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Maximizing the Impact of ICC Preliminary Examinations

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International Criminal Court Prosecutor Luis Moreno-Ocampo speaks at an ICC press conference in The Hague, Netherlands. Photo courtesy of AP/Peter Dejong.



The primary goal of the International Criminal Court's (ICC (<http://www.icc-cpi.int/Menus/ICC>)) preliminary examinations is to determine whether there are grounds to launch an official ICC investigation into a situation. As a basis for the decision to open an investigation, preliminary examinations have the potential to further the Court's overall goals of ending impunity and deterring future crimes. To successfully achieve these goals, preliminary examinations require a balanced approach. On one hand, the Office of the Prosecutor (OTP (<http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/>)) must adopt a consistent method of analysis that provides sufficient information about the investigation to spur national proceedings and alert potential perpetrators of crimes that they could be held accountable. On the other hand, the OTP must adapt to a wide variety of circumstances and cannot provide information that would raise expectations about the Court's involvement, compromise due process, or risk the safety of victims and witnesses. During the first decade of the Court's work, inconsistency among the approaches to preliminary examinations, especially the absence of clear timelines, has limited their effectiveness.

The ICC initiates preliminary examinations in one of three ways: through a decision of the Prosecutor; through a referral from a State Party or the UN Security Council; or through a declaration of a non-State Party pursuant to Article 12(3) of the Rome Statute (<http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>), under which that State accepts ICC jurisdiction for the preliminary examination and consequent proceedings. In all three instances, the Prosecutor follows the same procedure to determine whether there is a reasonable basis to proceed with an investigation based on three criteria laid out in Article 53(1) of the Rome Statute. The Prosecutor must first determine whether there is temporal, material, and either territorial or personal jurisdiction. Second, the Prosecutor considers whether the case would be

admissible, taking into consideration both the gravity of the alleged crimes and whether there are already sufficient and ongoing national proceedings. Finally, the Prosecutor considers whether ICC proceedings would violate the interests of justice.

In practice, however, the timeline of preliminary examinations conducted by the Prosecutor to date has been inconsistent. Without a clear and predetermined timeline, the Prosecutor has progressed quickly through all three Article 53(1) steps in some situations, while drawing out his analysis in others. In part, these discrepancies are necessary because the time required to analyze Article 53(1) factors will vary based on the circumstances. In evaluating admissibility, the Prosecutor must determine whether there are already national proceedings covering the same crimes and individuals that would likely be the focus of an ICC investigation. In the Democratic Republic of the Congo and Uganda, the Prosecutor quickly found that no national proceedings were ongoing and moved on to the next phase of his analysis. However, the preliminary examination in Colombia continues because some national proceedings are ongoing; therefore, the Prosecutor must evaluate whether the national proceedings are genuine and focused on the individuals most responsible before moving to the next phase in his analysis.

Although certain situations require more time to complete all of the Article 53(1) steps, as preliminary examinations in Colombia and other situations are drawn out without even a general timeline, they become less credible. When the Prosecutor quickly decides to open an investigation—as in the Kenya situation—without making a decision about long-term preliminary examinations—in places like Colombia and Afghanistan—it can taint perceptions of the Prosecutor's impartiality and give rise to the impression that the Prosecutor has been influenced by non-legal factors. Disparate timelines may lead to impressions that the Prosecutor allocates time and resources unevenly among preliminary examinations, and could be mitigated by increasing transparency and establishing general timelines.

As preliminary examinations continue without a decision, potential perpetrators and national authorities may doubt the seriousness of the OTP's investigations. As the prospect of an ICC investigation fades, there are fewer incentives to comply with the ICC's laws. In this way, prolonged preliminary examinations weaken the Court's ability to deter crimes and encourage national proceedings. Finally, the lack of even a general timeline is difficult for victims and affected communities, who have no indication of how long they must wait for justice, or if justice will even come at all. The ICC provides a forum for victims to experience justice when States are unwilling or unable to guarantee this right. As the well-known maxim states, justice delayed is justice denied, and thus long delays without any indication of whether the ICC will initiate an investigation represent an offense to one of the Court's primary constituencies.

Some negative consequences of prolonged preliminary examinations can be mitigated by increased transparency and consistent communication, and the OTP has made progress in this regard. The OTP released a report (http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/OTP+Report+on+Preliminary+Examinations_+13+Dec+2011) about the status of preliminary examinations in December 2011, and includes updates regarding preliminary examinations in its weekly briefings (<http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Weekly+Briefings/>). These reports are essential to reinforce the credibility and seriousness of the OTP's actions because they explain the basis for and progress of the Prosecutor's Article 53(1) analysis.

Preliminary examinations provide a potential avenue for the Court to have a greater impact outside the courtroom. The OTP has taken some positive steps, but the inconsistent approach to preliminary examinations has weakened their credibility and effectiveness in spurring national proceedings and deterring crimes. By establishing clear guidelines, a general timeline, and consistently providing updates regarding preliminary examinations, the OTP could help the ICC achieve its goals of deterring crimes and ending impunity without even going to trial.



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