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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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ICC Preliminary Examinations and National Justice: Opportunities and Challenges for Catalysing Domestic Prosecutions

Elizabeth M. Evenson*

The International Criminal Court ('ICC') is a court of last resort. Under the principle of complementarity, the ICC can only take up cases where national authorities do not; these national authorities have the primary responsibility under international law to ensure accountability for atrocity crimes. Where States have an interest in avoiding the ICC's intervention, they can do so by conducting genuine national proceedings. This means that the leverage of the Court's Office of the Prosecutor ('OTP') with national authorities to press for domestic proceedings can be significant in countries where it is considering whether to open an investigation, that is, in what are known as 'preliminary examinations'.

The OTP has recognized this opportunity. In policy and in practice, the OTP is committed, where feasible, to encouraging national proceedings into crimes falling within the ICC's jurisdiction in preliminary examinations. This makes the OTP an important actor in what has come to be known as 'positive complementarity' – that is, the range of efforts by international partners, international organizations, and civil society groups to assist national authorities to carry out effective prosecutions of interna-

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tional crimes. These efforts include legislative assistance, capacity building, and advocacy and political dialogue to counter obstruction.

Translating this commitment into successful practice is far from easy. Domestic prosecutions of international crimes face a number of obstacles. Political will of national authorities to support independent investigations is needed, but often in short supply given that these prosecutions will likely touch on powerful interests opposed to accountability. Prosecutions of mass atrocity crimes also require specialized expertise and support, including witness protection, but countries are often ill-equipped to meet these challenges. The OTP, like other complementarity actors, needs to have strategies geared towards bridging these two pillars of 'unwillingness' and 'inability'.

As challenging of a task as it may be, the stakes for the OTP's success in this area are no less profound. In the long term, bolstering national proceedings is crucial in the fight against impunity for the most serious crimes and is fundamental to hopes for the ICC's broad impact.

Indeed, the demands for justice for atrocity crimes have far outstripped the capacity of the ICC; the number of situations in which the ICC could and should act simultaneously are probably far more than what the Court's founders envisioned. And this is not likely to improve any time soon, with a multiplication of human rights crises and an all-too-limited appetite on the part of ICC States Parties to fund a court that can go beyond a handful of investigations in any given year.

The OTP's commitment to encouraging national proceedings in situations under preliminary examination therefore holds out significant potential to meet victims' rights to access justice, by bridging some of this capacity gap. Prospects for success should be realistically understood and appraised, however.

As a follow-up to our 2011 briefing paper on the OTP's approach to situations under analysis, "Course Correction",[1] Human Rights Watch undertook fresh research between 2015 and 2017 on aspects of national proceedings in situations in four countries that are or were the subject of OTP preliminary examinations – Colombia, Georgia, Guinea, and the

[1] Human Rights Watch, *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/).

United Kingdom. Our research aimed to understand both the limits of what the OTP can reasonably be expected to accomplish through its preliminary examinations when it comes to catalysing national justice and areas where the OTP could strengthen its impact in future practice. We did not seek to evaluate numerous other aspects of the OTP's approach to preliminary examinations, which, of course, have as their primary aim the determination of whether or not to open a full ICC investigation. Catalysing national proceedings is only a secondary aim.

Our case studies in these four countries are the subject of a forthcoming Human Rights Watch report, to be published in 2018. This chapter does not deal with the findings of the research. Instead, it provides the conceptual background against which these case studies were carried out. It first looks at the OTP's approach to positive complementarity in its preliminary examinations, and then identifies the key challenges that run across efforts to implement this policy commitment in practice. This chapter is an expanded version of a background section to be published as an appendix in the forthcoming Human Rights Watch report. Some of these observations have also previously been set out in "Course Correction", cited above.

It is important to note that regarding most, if not all, of the challenges referenced below, the OTP has relevant strategies. The absence of reference to these strategies in this chapter should not be understood to suggest that the OTP is unaware of or not actively seized of these issues. Our full report assesses the OTP's approaches and strategies, and makes recommendations as to how the OTP and other complementarity actors can strengthen practice.

35.1. Overview of the Preliminary Examination Process

'situations under analysis' or 'preliminary examinations' are a specific set of events in a given country that the OTP is assessing to determine whether to open a formal ICC investigation.[2] It is important to note that the

[2] ICC jurisdiction can be triggered in one of three ways: ICC member states or the Security Council can refer a specific set of events – known as a situation – to the ICC prosecutor or the ICC prosecutor can seek to open an investigation on their own initiative ('*proprio motu*') with the authorization of an ICC pre-trial chamber. See Rome Statute of the International Criminal Court (hereinafter 'Rome Statute'), U.N. Doc. A/CONF.183/9, 17 July 1998, entered into force 1 July 2002, Article 13. Regardless of how the Court's jurisdiction is triggered, however, the Office of the Prosecutor first analyses the information it has be-

OTP's approach to the preliminary examination process has been consolidated over a number of years; the approach described below reflects current practice and dates to 2013, when the OTP issued a revised policy on preliminary examinations.[3]

Information about possible crimes falling within the ICC's jurisdiction first comes to the OTP through one of two channels: communications and referrals. These channels relate to the three mechanisms that can trigger ICC jurisdiction: *proprio motu* investigations (Rome Statute, Articles 13(c) and 15), Security Council referrals (Article 13(b)), and State Party referrals (Article 13(a)).

'Communications' are information received by the OTP under Article 15 of the Rome Statute, which permits the prosecutor to open an investigation *proprio motu* ("on one's own initiative") with the authorization of a pre-trial chamber. Not all such communications, however, will lead to a preliminary examination. Instead, and consistent with Article 15(2)'s instruction that the prosecutor "analyse the seriousness of information received", the OTP first filters out information regarding crimes manifestly outside the ICC's jurisdiction. This is known as Phase 1. Situations that survive this initial filter then enter Phase 2 and become formally 'situations under analysis'.[4]

By contrast, situations referred to the ICC prosecutor by the Security Council or a State Party are automatically considered to be situations under analysis and directly enter Phase 2. In addition, the prosecutor has indicated that situations directly enter Phase 2 when a declaration has been lodged under Article 12(3), which permits a State to temporarily accept the jurisdiction of the ICC.[5] This is the case even though an investigation opened following an Article 12(3) declaration is done so pursuant to the prosecutor's *proprio motu* powers under Article 15.

Beginning with Phase 2 – which marks the formal start of a preliminary examination – the OTP, through its Situation Analysis Section with-

fore it regarding a situation to determine whether there is a reasonable basis for initiating a formal investigation. This process is known as 'preliminary examination'.

3 Office of the Prosecutor, ICC, *Policy Paper on Preliminary Examinations*, November 2013 (http://www.legal-tools.org/doc/acb906/).

4 *Ibid.*, para. 80.

5 *Ibid.*

in the Jurisdiction, Complementarity and Cooperation Division, examines the factors listed in Article 53(1) of the Rome Statute that control the prosecutor's determination as to whether to initiate an investigation. Those are:

- whether there is "a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed" (Article 53(1)(a));
- whether "the case is or would be admissible under article 17" (Article 53(1)(b)); and
- whether "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" (Article 53(1)(c)).[6]

Admissibility – assessed in Phase 3 of the examination – has two components, consistent with the requirements of Article 17 of the Rome Statute. First, a potential case must be of sufficient gravity to justify further action by the ICC. Second, the principle of complementarity must be satisfied; that is, national authorities are not conducting national proceedings or, if they are, they are unable or unwilling to carry out genuine investigations and prosecutions.[7]

At the conclusion of Phase 2 and, again at the end of Phase 3 should the examination proceed, the Situation Analysis Section prepares an internal report – an Article 5 report for Phase 2, referring to the Rome Statute article governing the ICC's subject matter jurisdiction, and an Article 17 report for Phase 3, referring to the Rome Statute provision governing admissibility – assessing the relevant criteria and submits the report to the prosecutor. If the examination proceeds further, at the conclusion of Phase 4, the Situation Analysis Section submits an Article 53(1) report. The de-

6 *Ibid.*, paras. 34–71, 80–83.

7 Given that at the pre-investigation stage there are no cases (understood to mean an "identified set of incidents, individuals, and charges"), the Office of the Prosecutor examines the admissibility of "potential cases that could be identified in the course of the preliminary examination based on the information available and that would likely arise from an investigation into the situation". *Ibid.*, para. 43.

cision of the prosecutor as to whether to open an investigation – or to seek authorization to investigate, as needed – is based on this report.[8]

Phases 2 through 4 are conducted sequentially, although there may be a certain fluidity in the OTP's approach, given that information relevant to more than one phase may be received by the OTP at any point.

Only decisions not to proceed with investigations following a State or Security Council referral, or where the OTP has based its decision solely on the interests of justice, are subject to judicial review. Review of the former must be requested by the State or Security Council, while the latter may be reviewed at the initiative of the Pre-Trial Chamber, and if reviewed, will only be effective if confirmed by the judges.[9]

35.2. Overcoming Inability and Unwillingness through Positive Complementarity

There are often several obstacles to effective national investigations and prosecutions of mass atrocity crimes. Tracking the language of the Rome Statute in Article 17, these challenges can be described as falling into one of two categories: unwillingness on the part of national authorities to genuinely investigate and prosecute, or an inability to do so.

Unwillingness refers to an absence of political will by national authorities to support genuine proceedings. Unwillingness, of course, can result in no proceedings at all. Where there are proceedings, Article 17(2) of the Rome Statute refers to the following aspects of unwillingness to conduct genuine proceedings: proceedings undertaken to shield the person concerned from justice; unjustifiable delay in proceedings that is inconsistent with an intent to bring the person concerned to justice; or proceedings lacking independence or impartiality, and conducted in a manner inconsistent with an intent to bring the person concerned to justice. The OTP has articulated several indicia it considers in assessing these different dimensions of unwillingness, ranging from too limited investigations to witness intimidation to political interference with investigations.[10]

Inability refers to a lack of capacity within a national jurisdiction to conduct genuine proceedings. The Rome Statute in Article 17(3) defines

8 *Ibid.*, paras. 81–83.

9 Rome Statute, Article 53(3)(a)–(b).

10 Office of the Prosecutor, ICC, 2013, paras. 50–55, see *supra* note 3.

inability by reference to "a total or substantial collapse or unavailability of its national judicial system" that renders the State "unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings". The OTP has also developed a limited set of indicia for assessing inability; they are, among other things, "the absence of conditions of security for witnesses, investigators, prosecutors and judges or lack of adequate protection systems; the existence of laws that serve as a bar to domestic proceedings in the case at hand, such as amnesties, immunities or statutes of limitation; or the lack of adequate means for effective investigations and prosecutions".[11]

The definitions or indicia of 'unwillingness' and 'inability' contained in the Rome Statute and elaborated on in the OTP's policy statements are there to guide the court's exercise of its jurisdiction, that is, to determine which cases remain admissible before the ICC, and which, because of genuine national activity, are inadmissible.

It is important to note that difficulties encountered or imposed by national authorities and which may need to be addressed to ensure credible justice may go beyond the Rome Statute definitions of 'unwillingness' and 'inability'. The ICC appeals chamber, for example, in assessing an admissibility challenge mounted in the Abdullah Al-Senussi case by the government of Libya noted that the ICC "is not primarily called upon to decide whether in domestic proceedings certain requirements of human rights law or domestic law are being violated"; rather, in its view, admissibility is concerned with guarding against sham proceedings that lead to the evasion of justice. While violations of fair trial rights are not irrelevant to the court's consideration of admissibility, the appeals chamber held that only "violations of the rights of the suspect [that] are so egregious that the proceedings can no longer be regarded as being capable of providing any genuine form of justice to the suspect" will be, in the language of Article 17(2), "inconsistent with an intent to bring that person to justice".[12]

In addition, admissibility before the ICC is case-specific; the existence of national proceedings that could preclude ICC jurisdiction is de-

[11] *Ibid.*, paras. 56–57.

[12] See ICC, *Prosecutor v. Saif Al-Islam and Abdullah Al-Senussi*, Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi", 24 July 2014, para. 230 (http://www.legal-tools.org/doc/ef20c7).

termined by reference to an actual (or, at the situation phase, potential) case, defined by the person charged (or groups of persons who could be charged) and the conduct charged (or the kinds of conduct that may be charged). Admissibility assessments before the ICC are "not a judgement or reflection on the national justice system as a whole".[13]

Nonetheless, the concepts of "unwillingness" and "inability" contained in the Rome Statute have been useful to broader efforts to map and address obstacles to national justice.[14] Such efforts to encourage and assist national investigations and prosecutions – which range from legislative assistance with capacity building to political dialogue for countering obstruction – have come to be known collectively as 'positive complementarity'. The first ICC prosecutor, Luis Moreno-Ocampo, introduced the concept of 'positive complementarity' – although he did not use that term – at a public hearing when he took office in June 2003, referring specifically to the role of the ICC.[15] The term has since evolved, particularly leading up to and after the 2010 ICC review conference in Kampala, Uganda. While momentum has been difficult to sustain since Kampala, the term has come to encompass initiatives by a range of actors to encourage national prosecutions of international crimes.[16]

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13 Office of the Prosecutor, ICC, 2013, para. 46, see *supra* note 3.

14 See, for example, Open Society Justice Initiative, *International Crimes, Local Justice: A Handbook for Rule-of-Law Policymakers, Donors, and Implementers*, Open Society Foundations, New York, 2011; High Representative of the European Union for Foreign Affairs and Security Policy and European Commission, "Joint Staff Working Document on Advancing the Principle of Complementarity: Toolkit for Bridging the gap between international and national justice", SWD(2013)26final, 31 January 2013; Assembly of States Parties, ICC, "Report of the Bureau on Stocktaking: Complementarity", ICC-ASP/8/51, 18 March 2010.

15 Statement made by Mr. Luis Moreno-Ocampo, Ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court, The Hague,16 June 2003, p. 3; see also Office of the Prosecutor, ICC, "Paper on some policy issues before the Office of the Prosecutor", September 2003, p. 5 (http://www.legal-tools.org/doc/f53870/); Silvana Arbia, "The Three Year Plans and Strategies of the Registry in Respect of Complementarity for an Effective Rome Statute System of International Criminal Justice", Consultative Conference on International Criminal Justice, 2009 conference.

16 See Morten Bergsmo, Olympia Bekou, and Annika Jones, "Complementarity After Kampala: Capacity Building and the ICC's Legal Tools", in *Goettingen Journal of International Law*, 2010, vol. 2, pp. 793–803; Olympia Bekou, "The ICC and Capacity Building at the National Level", in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, pp. 1252–54.

The ICC is now considered just one actor in this landscape, which also includes assistance between States, international organizations, and civil society groups.[17] Indeed, some ICC States Parties – citing budgetary or mandate concerns – have steered the ICC away from taking on a more robust role on positive complementarity.[18] To be sure, successfully shifting the political will and capacity to permit national prosecution of international crimes, particularly in circumstances of entrenched impunity, is likely to require strategic alliances between a number of different stakeholders. The ICC is not a development agency, and does not have resources to contribute directly to rule-of-law programming.

And yet, the role of the ICC could be central to positive complementarity in situations pending before the court.[19] In these situations, the OTP's engagement around justice with a range of domestic actors promises to be a powerful catalyst for national proceedings. Human Rights Watch's previous reporting and ongoing monitoring of situations under analysis, as well as its broader work on complementarity, suggest a few possible pathways in this regard. These relate to both overcoming political obstruction and addressing capacity gaps, and include:

- Focusing public debate through the media and within civil society on the need for accountability;

[17] This approach is clear from reports of the Assembly of States Parties facilitation on complementarity issued since the Kampala review conference. See, for example, Assembly of States Parties, ICC, "Report of the Bureau on stocktaking: Complementarity", 2010, see *supra* note 14.

[18] Unfortunately, the Assembly of States Parties – a natural ally – has not taken up this role. See Elizabeth Evenson and Alison Smith, "Completion, Legacy, and Complementarity at the ICC", in Carsten Stahn (ed.), 2015, p. 1274, see *supra* note 16.

[19] The Office of the Prosecutor's commitment in practice to positive complementarity has been much more evident in its preliminary examinations. But in ICC situations under investigation, the Court's clear knowledge of what is needed to try grave crimes coupled with its understanding of the capacity limitations in countries where it is active means it is well placed to help donor states efficiently identify existing gaps and target their assistance to strengthening national prosecutions. Court staff can also directly lend expertise and, subject to protecting witnesses and other vulnerable sources, the Office of the Prosecutor may be able to share information gathered during investigations, including non-confidential material and broad pattern analysis of crimes. Field-based staff, in particular, may be particularly well-placed to broker positive complementarity efforts through relationships between national authorities and rule-of law actors.

- Serving as a source of sustained pressure on domestic authorities to show results in domestic proceedings;
- Highlighting to international partners the importance of including accountability in political dialogue with domestic authorities;
- Equipping human rights activists with information derived from the OTP's analysis, strengthening advocacy around justice; and
- Identifying weaknesses in domestic proceedings, to prompt increased efforts by government authorities and assistance, where relevant, by international partners.[20]

[20] Other authors have also addressed strategies available to the Office of the Prosecutor to advance positive complementarity, including several authors in this volume. William Burke-White's article was among the first on positive complementarity, although not specific to the preliminary examination phase, see William Burke-White, "Proactive Complementarity: The ICC and National Courts in the Rome System of International Justice", in *Harvard International Law Journal*, 2008, vol. 49, pp. 53–108; see also Carsten Stahn, "Complementarity: A Tale of Two Notions", in *Criminal Law Forum*, 2008, vol. 19, pp. 87–113; Carsten Stahn, "Taking Complementarity Seriously", in Carsten Stahn and Mohamed M. El Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press, Cambridge, 2011, pp. 233–82; Justine Tiller, "The ICC Prosecutor and Positive Complementarity: Strengthening the Rule of Law?", in *International Criminal Law Review*, 2013, vol. 13, pp. 507–91. Mark Kersten and Thomas Obel Hansen have sought to further theorize the mechanisms through which the Office of the Prosecutor can influence national actors in preliminary examinations, whether to bring about proceedings or to deter abuses. Of them, Kersten emphasizes, as we do, the importance of strategic alliances and the Office of the Prosecutor taking a bolder approach with governments, under certain circumstances: see Mark Kersten, "Casting a Larger Shadow: Premeditated Madness, the International Criminal Court, and Preliminary Examinations", in Morten Bergsmo and Carsten Stahn (ed.), *Quality Control in Preliminary Examination: Volume 2*, Torkel Opsahl Academic EPublisher, Brussels, 2018, chap. 33; Obel Hanson, whose study of the Iraq/United Kingdom situation is also included in this volume, while citing some exceptions, notes that, generally, there have been "few existing studies [to] examine the extent to which this goal is being effectively pursued by the Office of the Prosecutor at the preliminary examination phase and how ICC preliminary examinations may affect national authorities' commitment to domestic accountability processes and otherwise impact the scope, nature, and conduct of such process", see Thomas Obel Hansen, "The Policy Paper on Preliminary Examinations: Ending Impunity Through 'Positive Complementarity'?", Transitional Justice Institute Research Paper No. 17-01, 22 March 2017 (on file with the author). One of the exceptions cited by Hansen is Christine Björk and Justine Goerbertus, "Complementarity in Action: The Role of Civil Society and the ICC Ruel of Law Strengthening in Kenya", in *Yale Human Rights and Development Journal*, 2014, vol. 14, pp. 205–29. Other authors have examined what approach the Office of the Prosecutor should take to its legal analysis during the preliminary examination in order to advance complementarity. See Paul Seils, "Putting Complementarity in its Place", in

While these strategies are shared, for the most part, with other complementarity actors, the OTP's leverage – that is, that it can open investigations where national authorities fail to act and where it has jurisdiction – is unique.

35.3. OTP's Approach to Encouraging National Proceedings in Preliminary Examinations

As already indicated above, during its preliminary examinations, "[w]here potential cases falling within the jurisdiction of the Court have been identified, the Office [of the Prosecutor] will seek to encourage, where feasible, genuine national investigations and prosecutions by the States concerned in relation to these crimes".[21]

As the language makes clear, this is not an unqualified commitment to encouraging national proceedings in every circumstance. The OTP's practice is to do so "where feasible", and, in addition, to focus, for the most part, on situations in Phase 3, that is, only after the OTP has concluded in Phase 2 that a reasonable basis exists to believe that crimes within the ICC's jurisdiction have been committed. This current statement of policy and practice reflects an evolution in the OTP's approach, part of its overall consolidated practice in situations under analysis, memorialised in its 2013 "Policy on Preliminary Examinations".[22]

Where it does seek to encourage national proceedings, the OTP has identified a number of different forms of engagement: "report[ing] on its monitoring activities, send[ing] in-country missions, request[ing] information on proceedings, hold[ing] consultations with national authorities as well as with intergovernmental and non-governmental organisations, participat[ing] in awareness-raising activities on the ICC, exchang[ing] lessons learned and best practices to support domestic investigative and

Carsten Stahn (ed.), 2015, pp. 305–27, see *supra* note 16. Seils has also written a handbook with guidance for national prosecutors seeking to avoid an ICC intervention, see International Center for Transitional Justice, *Handbook on Complementarity: An Introduction to the Role of National Courts and the ICC in Prosecuting International Crimes*, 2016, p. 79.

21 Office of the Prosecutor, ICC, 2013, para. 101, see *supra* note 3.

22 See also Office of the Prosecutor, ICC, "Results of the Strategic Plan (June 2012-2015)", annex 1 to "Strategic Plan 2016-2018", 6 July 2015, para. 18 (http://www.legal-tools.org/doc/7ae957/).

prosecutorial strategies, and assist[ing] relevant stakeholders to identify pending impunity gaps and the scope for possible remedial measures".[23]

35.4. Key Challenges

Our observation of the OTP's practice and our research for our forthcoming report highlight several consistent challenges in strengthening the influence of the OTP with national authorities.

35.4.1. Context Matters

It is clear that context will influence the likelihood of successful positive complementarity activities by the OTP. Context here includes the underlying alleged crime base; public demand for accountability, where high public interest providing more fertile ground for engagement; the availability of other partners on complementarity, particularly among international donors; and, most significant of all, the posture of national authorities. The OTP can take steps to influence context – in fact, that is the entire premise of positive complementarity strategies – but there will be objective challenges to its ability to do so. To a certain extent, it has to take situations as it finds them.

That context matters is an obvious point, but it may have some implications for practice.

In Human Rights Watch's 2011 report on OTP practice in preliminary examinations, we criticized the appearance of inconsistent treatment of situations, which tended to undermine the OTP's credibility with potential complementarity partners and its leverage with national authorities. Inconsistency can be problematic, but when it comes to having an impact on national justice efforts, differences in context mean that there may be

[23] Office of the Prosecutor, ICC, 2013, para. 102, see *supra* note 3. A number of the Office of the Prosecutor's activities during the preliminary examination – in particular, collecting information and consultations with national authorities and other stakeholders with an informed perspective on the commission of crimes or the status of national proceedings – relate to the primary aim of the preliminary examination, that is, the determination as to whether or not an ICC investigation in a given situation is warranted. Regular reporting also leads to increased transparency, which serves an important end: responding to interests of affected communities in knowing the status and eventual outcome of the Office of the Prosecutor's preliminary examination. Increased public understanding of the criteria guiding the Office of the Prosecutor's decision-making process also should help combat accusations of selectivity or bias in the court's investigations.

differences in the OTP's approach. How the OTP can navigate the need for tailored approaches that give rise to perceptions of inconsistent treatment and, therefore, raise credibility risks may be a significant challenge.

35.4.2. Importance of Strategic Alliances

Given the steep obstacles to national justice, it is likely that the OTP cannot go alone and will have more influence where its efforts are amplified by others, including local and international non-governmental actors, international donors, and intergovernmental partners, like the UN or regional organizations. Under some circumstances, the OTP's engagement with these other actors can stimulate collective efforts; in other circumstances, these actors may need to proactively develop approaches that take into account the potential to make us of the preliminary examination as a pressure point on national justice efforts. Depending on context, the media, too, can be an important source of attention to the issue of accountability.

35.4.3. Passive v. Active Effects

To what extent does the OTP need active strategies around positive complementarity or is the existence of the preliminary examination itself sufficient for impact? The emphasis in our research is on the former – what steps the OTP can take to actively increase its impact. But this is not to overlook the possibility of more passive effects.

The strength of such passive effects may have some implications for assessing the OTP's current phased approach to preliminary examinations. The OTP's current focus on encouraging national proceedings largely after moving from Phase 2 to Phase 3 has significant advantages, in that it limits the appearance of OTP engagement as amounting to an empty threat, a concern we had raised in our 2011 report.[24] At the same time, a delay may also have opportunity costs, given uncertainty as to how long moving from Phase 2 to Phase 3 may take (on the absence of timelines, see below). To the extent there are passive effects even in the absence of active strategies, however, this may provide a greater flexibility and momentum on complementarity than the division between Phase 2 and Phase 3 suggests.

[24] See Human Rights Watch, 2011, Part III.D, see *supra* note 1.

35.4.4. Effects of the ICC's Admissibility Regime and OTP's Prosecutorial Policies

As noted above, the ICC is a court of last resort. Under the principle of complementarity, cases are only admissible before the ICC where national authorities have not conducted genuine domestic proceedings.

On the one hand, that the ICC's jurisdiction is complementary to domestic jurisdiction is what, in the first place, makes space available during the preliminary examination to seek to catalyse national proceedings. Where States have an interest in avoiding the ICC's intervention, they can do so by conducting national proceedings. This can mean that the OTP's leverage over national authorities is or can be made to be significant.[25]

On the other hand, however, the ICC's complementary jurisdiction means that the OTP will need to be prepared to prove to the judges that there are no national proceedings that would render potential cases inadmissible. Efforts by the OTP to stimulate national proceedings can produce domestic activity that will make it more difficult for the OTP to meet this burden. Where that activity leads to genuine national proceedings, this is positive. But there is an equal risk of domestic authorities producing a certain amount of activity – opening of case files and limited investigative steps – to starve off ICC intervention, but without following through to prosecutions.

In this scenario, the preliminary examination period may be manipulated by national authorities, leaving it in limbo: the domestic activity may be too much to warrant OTP actions, but too little to close out the preliminary examination in deference to genuine national proceedings. As a result, ICC action could be delayed where it is ultimately needed, both making it more difficult to investigate long after crimes are committed and deferring the access of victims to justice.

[25] It is important to note, however, that the degree to which states care about avoiding an ICC intervention is highly contingent on context. ICC states parties through their membership in the ICC may have a stronger incentive to carry out national prosecutions than non-states parties that are the subject of Security Council referrals. ICC states parties may even already have relevant national legislation (laws embodying the provisions of the Rome Statute through 'implementation' of the treaty) and, through the ratification and implementation processes, pro-accountability constituencies within parliament or civil society.

This catch-22 applies, primarily, to situations where the OTP would need to act *proprio motu* under Article 15 to open investigations. For these investigations, the OTP needs to seek authorization from the court's judges, which includes a positive determination that there are no national proceedings that would render potential cases inadmissible. The judges' remit to look at the admissibility of potential cases – which has been defined as the "groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and … the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s)"[26] – means that there is a wide scope of national investigative activity that could be deemed to render ICC action impermissible.[27] Again, where this serves to promote genuine national cases, this is a strength of the ICC system. But it can offer national authorities space to manipulate the admissibility regime.

This was perhaps a particular risk in the court's earliest years. As with many aspects of the Rome Statute system, the court's case law on complementarity is a work in progress. It may have been difficult for the OTP to predict just what it would need to show the judges to satisfy the statute's admissibility requirements. It was only with the first Article 15 investigation, in Kenya in 2010, where judges had the opportunity to clarify what admissibility would look like at this phase of proceedings, namely, that it would be measured with regard to potential cases, rather than a more abstract assessment of the situation as a whole. The requisite gravity of potential cases – the other admissibility requirement – continues to be debated.[28]

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[26] ICC, Situation in the Republic of Kenya, 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, para. 50 (http://www.legal-tools.org/doc/338a6f/).

[27] Once specific charges are pressed against specific individuals, the court's case law invokes a 'same person, same conduct' test, requiring a successful challenge to admissibility to show domestic activity with regard to the same incidents and persons against whom the prosecutor seeks to press charges. For an overview of the ICC's case law on complementarity, see Seils, 2016, Part V, see *supra* note 20; see also, Carsten Stahn, "Admissibility Challenges Before the ICC: From Quasi-Primacy to Qualified Deference", in Stahn (ed.), 2015, pp. 228–59, see supra note 16.

[28] See, for example, ICC, *Situation on the Registered Vessels of the Union of the Comoros et al.*, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, 16 July 2015 (http://www.legal-tools.org/doc/2f876c/).

The OTP needs to carefully determine when deferring to national authorities and deploying positive complementarity strategies is the right choice, and when this will only delay ICC action without any reasonable prospect of national justice. Getting that call right and avoiding instrumentalization is perhaps the OTP's paramount challenge when it comes to encouraging national proceedings in situations under analysis.

Finally, as indicated above, ICC judges have not interpreted the court's admissibility regime in a manner that seeks to safeguard the quality of national justice. Their examination of the 'genuineness' of proceedings aims at ensuring that proceedings are not undertaken to shield perpetrators from justice, rather than a concern for protecting the fair trial rights of defendants, in all but the most egregious circumstances. Whether the OTP ought to consider increasing its focus on the quality of these proceedings as a matter of policy may be a relevant question for future consideration.

35.4.5. Absence of Timelines

The ICC's legal texts do not prescribe any timeline for taking decisions regarding preliminary examinations. The absence of timelines can provide a helpful flexibility to the OTP, when it comes to carrying out its analysis, as well as implementing its policy commitment to encourage domestic proceedings; the time necessary to catalyse national proceedings is likely to vary greatly depending on context.[29]

[29] The Office of the Prosecutor has provided some generic guidance on the length of Phases 1–2 and 4, but when it comes to Phase 3, has stated that the phase "often entails the assessment of national proceedings which inevitably makes it impossible to establish a definite duration of this phase". See Assembly of States Parties, ICC, "Resource justification for mandated activities", annex 2 to "Report of the Court on the Basic Size of the Office of the Prosecutor", ICC-ASP/14/21, 17 September 2015, p. 37. Human Rights Watch has previously recommended that the Office of the Prosecutor develop general guidance on how long preliminary examinations can be expected to take. A certain flexibility, of course, is also necessary for the primary purpose of the preliminary examination, that is, to reach a decision as to whether an ICC investigation is merited because the time required for assessing the article 53(1) factors is likely to vary from situation to situation. For example, information about alleged crimes may be difficult to obtain. And a determination as to complementarity may be more straightforward where there is a complete absence of national proceedings as opposed to where there are proceedings that need to be evaluated for their relevancy and genuineness. See Human Rights Watch, 2011, Part III.C, IV, see *supra* note 1.

The absence of timelines, however, could exacerbate some of the risks identified above. That is, the OTP cannot resort to pre-set timelines in order to put national authorities under pressure to produce real results, nor can it rely on these timelines to help it make crucial and difficult determinations regarding whether prospects for national investigations are sufficient to justify deferring ICC action. In addition, the OTP's ability to influence national authorities can be amplified through civil society actions. But civil society groups may lose confidence in the OTP's process due to the prolonged nature of preliminary examinations. Strategies to increase transparency with these key partners may be critical to addressing this challenge.

35.4.6. Maintaining Leverage and the Use of Publicity

While the fact that a situation may come before the ICC can initially provide an incentive for national authorities to start their own investigations, that leverage is likely to wane with the passage of time. Authorities can become desensitized to impending ICC action. And with a number of pending situations being analysed simultaneously by the OTP, with limited resources (see below) national authorities may judge that the chances a situation will be selected for investigation do not warrant changes in behaviour.

In our 2011 report, following a period in which the OTP sought to raise the public profile of preliminary examinations, Human Rights Watch welcomed increased transparency, but expressed some concern that certain kinds of publicity could actually undermine, rather than sustain leverage with national authorities.[30] One risk we noted is that where the OTP's preliminary examination is protracted, as has often been the case, repeated public statements but no apparent action on investigations can give rise to perceptions of the ICC as a paper tiger, lessening the weight future statements of possible ICC action may carry.[31]

[30] We also noted that there were limits to the resources the Office of the Prosecutor had available, and therefore it needed to strike a proper balance between the primary aim of reaching a decision as to whether or not to open an investigation, and efforts, including increased publicity aimed at positive complementarity. This increase in publicity also related to potential deterrent effects. *Ibid.*, Part II.

[31] *Ibid.*, Part IV.

Publicity can be a powerful and important medium to maximize leverage on national authorities, and to a certain extent, these risks are inherent to its use. At the time, we recommended a few steps the OTP could take in its public statements on preliminary examinations to mitigate these risks. First, we called on the OTP to increase its regular reporting on its substantive assessment of the Article 53(1) factors – including admissibility – in pending situations under analysis. Among other things, we thought this would help demonstrate more credibly that the OTP is actually proceeding with the analysis, and could have helped counteract perceptions of what appeared at that time to be an inconsistent treatment of different situations, with some receiving considerable public attention or public missions by the OTP, and others comparatively little. Second, we recommended that public statements provide additional context about the preliminary examination process, and not go beyond where the OTP's own examination stands, in order to inform and manage expectations as to the prospects of ICC action. Third, we recommended that the OTP take care to avoid improperly publicizing aspects of a possible investigation – such as the names of possible suspects – in a manner that could undermine the due process rights of potential accused or the reputation of others and call into question the impartiality of any subsequent investigation.[32]

The OTP's current approach to publicity in preliminary examinations has since changed, and incorporates some of these recommendations.

First, while the OTP issued a draft policy on preliminary examinations in 2010, it finalized the policy in 2013, setting out in detail the principles and processes governing situations under analysis. It also now publicly identifies on the ICC's website and other public materials where a situation falls in the four-phased approach, which is also explained in that policy paper.[33]

Second, it has also increased substantive reporting on its preliminary examinations. In December 2011, the OTP issued its first annual report spanning all preliminary examination activities over the previous year. These annual reports have become increasingly more detailed with

[32] *Ibid.*, Part IV.

[33] See ICC, "Preliminary Examinations" (available on its web site).

each year. In 2012, the OTP also issued a lengthy 'interim report' on Colombia, covering both subject matter and admissibility issues.[34]

The OTP has also made public an internal Article 5 report when moving from one phase to the next (Nigeria, Phase 2 to Phase 3). Decisions not to move a situation under analysis forward into the next phase or to open an investigation – because the OTP considers that the legal criteria are not met – are also communicated publicly, and since 2013 have been accompanied by publication of the relevant report (to date, an Article 5 report for South Korea and Honduras, and an Article 53(1)) report for Comoros). Decisions to open investigations in non-*proprio motu* cases have been accompanied by a public Article 53(1) report since 2013 (Mali and CAR II).

35.4.7. Limited Resources

At this writing, there are 13 staff members within the Situation Analysis Section. Of these 13 positions, two are at the P-1 level, six are at the P-2 level, four are at the P-3 level, and one position is at the P-5 level. This staffing size falls below the 17 staff members the OTP has indicated ought to be the "basic size" of the Situation Analysis Section.[35]

But even with 17 staff members, by the OTP's calculations this would translate into an average of 1.5 full-time P-2 or P-3 analysts to work on each situation, assuming an average of nine preliminary examinations at any given point of time. These 1.5 staff members, with support from P-1 analysts and under the supervision of the P-5 head of section, are responsible for a wide range of activities in their assigned situations – from analysis necessary to support determinations regarding investigations, to public information, to efforts to deter crimes or encourage na-

[34] These reports are available from the Court's web site, *ibid.*

[35] Assembly of States Parties, ICC, "Report of the Court on the Basic Size of the Office of the Prosecutor", ICC-ASP/14/21, 17 September 2015, para. 19. The "basic size" of the Office of the Prosecutor, presented to ICC member countries in 2015, is the size it considers necessary "not only [to] ensure that the Office attains a staffing size which is stable for the foreseeable future, but also one with sufficient depth to absorb new demands without having to continue the present unsustainable practice of repeatedly postponing new investigations which must be pursued in accordance with the Office's mandate, or constantly stripping ongoing activities of critical resources so as to staff the highest prioritised activities". *Ibid.*, para. 3.

tional proceedings, along with the associated field missions, consultations, and other activities necessary to support these functions.[36]

Particularly in preliminary examinations with widespread allegations of crimes, extending over a long temporal period, or where significant national proceedings are under way, the OTP's resources are highly limited as compared to the quantity of needed analysis, let alone the steps that may be necessary to engage national authorities in a way that can effectively catalyse national prosecutions. These resources are also limited as compared to the diplomatic or resources that some governments are likely to allocate to engage with the OTP.

These limited resources give reason to pause in considering what strategies the OTP can reasonably be expected to pursue on positive complementarity. It is worth bearing in mind that these strategies are, appropriately, only secondary to the Situation Analysis Section's primary role of analysis to support decisions regarding whether or not to open ICC investigations.

[36] *Ibid.*, paras. 14–21.

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