The two volumes contain papers presented at the conference "Quality Control in Preliminary Examination" in the Peace Palace in The Hague on 13–14 June 2017, supplemented by some additional papers. The papers have been organized in five parts across the two volumes:

1. The Practice of Preliminary Examination: Realities and Constraints (seven chapters);
2. Case Studies or Situation Analysis (nine);
3. The Normative Framework of Preliminary Examinations (six);
4. Transparency, Co-operation and Participation in Preliminary Examination (seven); and
5. Thematicity in Preliminary Examination (five).

Volume 1 contains the chapters in Parts 1–2, whereas the remaining parts are in Volume 2. This introductory chapter concerns both volumes.

1.2. Preliminary Examinations at the International Criminal Court

ICC preliminary examinations are marked paradoxes and curiosities.[1] They defy many traditional categorizations. Courts are often said to be effective if they have robust enforcement powers. The late Antonio Cassese framed the image of the 'giant without legs'.[2] But strong enforcement powers are not always an indicator of effectiveness. Sometimes soft powers may be as effective or even more effective because they provide greater room for flexibility. Preliminary examinations fall in this category.

Part 9 of the Rome Statute, which deals with co-operation, does not apply to preliminary examinations. But preliminary examinations are one of the most powerful policy instruments of the OTP.[3] Hardly anyone ex-

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

[2] See Antonio Cassese, "On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law", in *European Journal of International Law*, 1998, vol. 9, no. 1, pp. 2, 13 ("the ICTY remains very much like a giant without arms and legs — it needs artificial limbs to walk and work").

[3] See David Bosco, "Discretion and State Influence at the International Criminal Court: The Prosecutor's Preliminary Examinations", in *American Journal of International Law*, 2017, vol. 111, no. 2, pp. 395–414.

pected how important they would become. Their impact exceeds their actual legal power. This is reflected in the configuration of preliminary examinations. The opening of many preliminary examinations has caused anxieties or even friction among States. The very message inherent in the opening of a preliminary examination is to some extent a performative speech act by the OTP.[4] It expresses what ought to be done. It sends a global message about what types of situations matter to the Court and what type of violations deserve further scrutiny. The signals expressed by preliminary examinations are mostly directed to collective communicative audiences, such as States, armed groups, international organizations (for example, the African Union, the United Nations), human rights bodies or NGOs. The function of preliminary examinations has thus strong synergies to international relations and international politics. It involves sensitive stigmas about State failure and control.[5] Preliminary examinations have been developed into an unprecedented accountability mechanism in ICC policy. But some of the magic and appeal of the first years has waned.

The ICC regime has met critiques by situation States and non-States Parties. In particular, States that are under preliminary examination for a prolonged period of time feel that they lack control over the process. The ICC has been stuck with many complex situations over years. It faces difficulties to develop sustainable exit strategies. The *status quo* bears synergies with the dilemmas addressed in one of Johann Wolfgang von Goethe's most famous ballads: the sorcerer's apprentice. Goethe's poem is a story about magic. It concerns an old sorcerer who leaves his apprentice behind in a shop to do chores. The apprentice tries to use the magic of an old broomstick to do the work for him. But the situation gets out of hand, since the apprentice loses control over the broom. Goethe uses three often-quoted lines to express the dilemma of the apprentice:

> Sir, my need is sore.
> Spirits that I've cited
> My commands ignore.

Some of these lessons apply to ICC preliminary examinations, and its vast docket of situations. The jurisdiction of the Court may take a life

[4] On trials as messages, see Tim Meijers and Marlies Glasius, "Trials as Messages of Justice: What Should Be Expected of International Criminal Courts?", in *Ethics & International Affairs*, 2016, vol. 30, no. 4, pp. 429–47.

[5] On stigma, see Frédéric Mégret, "Practices of Stigmatization", in *Law and Contemporary Problems*, 2014, vol. 76, nos. 3–4, pp. 287–318.

its own, if some of the goals, methodologies and limits of preliminary examinations are not controlled. The ICC faces a bottleneck problem. The OTP has not developed a credible exit strategy from situations. There is a risk that the Court takes on more that it can swallow.

1.3. Functions, Meanings and Messages of Preliminary Examinations

In its first decade, the ICC has largely shied away from confronting 'Big Powers'. William Schabas has called this the "banality of international justice".[6] The exercise of powers has been mostly based on consensual or uncontested jurisdiction. Many cases have concerned non-State actors. Proceedings against recalcitrant State actors or regimes (for example, Sudan, Kenya) have largely failed or suffered from obstruction.

In its second decade, the ICC has engaged more intensively with non-States Parties, including major powers. The ICC has become involved in situations in different ways, namely by way of State referrals (for instance, Comoros, Palestine), the lodging of Article 12(3) declarations by territorial States (for example, Ukraine, Palestine), and *proprio motu* proceedings (Afghanistan, Georgia, Iraq and potentially Myanmar). To some extent, this is a laudable development. The Rome Statute is a global treaty regime that institutes a system of justice. It opens jurisdiction over third parties. The situation in Afghanistan presents a 'Nicaragua moment' for the ICC that can make it or break it.[7] The problem is that such situations are often more complex than others. Non-States Parties do not have co-operation obligations towards the Court. This means that even where investigations are authorized, access to evidence relating to conduct involving third parties may be more difficult. Some may wonder to what extent there is a point for seeking authorization under Article 15 to move from preliminary examination to the opening of an investigation in situations where the ICC is barred from any meaningful co-operation. In such contexts, ICC action may ultimately be more expressivist in nature.

The ICC has faced 'pushback', if not 'backlash'. As Mikael Madsen, Pola Cebulak and Micha Wiebusch have explained, 'pushback' is an ordi-

6 William Schabas, "The Banality of International Justice", in *Journal of International Criminal Justice*, 2013, vol. 11, no. 3, pp. 545–51.

7 On the Nicaragua judgment of the ICJ, see Theodore M. Lieverman, "Law and Power: Some Reflections on Nicaragua, the United States, and the World Court", in *Maryland Journal of International Law*, 1986, vol. 10, no. 2, pp. 295–320.

nary form of resistance that is visible across courts and tribunals in many fields.[8] It involves critique and contestation that does not challenge authority as such. 'Backlash' is a more drastic form of resistance that challenges authority.[9] It can be characterized by factors, such as declining membership, diminishing case-load, a push for restrictions to jurisdiction or access to justice, shrinking co-operation and failure of compliance with judgments. The ICC has faced challenges in at least four of the areas, namely (i) withdrawals or threats of withdrawals from the treaty (for example, by Burundi, Philippines, South Africa), (ii) struggle for new actual cases at trial, (iii) co-operation problems in the context of Security Council referrals, and (iv) open challenges of authority, such as the failure by certain States Parties to comply with Pre-Trial Chamber decisions on the duty to arrest President Omar Al Bashir, or the lack of reference to the ICC treaty system in the framing of the institutional architecture of the Malabo Protocol, which extends the jurisdiction of the African Court of Justice and Human Rights to international and transnational crimes.[10]

Preliminary examinations have key functions in this regard. They involve a significant amount of ICC discretion and serve as a means to accommodate such tensions. They provide to some extent a resilience technique, namely as a means to counter public critiques or limit the effects of resistance. They have been partly used as a means to deflect from the critique that the ICC is too biased against Africa and to signal that the Court has a global reach.[11] In public discourse, the OTP often stresses that is own action is determined by firm legal parameters that tie its choices. But this reliance on legal formalism hides the rather broad scope of discretion. The relevant judicial constraints (for example, jurisdiction, gravity,

8 Mikael Madsen, Pola Cebulak and Micha Wiebusch Madsen, "Backlash Against International Courts: Explaining the Forms and Patterns of Resistance to International Courts", in *International Journal of Law in Context*, 2018, vol. 14, no. 2, pp. 197–220.

9 On the authority of the ICC, see Leslie Vinjamuri, "The International Criminal Court and the Paradox of Authority", in *Law and Contemporary Problems*, 2016, vol. 79, no. 1, pp. 275–87.

10 On the Malabo Protocol, see Matianga Sirleaf, "The African Justice Cascade and the Malabo Protocol", in *International Journal of Transitional Justice*, 2017, vol. 11, no. 1, pp. 71–91.

11 The opening of preliminary examinations in situations involving 'Big Powers' did not necessarily convince African States that the ICC is free of bias. They argued that the lack of passing on to investigation is a demonstration of bias against African States.

admissibility, interests of justice[12]), leave *de facto* a broad scope of leeway for unconstrained behaviour. The uniqueness of preliminary examination lies in their flexible nature and their broad range of decision-making choices.

Preliminary examinations are convenient for the OTP because they are less legalized than investigations, pre-trial or trial proceedings. This explains their popularity. The methodology may differ across situations. In some contexts, it is better to keep preliminary examinations short and to pass on to formal investigation, since investigation entails greater pressure for compliance. In other contexts, it is precisely the unpredictability and surprise element of preliminary examinations that makes them a powerful instrument. They allow the Office to engage with delicate atrocity contexts, without being firmly locked in with regard to investigation and prosecutions.[13] They are partly a site of prosecutorial diplomacy, namely an instrument to engage with States and civil society to counter claims in relation to the selectivity of international criminal justice.

Preliminary examinations are a unique procedure that enables the OTP to stigmatize violations and to engage in dialogue with States to frame accountability responses. They have been used in very different ways, namely (i) to showcase the criminal nature of human rights violations, (ii) to incentivize domestic investigations or prosecutions, (iii) to demonstrate that the ICC remains vigilant despite domestic action, or (iv) to address State inaction in relation to atrocities that fall within ICC jurisdiction.

Preliminary examinations involve highly sensitive judicial determinations, such as findings on the legal qualification of armed conflicts, the nature and qualifications of crimes, or the adequacy of State responses. Prime examples are the preliminary examinations relating to Afghanistan and Palestine. They affect not only ICC States Parties and non-States Parties, but a large number of human rights actors and NGOs. Sometimes, the main effect may not lie in the exercise of ICC jurisdiction, but in the spill-over effect of the ICC on other actors.

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12 See Rome Statute of the International Criminal Court, 17 July 1998, Article 53 ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/).

13 See Mark Kersten, "Casting a Larger Shadow: Pre-Meditated Madness, the International Criminal Court, and Preliminary Examinations", in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 2*, Torkel Opsahl Academic EPublisher, Brussels, 2018, chap. 33.

In many instances, the opening of a preliminary examination empowers civil society initiatives on accountability or contributes to a global accountability dialogue on atrocity situations. It shapes narratives about the underlying conflicts, the type of justice that is appropriate for a specific context, or the framing of individual and collective responsibility. It involves a high degree of social construction. It links conduct to crime labels, produces narratives of agency and victimhood, or creates images of State behaviour. This process creates new objects of reference in discourses, and may also suppress alternative accounts. The Portuguese sociologist Boaventura de Sousa Santos has developed a "sociology of absence" to explain such effects.[14] The active production of meaning may limit other imaginations or present other objects as being non-existent or irrelevant. For instance, silence of the OTP in an atrocity context may attain 'bespoke' meaning. It may signal that a situation is not grave enough to warrant ICC or global attention. Victims may thus not be 'global' – that is, victims of international atrocity crime – but rather national or local victims. The fact that there is an ICC preliminary examination may become an excuse for other legal or political agents not to proceed, while the ICC is acting. This can delay justice. Preliminary examinations involve thus not only opportunities, but also risks.

1.4. Prosecutorial Managerialism

The development of the functioning of preliminary examinations in the ICC context is largely an invention of ICC practice. In the context of international criminal justice, crucial elements of substantive law and procedure have been developed through judicial authority, including law-making by judges.[15] This is a result of the large degree of managerial powers of judges.[16] The legal regime of ICC preliminary examinations may be largely attributed to the exercise of managerial powers by the OTP

[14] Boaventura de Sousa Santos, "Nuestra America: Reinventing a Subaltern Paradigm of Recognition and Redistribution" in *Theory, Culture & Society*, 2001, vol. 18, nos. 2–3, pp. 185–217.

[15] See Shane Darcy and Joseph Powderly (eds.), *Judicial Creativity at the International Criminal Tribunals*, Oxford University Press, 2010.

[16] Maximo Langer, "The Rise of Managerial Judging in International Criminal Law", in *American Journal of Comparative Law*, 2005, vol. 53, no. 4, pp. 835–909.

and the development of law through practices.[17] It is thus grounded in prosecutorial managerialism.[18]

As mentioned above, preliminary examinations have for a long time remained a *carte blanche*. The founding instruments of the ICC regime have regulated investigations and specific aspects of preliminary examinations. Many scholarly works on ICC procedure have focused on the triggering mechanisms or investigation. The foundations of preliminary examinations have been mainly determined by non-binding instruments, namely internal OTP regulations (for example, Regulations 28 and 29) and Policy Papers of the OTP on Preliminary Examinations and Case Prioritization and Selection.[19] They come, to some extent, out of a magic box.

The way how preliminary examinations are conducted differs partly from national systems. In domestic systems, preliminary examinations are often internal processes that are largely shielded from public scrutiny. The ICC has opted for utmost transparency. This may be explained by the specific rationales of the ICC. Due to its limited powers and selective jurisdiction, the ICC has been largely dependent on force-multipliers to create a broader system of justice. It has thus given special prominence to justice goals that require transparency, such as increasing prevention of violations or empowering domestic justice. There is continuing debate to what extent there should be greater caution towards publicity or greater accountability for choices, and to whom.[20]

The ICC regime differs from other tribunals that did not have the same selectivity of choice in relation to situations. Some authorities have argued that preliminary examinations are comparable to the activities of

[17] On practice as a concept, see Jens Meierhenrich, "The Practice of International Law: A Theoretical Analysis", in *Law and Contemporary Problems*, 2014, vol. 76, nos. 3–4, pp. 1–83.

[18] On the ICC and judicial activism, see William Schabas, "Prosecutorial Discretion v. Judicial Activism at the International Criminal Court", in *Journal of International Criminal Justice*, 2008, vol. 6, no. 4, pp. 731–61.

[19] See OTP, *Policy Paper on Preliminary Examinations*, 1 November 2013 (http://www.legal-tools.org/doc/acb906/); OTP, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016 (http://www.legal-tools.org/doc/182205/).

[20] See, for example, Ana Cristina Rodríguez Pineda, "Deterrence or Withdrawals? Consequences of Publicising Preliminary Examination Activities", in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 2*, Torkel Opsahl Academic EPublisher, Brussels, 2018, chap. 24.

fact-finding bodies.[21] But this analogy is partly misleading. Fact-finding bodies have a broader mandate to bring human rights violations to light. Preliminary examinations are geared at establishing context, structures and patterns of international crimes that lend themselves to formal investigation. The two are complementary, rather than competitive. Experiences such as the Darfur situation have shown that the ICC often needs to start from scratch, even though it has the benefit of a report from a commission of inquiry.

In 2008, Mirjan Damaška asked in an important essay: "What is the point of international criminal justice?".[22] This question applies even more forcefully to preliminary examination. In an ideal world, the ICC would have short preliminary examinations, culminating in comprehensive investigations and prosecutions. But this has not been the reality. In practice, the ICC has relatively large amount of preliminary examinations, which lead only to a handful of actual cases. There is not always a straight line between preliminary examinations and investigations. The policy rationales of preliminary examinations have been determined by OTP practice. The OTP has linked preliminary examinations to two macro goals: complementarity and prevention.

A priori, there are at least two competing approaches towards preliminary examination. One is what one may call the 'gateway model'. This is a narrow conception of preliminary examination. According to this model, preliminary examinations are investigation-centred. This means that they mainly serve as a means to decide whether or not to open an ICC investigation. They serve as a gateway and filter in relation to the criminal process. This approach has, among others, been applied in the context of the Libya referral, where the preliminary examination was conducted in several days, based largely on open-access sources.

It contrasts with a second, somewhat broader model which provides greater space to the virtue of preliminary examination and its link to goals the Statute (that is, prevention, complementarity, ending impunity). It implies that there is certain virtue in the conduct of a preliminary exami-

[21] See Karel de Meester, Kelly Pitcher, Rod Rastan and Göran Sluiter, "Investigation, Coercive Measures, Arrest and Surrender", in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev and Salvatore Zappala (eds.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, pp. 171, 181.

[22] Mirjan Damaška, "What is the Point of International Criminal Justice?", in *Chicago-Kent Law Review*, 2008, vol. 83, no. 1, pp. 329–65.

nation as such, irrespective of whether it leads to investigation at the ICC. It is closer to the human rights tradition. It builds on the alert function and the communicative power of the Court to give most effect to the goals of the Statute. The OTP has significantly developed this second approach. It embraces a more managerial approach which seeks to maximize the impact of the ICC through atrocity alert, communication, and exposure of wrongdoing.[23] It involves early warning functions, through preventative statements, discursive engagement with State authorities and public annual reports on preliminary examinations, which track the crime-base and domestic action. This approach has been used in contexts, where domestic systems are in principle able to exercise jurisdiction, but prove unwilling to do so, pursue only a fraction of the relevant criminality within a situation, or develop their own accountability strategies. In many of these situations, international criminal justice can be pursued on different levels: internationally or domestically. The OTP has used complementarity as a carrot and stick to influence State behaviour, namely by signalling its own power to act, or seeking to incentivize domestic proceedings over atrocities. Preliminary examinations are not merely technocratic exercises. They provide leverage to shape such choices.

As Human Rights Watch has noted:

> This unique leverage […] comes with a unique catch: the OTP needs to strike a balance between opening space to national authorities, while it proceeds and is being seen to proceed with a commitment to act if national authorities do not. Where delay in ICC action does not result in genuine national justice, but provides space to national authorities to obstruct ICC action, it undermines the OTP's influence with national authorities and the OTP risks legitimizing impunity in the view of key partners on complementarity.[24]

This managerial use of preliminary examinations is contested. It is difficult to argue that preliminary examination should be opened to seek to prevent crimes or to promote complementarity. Atrocity alert and crime prevention fall within the mandate of many competing institutions, such

[23] For a critique of managerialism, see Padraig McAuliffe, "From Watchdog to Workhorse: Explaining the Emergence of the ICC's Burden-sharing Policy as an Example of Creeping Cosmopolitanism", in *Chinese Journal of International Law*, 2014, vol. 13, no. 2, pp. 259–96.

[24] Human Rights Watch, *Pressure Point: The ICC's Impact on National Justice*, May 2018, p. 3 (http://www.legal-tools.org/doc/442f1c/).

as human rights monitoring bodies or accountability mechanisms. Using preliminary examination as a means of atrocity prevention, without follow-up investigations, is a double-edged sword. It may easily be seen as a strain on the limited resources of the Court or even illustrate its lack of teeth. The claim that preliminary examinations may serve to shape domestic justice policies involves a high degree of uncertainty. It is dependent on many other contextual factors, including concern over ICC involvement. There are still doubts to what extent the OTP may successfully influence domestic political dynamics, in order to promote domestic cases. In the situation of Guinea, which involved a relatively confined crime-base, ICC benchmarking has had some positive effects. It led relatively quickly to a domestic investigation. In other contexts, it has been less successful. The OTP may be may be easily manipulated. Governments may simply develop domestic mechanisms or procedures to avoid or delay ICC action. This may result in partial domestic justice. If preliminary examinations are kept open too long, without investigation, ICC engagement may reach a tipping point. For example, the experience in the situations of Colombia or Georgia has shown that ICC leverage may drop significantly if analysis is not backed up by ICC action.[25] ICC action may empower civil society but not directly alter State behaviour. There is still limited empirical research on the extent to which preliminary examination manages to produce the desired effects. The effects need to be better understood, before they can be used to build a policy.

In practice, preliminary examinations are clouded by mystery. Their shadow is often bigger than their actual core. Their impact may be more powerful than actual cases. They make the ICC relevant as object of reference in accountability discussions, even before any concrete investigations. States do not necessarily fear preliminary examinations because of their coercive consequences, but rather due to their stigma and reputational damage that come with public 'naming and shaming' of situation countries. The periodicity of OTP reports increases these effects. Preliminary examinations produce a certain 'snowball' effect. Human rights actors, domestic courts, NGOs or civil society serve as force-multipliers. They do not only provide input for OTP action, but complement or broaden the space of accountability through their networks and communicative structures. The sum becomes thus bigger than the whole of its parts.

[25] *Ibid*., pp. 15–16.

1.5. Discretion

As many contributions in these two volumes set out, prosecutorial discretion plays an important role in preliminary examinations. It underpins fundamental aspects of preliminary examination. As Gerry Simpson has stated:

> Each war crimes trial is an exercise in partial justice to the extent that it reminds that the majority of war crimes go unpunished.[26]

Unlike many domestic prosecutors, the OTP does not have a firm duty to investigate and prosecute all crimes committed under ICC jurisdiction. Article 53 establishes a presumption in favour of investigation and prosecution of crimes in a situation following a State or Security Council referral.[27] But within this constraint, there is a rather wide space of discretion that is rarely articulated.[28]

The ICTY highlighted this dilemma. It noted that in many international criminal justice contexts,

> the entity responsible for prosecution has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted.[29]

At the ICC, this problem is magnified. In light of the large scale of atrocity crimes, the Court can only pursue a fraction of the crimes within each situation. This has repercussions in relation to preliminary examinations. For instance, the Prosecution enjoys discretion in relation to the opening and the determination of the scope of the relevant situation in the

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[26] Gerry Simpson, "War Crimes: A Critical Introduction", in Timothy L.H. MacCormack and Gerry J. Simpson (eds.), *The Law of War Crimes: National and International Approaches*, Kluwer Law International, 1997, pp. 1, 8.

[27] Article 53(1) states that the Prosecutor "shall […] initiate an investigation, unless he or she determines that there is no reasonable basis to proceed".

[28] Morten Bergsmo, Pieter Kruger and Olympia Bekou, "Article 53", in Otto Triffterer and Kai Ambos (eds.), *A Commentary on the Rome Statute of the International Criminal Court*, C.H. Beck, Hart Publishing, 3rd edition, 2016, pp. 1368–69 ("Despite the use of the mandatory 'shall', […] there is a lot of debate as to whether […] the Prosecutor's operation is conducted under the principle of opportunity").

[29] ICTY, *Delalić et al.*, Appeals Chamber, Judgment, 20 February 2001, IT-96-21-A, para. 602 (http://www.legal-tools.org/doc/051554/).

context of *proprio motu* proceedings. It determines the timing and priority of preliminary examinations and the nexus to the opening of investigations. Only limited aspects are subject to review. Neither States nor judges can force the OTP to move from preliminary examination to investigation.

The way how the OTP engaged with this discretion is marked by paradoxes. Discretion is often presented as an unaccountable space. But in practice, it is subject to many checks and balances. The OTP has a highly attentive audience. Its visibility is reinforced by the degree of publicity that it has devoted to preliminary examinations. Every choice that the OTP makes is carefully scrutinized by States, NGOs, information-providers, victims or critical observers. There are many legitimate reasons to defend prosecutorial discretion: the need to preserve prosecutorial independence from external influence (for example, State influence), deference to special prosecutorial experience and expertise, the need for pragmatism in light of the broad crime-base and the limited resources of the ICC, or considerations of judicial economy.[30] Curiously, the OTP has rarely used such arguments to explain its decisions rationally through its discretion and constraints. Instead, it has tried to ground its methodology predominantly in the mere application of law, almost as if the law provided no space for choice and engagement with context. It has conceptualized preliminary examination as a process with four different phases – initial assessment, jurisdictional analysis, admissibility analysis, and interests of justice. It has derived this phased-based approach or structure from the logic of Article 53. This scheme creates the impression that the conduct of preliminary examinations is a logical or even mechanical process that is applied to each situation. In reality, this process involves many variable factors that are subject to a judgment call by the OTP. For instance, the notion of gravity, which the OTP considers in the selection of situations for preliminary examinations, is a highly flexible concept that leaves space to go beyond the number of victims and take into account the social impact of crimes. It is necessary to determine an optimal point between adherence to law and discretion.[31]

[30] See, generally, Carsten Stahn, "Judicial Review of Prosecutorial Discretion: Five Years On", in Carsten Stahn and Goran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Brill/Martinus Nijhoff, 2008, pp. 247–80.

[31] See Jens Iverson, "Prosecutorial Discretion and Preliminary Examinations; Beyond the False Dichotomy of Politics and Law", in Morten Bergsmo and Carsten Stahn (eds.), *Qual-*

Like the sorcerer's apprentice, the OTP might have locked itself in too much through its phased-based model. There is 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 approach, analysis may get stuck by comprehensive scrutiny at one phase, like jurisdiction, for years, without considering information relating to other phases. Such a strict sequencing is not directly required by the Statute. It might be preferable to adopt a more flexible approach in order to avoid that the OTP get stuck in its own methodology.[32] For instance, in some contexts, it might be better to pursue in relation to a part of the situation, rather than leaving the situation on the docket for years.

Curiously, at the time of writing, the OTP has never used the "interests of justice" clause.[33] It offers space to accommodate alternative justice procedures or creative forms of punishment, for example, mitigated or suspended sentences. The OTP could have invoked it in the Colombian peace process. But it placed the emphasis on the admissibility assessment, which kept the situation open for more than a decade.

One missing part in the architecture of preliminary examinations is the limited ability of the Prosecutor to seek guidance from the Pre-Trial Chamber on status issues. The OTP is a quasi-judicial actor. It has to make foundational determinations at the preliminary examination stage. They may relate to the quality of statehood or material jurisdiction. The Statute does not foresee an explicit power of the Prosecutor to seek an advisory ruling by the Chamber at the preliminary examination stage. This is a weakness, and one of the potential gaps of the Statute. For instance, in the Palestine context, the OTP has conducted substantial analysis on the issue of jurisdiction over years, including the assessment of whether Palestine qualifies functionally as a State within the meaning of

ity Control in Preliminary Examination: Volume 2, Torkel Opsahl Academic EPublisher, Brussels, 2018, chap. 20.

[32] See also Asaf Lubin, "Politics, Power Dynamics, and the Limits of Existing Self-Regulation and Oversight in ICC Preliminary Examinations", in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 2*, Torkel Opsahl Academic EPublisher, Brussels, 2018, chap. 19.

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

the Statute. It has not sought to gain judicial clarification. Much of this work might be in vain, if a Chamber came to the conclusion that the OTP's working assumption is wrong.

The creation of a procedure to clarify foundational jurisdictional parameters as early as possible is in the interest of effective investigations and prosecutions, the interests of victims and the efficiency of Court proceedings more generally. Procedurally, there are three avenues to open a path of communication between the OTP and the Chambers. First, judges can examine legal issues prior to the opening of a preliminary examination by virtue of Regulation 46(3) of the Regulations of the Court.[34] A second potential avenue is Article 19(3), which allows the Prosecutor to "seek a ruling from the Court regarding a question of admissibility or jurisdiction". It has been invoked by the OTP in the Myanmar context for the first time. Formally, Article 19(3) relates to determination on the jurisdiction or admissibility in the context of a case within a situation. This reading is reinforced by its systematic placement, and the participatory scheme outlined in the second sentence. But it could be applied by way of analogy to certain contexts in which no case exists yet. In this case, it should to be tied to certain circumstances (for instance, a compelling need to decide on jurisdiction at the situation stage, representation of different views).[35] Third and alternatively, judges could assert the power to decide on such a request based on their inherent power, namely their general authority to determine jurisdiction, as reflected in Article 19(1) – which has been found to entail *Kompetenz-Kompetenz*.[36]

[34] Regulation 46(3) regulates the assignment of a "request or information not arising out of a situation assigned to a Pre-Trial Chamber".

[35] See Alex Whiting, "Process as well as Substance is Important in ICC's Rohingya Decision", in *Just Security*, 15 May 2018.

[36] See ICC, Situation in Uganda, *Prosecutor v. Joseph Kony and Vincent Otti*, Pre-Trial Chamber, Decision on the Prosecutor's Application that the Pre-Trial Chamber disregard as irrelevant the Submission filed by the Registry on 5 December 2005, 9 March 2006, ICC-02/04-01/05-147, para. 23 ("The principle is enshrined in article 19, paragraph 1, of the Statute, pursuant to which 'the Court shall satisfy itself that it has jurisdiction in any case brought before it' and was also affirmed by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in its landmark 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction' in the 'Tadic' case") (http://www.legal-tools.org/doc/0568f7/).

1.6. Re-visiting Methodologies

One of the most pressing dilemmas of the ICC is that it may have opened many doors that are difficult to close. Many of the existing State referrals are open-ended. There is no sunset clause. Situations under *proprio motu* consideration are highly dynamic. Pessimists caution that the situation in Afghanistan may overburden the Court. Two situations (Burundi, Philippines) concern States which have notified their withdrawal from the Statute. ICC preliminary examinations may endure for years. Some of them may never result in concrete cases.

As in Goethe's poem, much energy has been devoted to the 'in', namely how to get the ICC into the picture. The critical side effects or the 'out', namely the resolution of underlying problems, has received less attention. The ICC may easily become a victim of its own magic. Placing too many of the world's most intractable conflicts under ICC preliminary examination, without meaningful support, is likely to cause disappointment. It is easy to add new situations to the Court's docket in order to express concern over atrocities or put pressure on States to act. Preliminary examinations may serve partly as what French sociologist Emile Durkheim has called the reaffirmation of a "collective conscience".[37] They contain an expression of moral outrage through which the international community reaffirms its values to itself. But they can turn into a Trojan horse, if they simply remain an end in themselves. It is much harder to keep up leverage over time, carry out reliable monitoring and to translate preliminary examinations into meaningful accountability strategies. The ICC has not yet managed to develop a fully convincing strategy to tackle some of the problems of preliminary examinations. Some of the existing methodologies may need adjustment.

First, the scope of ICC engagement requires careful scrutiny. Less may sometimes be more. The OTP must strike a balance between conflicting rationales, namely pursuing multiple situations in parallel, but with a partial focus or lesser depth, or doing fewer situations with greater intensity. In many existing situations, the ICC has stayed on the surface. It has closed some preliminary examinations without investigation, or confined

[37] On Durkheim and international criminal law, see Immi Tallgren, "The Durkheimian Spell of International Criminal Law?", in *Revue interdisciplinaire d'études juridiques*, 2013, vol. 71, pp. 137–69.

itself to a few thematic investigations and prosecutions[38] in contexts where preliminary examinations went on to investigation. This comes at a price of lack of sustainability. It might be helpful to pursue some situations in greater depth in order to leave a lasting footprint or gradually build accountability upwards. Thematic and structural preliminary examinations need to be balanced.

Second, the infrastructure of preliminary examinations requires further investment, if promoting national justice is taken seriously as one main goal of preliminary examinations. Existing experiences, such as the ICC engagement in Colombia, suggest that it is not enough to conduct structural analysis in order to incentivize domestic action. It is important to back up analysis by on-site visits, formulation of initial hypotheses and identifying potential cases during preliminary examination, in order to maintain leverage, so to speak.[39] It is further crucial to strengthen monitoring capability, in order to facilitate sustainable complementarity assessments. Situations such as Libya have shown that circumstances may quickly change, even where a certain degree of deference is given to domestic jurisdiction. It is essential to pursue long-term monitoring and keep track of domestic proceedings, in order to take into account such changes or allow for a re-opening of situations.

Third, criteria for deference to national jurisdictions at the situation stage need further thought. The standard for deference has varied across situations. In some contexts, the OTP has extended its preliminary examination and deferred to national authorities in the hope that genuine domestic proceedings would still occur. In other situations, it has left national authorities limited space. The admissibility criteria in relation to situations remain unsettled. The ICC typically looks at potential cases. This leaves a certain degree of flexibility, and more leeway than at later stages, that is, when an investigation has already materialized into a case. One of the downsides of the existing methodologies is that they are highly ICC-centric. Domestic authorities must essentially mirror potential ICC cases. There may be space for greater leeway. It may be, in particular, too strict

[38] See, generally, Morten Bergsmo (ed.), *Thematic Prosecution of International Sex Crimes*, 2nd edition, Torkel Opsahl Academic EPublisher, Brussels, 2018 (http://www.toaep.org/ps-pdf/13-bergsmo-second).

[39] See Paul Seils, "Putting Complementarity in its Place", in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, pp. 305, 317–20.

to require that domestic investigations and prosecutions must focus on the same incidents.[40] It would be helpful to spell out relevant parameters more clearly. Some voices have suggested that the OTP should leave a greater margin of appreciation to so-called Third-World States in its assessments.[41]

Fourth, the length of preliminary examinations deserves further attention. There is a discrepancy between words and action. Some preliminary examinations have been criticized for taking too long. Long preliminary examinations may miss the 'golden hour' of evidence collection.[42] The mass of available information is likely to increase in the future, due the rise of new technologies[43] and the availability of a large amount of open-access materials. Some have argued that the ICC should set limits for the duration of preliminary examinations. The problem with this approach is that the appropriate length of preliminary examination is context-specific. Reasonable limits are difficult to define in abstract terms. They require a hypothesis. It may be preferable to develop internal benchmarks, and better channels of communication where situations are pending for years. New technologies may facilitate the determination of the crime-base and context. Admissibility assessments are often most complex and time-consuming. It is important to move to such assessments as quickly as possible.

Fifth, the pros and cons of transparency need to be carefully considered. Over past years, the ICC has made unprecedented efforts to increase the transparency of preliminary examinations. Making preliminary examination public has many advantages. Transparency enhances leverage and the perception of the equal application of the law. It may contribute to prevention. But it also has trade-offs. It curtails the flexibility of the OTP, triggers additional inquiry, and may raise the expectations of affected

40 For a critique, see Carsten Stahn, "Admissibility Challenges before the ICC: From Quasi-Primacy to Qualified Deference?", in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, pp. 228–59.

41 Steven Kay QC and Joshua Kern, "A Prudential, Policy-Based Approach to the Investigation of Nationals of Non-States Parties", in *EJIL: Talk!*, 30 May 2018.

42 Anni Pues, "Towards the 'Golden Hour'?: A Critical Exploration of the Length of Preliminary Examinations", in *Journal of International Criminal Justice*, 2017, vol. 15, no. 3, pp. 435–53.

43 Lindsay Freeman, "Digital Evidence and War Crimes Prosecutions: The Impact of Digital Technologies on International Criminal Investigations and Trials", in *Fordham International Law Journal*, 2018, vol. 41, no. 2, pp. 283–336.

communities. Making the names of possible suspects public may raise due process concerns.[44] The virtues of transparency need to be balanced against the requirements of confidentiality.

Sixth, the problem of exit needs to be addressed more comprehensively. Disengagement from situations is complex. The 'in' should not be approached with a vision of the 'out'. The main question is how the ICC can leave a sustainable impact in situations. The OTP will inevitably face selectivity challenges each time it disengages from a situation. It needs manage the expectations of different actors involved: States, victims and affected communities, and the media. For instance, States may seek guidance as to how they may be de-listed from preliminary examinations. Victims and information providers seek answers as to their communications.

Sustainable exit is a process. It should be guided by a number of factors, such as thorough planning and revisiting of hypotheses throughout the preliminary examination; careful and well-reasoned explanations of decisions not to proceed with an investigation; continuing interaction with senders of communications, victims, and media; identification of potential accountability gaps and signposts for State action; as well as co-operation of the ICC with other accountability networks or domestic authorities, including potential co-operation by the ICC under Article 93(10) in order to facilitate further investigations or prosecutions.

1.7. Contents of the Following Chapters

In his foreword, Judge *LIU Daqun* of the MICT points out the relevance of effective control on preliminary examinations, which may give rise to many questions by the public, including political ones. In particular, the sensitive issue of investigating sitting Heads of State "may become a turning point in the life of an international criminal justice institute", as the dichotomic examples of Milošević and al-Bashir show. Judge LIU reminds us that the *policy* issues related to preliminary examination are also "closely related to the function and development of the Court as a whole", and recommended the ICC to adopt the procedure of 'policy review' at the ICTY.

Ambassador *Martin Sørby* stresses the importance of what he calls 'fact-work', as well as praises the technicality and neutrality of the term

[44] The practice of the OTP so far has been to make public only the names of the States or armed groups involved, and not individuals.

'quality control'. He gives us four personal insights as to (i) the richness of the content of this anthology, (ii) the applicability of the lessons to national jurisdictions, (iii) the necessity of not only regulations, but an awareness or culture in the organizations, and (iv) the particular responsibility of leaders of criminal justice agencies to set examples.

In Part 1 of Volume 1, we ask contributors to tell us how preliminary examination is actually practised in the jurisdictions they have experiences in, as well as what constraints they have faced. It opens with *Andrew T. Cayley*'s "Constraints and Quality Control in Preliminary Examination: Critical Lessons Learned from the ICTY, the ICC, the ECCC and the United Kingdom" (Chapter 2), where he gives insights from his rich personal experiences. On one hand is the ICTY, which started with no rule; a prosecutor could commence a pre-investigation simply on reading a book on the defendant. The ICTY prosecutors often found themselves "assembling a Jumbo jet while at the same time piloting it across the Atlantic". On the other hand is the hybrid scheme at the ECCC, where "the legal procedures […] were some of the best suited and fairest, at least on paper, of any of the courts that were specially established to deal with these mass crimes". Even at pre-investigative stage, the Co-Prosecutors have to include both damning and exculpatory in the Introductory Submission to the Co-Investigating Judges, unlike most other courts (an idea which Gregory Gordon will also seize upon in his chapter.) Lastly, he brings us to the "extremely challenging" domestic investigations on alleged British war crimes in Iraq from his perspective as the Director of the Service Prosecuting Authority, explaining the pre-investigative processes that were "some of the most rigorous" he has seen.

In "The Concern for Quality Control and Norwegian Preliminary Examination Practice" (Chapter 3), *Runar Torgersen* brings a rare Scandinavian perspective to this subject matter. Giving us an overview of the limited scope of preliminary examinations (as distinct from formal investigation) in different cases, he addresses the quality concerns, in particular due to lack of regulations. He observes that, whereas over all "there seems to be a fair attention to and control of the scope of preliminary examinations" in Norway, "[c]ontrolling the content of preliminary examinations appears to be one of the main challenges". This, he argues, calls "for a more structured approach to preliminary examinations".

In contrast to the civilian context, in "Preliminary Examination in the United States Military: Quality Control and Reform" (Chapter 4),

Franklin D. Rosenblatt gives us an insider's view of the United States military's preliminary examination process in Afghanistan and Iraq. Pointing out that "speed is the most salient virtue for preliminary examinations in the context of military operations", he first considers the fact-finding and filtering roles of *non*-judicial mechanisms for preliminary examination. He then turns to the judicial mechanisms, where he argues that time pressures and a series of definite laws and procedural requirements actually aids the exercise of prosecutorial discretion. In his lucid writing, Rosenblatt describes the unique military context for these preliminary examinations conducted abroad, as well as their direct impact upon the success or failure of the mission: "at times when good behaviour is needed the most, the tendency to bring in soldiers likely to cause trouble is also greater", an "uncomfortable paradox about wartime misconduct". In his conclusion, he gives us 10 suggested best practices from "hard-earned recent American military experience".

Providing the anthology with an Eastern perspective, in "Pre-Investigation and Accountability in India: Legal and Policy Roadblocks" (Chapter 5), *Abraham Joseph* forcefully argues how, in his view, "the Indian legal framework is inadequate to deal with" what he terms "mass crimes", which he illustrates in five examples. In India, he says, the function of investigation is vested with the police, without formal distinction between pre-investigation and investigation. Despite a formal prosecution organ, there is no effective co-ordination between the police and prosecution at the investigative stage. He concludes by giving five suggestions on the way forward for India.

In the last case study of domestic preliminary examination, in "German Preliminary Examinations of International Crimes" (Chapter 6), *Matthias Neuner* discusses how the German Federal Prosecutor General conducts preliminary examinations into international crimes in the absence of explicit statutory regulation, and what quality control measures are applied. After an overview of the measures available in a preliminary examination of international crimes, Neuner gives a detailed examination of the cases. He explains how the German legislature impliedly provides the FPG with a structured discretion to suspend a preliminary examination, with only limited judicial review possible.

Transiting from the domestic to the international scene, in "The Legalistic Function of Preliminary Examinations: Quality Control as a Two-Way Street" (Chapter 7), *Matilde E. Gawronski*, an Associate Situation

Analyst at the ICC-OTP, suggests that preliminary examination at the ICC is "first and foremost a legalistic analytical process" that is "essentially about rules, benchmarks, and parameters, against which information is assessed and decisions on where to turn and which direction to take are made". Under the "two-way street" approach proposed, she argues that the quality of each of the four phases of preliminary examinations could be both *controlled* internally (that is, within the ICC-OTP) and *enhanced* externally (that is, by inputs of stakeholders such as States, civil society, victims' groups, the media and the academia).

Following Gawronski's overview of the phases, *Amitis Khojasteh*, also a Situation Analyst, zooms into and sheds light on the "least reported" phase in "The Pre-Preliminary Examination Stage: Theory and Practice of the OTP's Phase 1 Activities" (Chapter 8). Focusing on the role of prosecutorial discretion especially with regard to communications that "warrant further analysis", she argues that the autonomy given to the OTP is an appropriate one, and the process is carefully "guided by sound and transparent legal criteria and relevant policy considerations, and subject to levels of internal review". Overall, she argues, the OTP's current approach "ensures a level of accountability and enables individuals, NGOs, and other actors to play a meaningful role in the process, while at the same time preserves the necessary level of prosecutorial independence and discretion".

Armed with the theoretical understanding of preliminary examination in both the domestic and the international contexts, in Part 2 of Volume 1, we present several case studies on situation analyses. It begins with *Marina Aksenova*'s "The ICC Involvement in Colombia: Walking the Fine Line between Peace and Justice" (Chapter 9), which focuses on the complementarity dynamics between Columbia and the ICC OTP, which she describes as the "dialogical model". Identifying the various tensions between the internationally and the locally conceived standards in four concepts, she argues that the ICC did have an impact on the eventual outcome of the Columbian peace deal, although the Court's influence on the "legitimacy deficit" of the peace deal is more limited.

In "'Magical Legalism' and the International Criminal Court: A Case Study of the Kenyan Preliminary Examination" (Chapter 10), *Christian M. De Vos* argues that "the closure of the Court's ill-fated intervention in Kenya stands as a cautionary tale: about the hubris with which then Prosecutor Luis Moreno-Ocampo approached the situation; about the poor

quality of the preparations [by the OTP]; and about the ability of governments to obstruct and hobble a Court that relies on State co-operation". Taking a new spin on the concept of "magical legalism" (not to be confused with, though linked to, Gawronski's legalism), De Vos argues that the former Prosecutor mistakenly believed that "the 'language of legality' – would be enough to move domestic political actors to action, while failing to sufficiently appreciate or engage with the country's complex political and social contexts", which led to "fatal presumptions" in the conduct of the Kenya preliminary examination. Despite this comparative dim view, he also gives several illuminating recommendations, including a "more co-operative, place-based approach to examinations and investigations".

Continuing with the critical view of the former Prosecutor but broadening the scope to African States in general, in "Challenges in the Relationship between the ICC and African States: The Role of Preliminary Examinations under the First ICC Prosecutor" (Chapter 11), *Benson Chinedu Olugbuo* asks "what guides the Prosecutor in the exercise of discretion" during preliminary examination. In so doing, he argues that the current frosty relationship is due to "the lack of transparency and objectivity, as well as the inability to adhere to the principles under the Rome Statute and [OTP] policies" under Moreno-Ocampo's leadership. It concludes with several recommendations in light of these shortcomings.

Shifting the focus beyond Africa, in "Dealing with the Ongoing Conflict at the Heart of Europe: On the ICC Prosecutor's Difficult Choices and Challenges in the Preliminary Examination into the Situation of Ukraine" (Chapter 12), *Iryna Marchuk* examines the OTP's investigation following Ukraine's two Article 12(3) declarations. In respect of the "Maydan crimes", she argues that the Prosecutor applied overly stringent definition of crimes against humanity and evidentiary standard, depriving the Court an opportunity to clarify. In respect of Crimea and eastern Ukraine, Marchuk highlights the strategic difficulty likely to be experienced by the OTP in light of Russia. Lastly, in respect of quality control, she gives several recommendations on speedy inquiry and transparency,

Then, the subject of alleged British misdeeds in Iraq is revisited. In comparison to the discussion in Cayley's chapter on the domestic side of the investigations, the next two chapters expand the focus to include the OTP preliminary examination. In "Accountability for British War Crimes in Iraq? Examining the Nexus between International and National Justice

Responses" (Chapter 13), *Thomas Obel Hansen* scrutinizes the "dynamics, consequences and impact of the Iraq/UK preliminary examination", thereby providing a case study on "how the ICC approaches preliminary examinations in 'hard cases' involving major powers […] and how such powers respond and engages the Court when put under scrutiny". Such dynamics were complex: while both parties desire to avoid direct confrontation (what he calls 'hand-over' complementarity), there also needs to be a credible threat of investigation. In the end, Obel Hansen argues, the OTP's approach has only yielded limited progress, which is compounded by the closure of the Iraq Historic Allegations Team in 2017 due to the disgrace of Phil Shiner.

Similarly, *Rachel Kerr*'s "The UK in Iraq and the ICC: Judicial Intervention, Positive Complementarity and the Politics of International Criminal Justice" (Chapter 14), also focuses on the shortcomings of the British domestic processes, though approaching the subject more broadly (bringing justice for the Iraq War into the discussion) and focusing less so on complementarity in comparison. She argues that the preliminary investigation "sat in the middle of a mess of contradictory and competing concerns, highlighting the delicate relationship between international and domestic politics, law, pragmatics and principles", which she seeks to disentangle "in order better to understand how and why we got here".

In "The Situation of Palestine in Wonderland: An Investigation into the ICC's Impact in Israel" (Chapter 15), using the vivid metaphor of the Cat in *Alice's Adventures in Wonderland*, *Sharon Weill* examines both the Court's contribution to deterrence, prevention, and complementarity. While pointing out the ICC's relevance, Weill points out the unintended consequences and detrimental outcomes it has produce, as well as the Court's declining presence, even in terms of reputation. She argues that the Court need to hasten its pace and make the right decisions.

In "Quality Control in the Preliminary Examination of the Georgia Situation" (Chapter 16), *Nino Tsereteli* dexterously combines the theoretical discussion on the "control of *quality*" and "quality of *control*" with the examination of their application in the Georgian examination. Based on two alternative logics concerning who is entitled to exercise control, she identifies three sets of actors and corresponding types of control: political, social and judicial – both formal and informal, *ex ante* and *ex post*. In light of the bi-directional and interactive nature of preliminary examination, she advocates against rigid time limits (proposed by, for example,

Gordon) and instead in favour of a "reasonable time" requirement. Different from Gawronski and Khojasteh, Tsereteli focuses on *external* quality control only but, like several other contributors, she also advocates for greater transparency to secure better control.

As the closing chapter on Part 2 and Volume 1, in "The Venture of the Comoros Referral at the Preliminary Examination Stage" (Chapter 17), *Ali Emrah Bozbayindir* provides an extensive analysis on the Gaza flotilla situation, which was the first referral of a State (and an African one) concerning the alleged crimes committed by a non-State Party. The procedural and substantive issues he examines include, among others, the Prosecutor's relationship with the other fact-finders, the different interpretations of 'gravity', as well as the issues of limits of prosecutorial discretion and the nature of Article 53(1)(a) judicial review contained.

In Part 3 of Volume 2, we ask contributors to address the normative framework of preliminary examinations. It begins with *Alexander Heinze* and *Shannon Fyfe*'s chapter on "Prosecutorial Ethics and Preliminary Examinations at the ICC" (Chapter 18). Whereas they agree that consequentialist political considerations should sometimes be prioritized to ensure the functioning of the ICC, they argue that the prosecutorial discretion to invoke political considerations should be limited by deontological constraints as well. In particular, the "interests of justice" analysis should include both global and local concerns, as well as victims. In the end, they recommend several changes to the ethical rules of the OTP.

In "Politics, Power Dynamics, and the Limits of Existing Self-Regulation and Oversight in ICC Preliminary Examinations" (Chapter 19), using the situation in Palestine as an example, *Asaf Lubin* explores the current deficiencies in as well as possible reform to the ICC's oversight of preliminary examinations, in terms of both the OTP's self-regulation and the PTC's quality control. In particular, he suggests four reforms: (1) rephasing 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.

In "Disarming the Trap: Evaluating Prosecutorial Discretion in Preliminary Examinations beyond the False Dichotomy of Politics and Law" (Chapter 20), *Jens Iverson* challenges the common and simplistic reduction of the OTP's choices in preliminary examination into law versus politics, instead arguing "in favour of a more open discussion of the trade-offs inherent in pursuing international criminal justice, particularly on a limited budget", in which parties "should directly confront the collisions of values inherent in the use of prosecutorial discretion". Adopting such a viewpoint would enable an appreciation of the "didactic potential" of preliminary examinations – to guide public discussion on the values that undergird international criminal justice.

In "Make the ICC Relevant: Aiding, Abetting, and Accessorizing as Aggravating Factors in Preliminary Examination" (Chapter 21), *Christopher B. Mahony* assesses the ICC's objective of deterring atrocity *vis-à-vis* the rising internal armed conflicts fuelled by external actors. As aggression has been activated, he argues, conduct enabling conflict as well as war crimes should constitute a key aggravating criterion for opening a formal investigation. Using the Syrian and the Afghan situations as examples, he argues that the OTP has failed to adequately focus on the role played by external aiders, abettors, as well as accessories in its preliminary examinations. Doing so would, he argues, both marry *jus in bello* with *jus ad bellum*, and allow an effective prosecution of the crime of aggression.

In "The Standard of Proof in Preliminary Examinations" (Chapter 22), *Matthew E. Cross* sheds much needed light on the fundamental question precedent to any assessment of "quality": if preliminary examination is about meeting the conditions in Article 53(1), just *when* are they met? "In other words, what standard of proof is applied, and what are the implications of this standard?" Cross distinguishes the standards applicable to Article 53(1)(a)–(b) and 53(1)(c), comparing the former with its counterparts in Articles 15(4) and 58, which he argues to be the same. In turn, this implies that: (i) preliminary examinations are not a re-flection of the Prosecutor's opinion but merely a statement of what the information made available to her reasonably suggests; (ii) preliminary examinations therefore serve a largely procedural function; and that (iii) preliminary examinations reflect a sophisticated balance struck. Overall, he observes, "the Court employs a system which makes a fair and reasonable effort to meet the unique constraints under which it operates".

In "Reconceptualizing the Birth of the International Criminal Case: Creating an Office of the Examining Magistrate" (Chapter 23), *Gregory S. Gordon* analyses the various problems surrounding preliminary examination and proposes a bold institutional solution. The Office of the Examining Magistrate, he proposes, would collaborate with the OTP on referrals, in a clearly defined temporal framework of 24 months. The new Office would, he argues, "provide an independent set of eyes and a degree of oversight" and, overall, promote complementarity, deterrence, efficiency and equality of arms.

In Part 4 of Volume 2, we focus on the specific themes of transparency, co-operation and participation in preliminary examination. It begins with *Ana Cristina Rodríguez Pineda*'s "Deterrence or Withdrawals? Consequences of Publicising Preliminary Examination Activities" (Chapter 24), where she argues that, while the OTP's efforts on publicity are laudable, "purposefully using preliminary examinations in a different manner from what the Statute intended can run counter to the interests of the ICC as a whole".

In "Objectivity of the ICC Preliminary Examinations" (Chapter 25), *Vladimir Tochilovsky* reveals and argues against the partiality of the OTP in situations referred by States themselves, such as Congo, Côte d'Ivoire and Uganda. While not blindly pursuing a 'fair balance', he argues that the OTP should adopt an even-handed approach, which includes (i) expanding its sources by requesting information from organizations, (ii) conducting on-site visits to the rebel-held territory, and (iii) use of experts in domestic investigations.

Next, *Mutoy Mubiala* examines "The ICC's Interplay with UN Fact-Finding Commissions in Preliminary Examinations" (Chapter 26), using the case studies on Darfur, Libya and the Central African Republic. Overall, he states, they are "two cross-fertilizing and mutually reinforcing processes". While the Commissions' findings often catalyse further OTP investigations, the open-source information received by latter also contribute to the former's fact-finding. As the UN continues to streamline and professionalize its fact-finding missions, Mubiala argues for a more institutionalized co-operation with the UN, especially in light of the OTP's capacity. Towards this end, he recommends the adoption of standards of operating procedures to complement the existing UN-ICC Cooperation Agreement.

In "Non-States Parties and the Preliminary Examination of Article 12(3) Declarations" (Chapter 27), *LING Yan* argues that, although Article 12(3) declarations have so far been treated as a precondition for the exercise of jurisdiction followed by the Prosecutor's usual *proprio motu* investigation procedures, they are in fact a combination of acceptance of jurisdiction and self-referrals of their own situations by non-States Parties. Seen in that light, the longer time and the lack of judicial oversight associated with ordinary *proprio motu* investigations are, she argues, unfair for those accepting States. In response, she proposes both a time limit as well as oversight by the Pre-Trial Chamber for Article 12(3) declarations.

In "Making Sense of the Invisible: The Role of the 'Accused' during Preliminary Examinations" (Chapter 28), *Dov Jacobs* and *Jennifer Naouri* point out the "paradoxical cognitive dissonance" of symbolically focusing on the perpetrator on the outside yet ignoring the accused's role and rights during preliminary examinations. Highlighting the ways in which alleged perpetrators are considered during the preliminary examination and what impact this might have for future practice of the OTP, they argue that "the OTP cannot pretend that the potential defendant was invisible" during a preliminary examination, when the prosecution "starts developing its theory of the case, which will set in motion and influence a series of investigative choices, even many years down the road".

The last two chapters of Part 4 both concern the role of civil society. First, *Andreas Schüller* and *Chantal Meloni* discuss "Quality Control in the Preliminary Examination of Civil Society Submissions" (Chapter 29), drawing from their experience in civil society and the academia, both in Germany and at the International Criminal Court. At the domestic level, Schüller argues, the role played by civil society is key: "On the one hand, they support the competent prosecutor's office with valuable information and analysis; on the other hand, they support victims' rights to get their cases heard and challenge the authorities if they refuse, in violation of their obligations, to pursue investigations". However, at the international level, Meloni argues, the ICC's handling of preliminary examination is problematic from victims' perspective. The participation of civil society and victims are restricted, particularly as examinations indefinitely draw out and hang in the air. Also, she doubts whether doubling the analysis at the preliminary examination stage is a "waste of resources, a source of delays and a ground for ineffectiveness".

Part 4 closes with *Sarah Williams*' analysis on "Civil Society Participation in Preliminary Examinations" (Chapter 30), where she similarly argues that the Article 15 mechanism is ill-suited for civil society seeking to influence the OTP's actions. The existing judicial oversight is designed to guard against an overly zealous prosecutor, but not a reluctant one. Nevertheless, she advocates against granting standing for civil society actors to challenge prosecutorial decisions. Instead, Williams looks at the alternative avenue of influence by *amicus curiae* briefs, which she suggests has some influence, if somewhat limited. She suggests that civil society actors must look for still other methods of influence, including (1) a call for "friend of the prosecutor" submissions during preliminary examination and (ii) a staged approach to Article 15 communications. Lastly, she also advocates for greater transparency on the part of the OTP.

Finally, Part 5 of Volume 2 explores various substantive themes, beginning with *Usha Tandon*, *Pratibha Tandon* and *Shreeyash U. Lalit*'s "Quality Control in Preliminary Examination of Rape and Other Forms of Sexual Violence in International Criminal Law: A Feminist Analysis" (Chapter 31). Observing that many allegations of sexual violence either fail to get through preliminary examination or lead to charges, they argue in favour of a feminist, instead of merely a gendered, approach. They also advocate in favour of a new "shared complementarity" approach in respect of sexual violence.

Shifting the attention to another class of victims, in "Preliminary Examinations and Children: Beyond Child Recruitment Cases and Towards a Children's Rights Approach" (Chapter 32), *Cynthia Chamberlain* examines how the recent Policy on Children can fruitfully apply to preliminary examinations under Article 53. The OTP, she argues, must pay regard to the principles enshrined in the Convention on the Rights of the Child, as well as develop a network with children's rights actors. In particular, she stresses the importance of actively seeking information on children when it is missing.

In "Casting a Larger Shadow: Premeditated Madness, the International Criminal Court, and Preliminary Examinations" (Chapter 33), *Mark Kersten* examines the curious notion of the ICC's 'shadow'. Unlike other contributors who argue for a more limited approach, he seeks to explore "novel strategies at the preliminary examination stage of ICC interventions, strategies that could enlarge the ICC's shadow", arguing that the OTP "should consider deploying more intrepid strategies at the prelimi-

nary examination phase in order to positively influence the behaviour of the Court's potential targets" – since the Court's strategies are the light creating the shadow. Among other things, he boldly suggests the use of the 'madman theory' "in the most politically sensitive and precarious contexts".

In "Open Source Fact-Finding in Preliminary Examinations" (Chapter 34), *Alexa Koenig*, *Felim McMahon*, *Nikita Mehandru* and *Shikha Silliman Bhattacharjee* observe the significant role played by "rigorous collection and analysis of open source information" due to the OTP's limited investigative powers during a preliminary examination. They ask "how can evolving practices around the use of online open source information be harnessed to improve the quality of preliminary examinations at the ICC?", a particularly important question in light of "our rapidly expanding digital information ecosystem".

Lastly, in "ICC Preliminary Examinations and National Justice: Opportunities and Challenges for Catalysing Domestic Prosecutions" (Chapter 35), *Elizabeth M. Evenson* presents highlights of Human Rights Watch's research on the catalytic (albeit secondary) role of preliminary examination, focusing on seven challenges in implementing positive complementarity.

1.8. Not a Conclusion

Not all of the mysteries of preliminary examinations may be fully solved. But these two volumes mark an attempt to de-mystify many of the strengths and weaknesses of preliminary examination practice in the area of core international crimes. It is the first of its kind. It is our hope that the volumes offer new insights to understand the magic, mystery and mayhem of preliminary examinations, especially at the ICC, and to address some of the existing challenges.

> Back now, broom,
> into the closet!
> Be thou as thou
> wert before!
> Until I, the real master
> call thee forth to serve once more!

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Quality Control in Preliminary Examination: Volume 1

Morten Bergsmo and Carsten Stahn (editors)

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

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

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