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Quality Control in Preliminary Examination: Volume 2

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PURL: http://www.legal-tools.org/doc/ed512e/

E-Offprint:

Dov Jacobs and Jennifer Naouri, "Making Sense of the Invisible: The Role of the 'Accused' during Preliminary Examinations", in Morten Bergsmo and Carsten Stahn (editors), *Quality Control in Preliminary Examination: Volume 2*, Torkel Opsahl Academic EPublisher, Brussels, 2018 (ISBNs: 978-82-8348-111-2 (print) and 978-82-8348-112-9 (e-book)). This publication was first published on 6 September 2018. TOAEP publications may be openly accessed and downloaded through the web site www.toaep.org which uses Persistent URLs (PURLs) for all publications it makes available. These PURLs will not be changed and can thus be cited. Printed copies may be ordered through online distributors such as www.amazon.co.uk.

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Front cover: *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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Making Sense of the Invisible: The Role of the 'Accused' during Preliminary Examinations

Dov Jacobs and Jennifer Naouri*

> I am invisible, understand, simply because people refuse to see me.
>
> Ralph Ellison, *Invisible Man*

28.1. Introduction

International criminal justice deals with the most visible crimes receiving international attention allegedly committed by people that are pre-identified as responsible and perceived as guilty even before any proceedings are even remotely considered, especially when it comes to public figures of a State. In other words, for most people, international crimes are directly associated with known figures of international relations as their perpetrators.

In the context of the actual criminal proceedings, consideration for the accused, and more particularly his/her rights, are usually not very high up on the list of priorities of the stakeholders of international criminal justice. There are obvious reasons for that, which need not be developed in the present chapter.[1] They include: (i) the collective nature of international crimes, which allows for a dilution of the consideration of an individual as a perpetrator; (ii) the increased focus on victims; and (iii) the

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1 Dov Jacobs, "A Tale of Four Illusions: The Rights of the Defense before International Criminal Tribunals", in Colleen Rohan and Gentian Zyberi (eds.), *Defense Perspectives on International Criminal Justice*, Cambridge University Press, Cambridge, 2017, p. 561.

moral stigma attached to international crimes, which leads to a desire to reach a guilty verdict for its symbolic and narrative effect. For many, observers and participants of the international justice project alike, a conviction is a 'victory for justice' while an acquittal is necessarily seen as a failure, especially for the victims.

While there are therefore reasons for ignoring the rights of the defence, it does create a sort of paradoxical cognitive dissonance: while outside the courtroom, the focus of the attention is symbolically on the perpetrator, inside the courtroom, the accused and his rights often does not have a central role in the procedure.

The result of this situation is that the rights of the accused, when they are taken into account, are always being balanced with other considerations, such as the costs of the proceedings, the rights of the victims, the interests of various stakeholders and overarching – and therefore necessarily vague – concepts such as the 'fight against impunity'.

While this assessment could apply at all stages of the process, one wonders if it applies equally throughout, especially for the present discussion, to preliminary examinations. A basic appraisal of the nature of a preliminary examination could lead to the conclusion that, until the preliminary examination moves to the next stage, and then cases are selected, there is technically no 'defendant' whose rights are to be protected and more generally who needs to be considered in the process. A preliminary examination could be seen as the Office of the Prosecutor ('OTP') simply gathering general information about a possible situation in order to decide whether a more formal investigation is required. One could say that this does not require precise identification of alleged perpetrators of crimes nor does it entail involving these alleged perpetrators in the process.

But the discussion does not end here. It is obvious that the OTP is going to be identifying during the preliminary examination not only contextual elements and details of the possible crimes, but also information relating to possible perpetrators. This is true from both a practical perspective (it is not possible to artificially distinguish between evidence relating to the crimes and evidence relating to the possible perpetrators of the crimes) and from a legal perspective (to the extent that during the preliminary examination the OTP is under an obligation to assess the admissibility of any future cases, there will necessarily be some assessment of potential defendants).

This chapter will highlight the ways in which alleged perpetrators are considered during the preliminary examination and what impact this might have for future practice of the OTP. The underlying idea is that potential defendants cannot simply be ignored during a preliminary examination. Experience has shown that the conduct of the preliminary examination, despite its preliminary nature, can affect the way the actual investigation and prosecution unfold. It is usually when the OTP 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. If the initial direction is based on incomplete information or a general misunderstanding of the situation, it will be harder to correct at a later stage. Moreover, the understanding of the context and role of the protagonists in what are most of the time highly complex factual situations necessarily requires hearing what the alleged perpetrators (from the point of view of the OTP) have to say. In other words, the OTP cannot pretend that the potential defendant were invisible.[2]

Considering the 'accused', in a broad sense, during a preliminary examination, is therefore a fundamental component of ensuring the quality control of that particular phase of the process.

This chapter will start by providing some insight on how the authors approach the notion of 'quality control' in the context of preliminary examinations (Section 28.2.). The chapter will then move on to discuss 1) how the role of the Defendant comes into play in the legal assessment done under Article 53, namely whether there exists a reasonable basis to believe that a crime within the jurisdiction of the Court has been committed (Section 28.3.) and whether the case would be admissible (Section 28.4.), and 2) how the potential defendant might be treated and approached during the preliminary examination (Section 28.5.).

[2] What we mean by 'invisible' here is not necessarily that the Office of the Prosecutor ('OTP') would not mention alleged perpetrators at all during the preliminary examination. As shown in subsequent sections of this chapter, the analysis of formal requests made by the OTP to open an investigation under Article 15 shows that the OTP generally does take into account, in more or less precise terms, possible perpetrators in the course of the preliminary examination, most notably when it comes to determining jurisdiction and admissibility. These alleged perpetrators are therefore not 'invisible' because they are not mentioned at all, but 'invisible' on a human level: they are reified as objects of study rather than considered as subjects that can be interacted with and whose input could provide the OTP with a better understanding of the situation it is examining.

28.2. Quality Control of the Preliminary Examination Phase: Some Basic Groundings

28.2.1. The Nature of a Preliminary Examination

28.2.1.1. The Legal Nature of a Preliminary Examination

The difficulty of establishing a framework to assess the quality of a preliminary examination is complicated by the uncertainty about the exact legal nature of a preliminary examination. While the language of the first sentence of Article 53(1) seems to suggest an obligation ("shall") to open an investigation, the legal framework surrounding preliminary examinations seems to suggest a large – and sometimes absolute – margin of discretion for the OTP for a finding that there is no reasonable basis to proceed.[3]

Indeed, a preliminary examination is not a formal 'judicial process' since it is not systematically subject to judicial review.[4] The only outcome of a preliminary examination that is necessarily subject to judicial review by a Pre-Trial Chamber is a decision to initiate an investigation *proprio motu* under Article 15.[5] Some decisions *may* be subject to review by a Pre-Trial Chamber: (1) the decision not to open an investigation after a State or UNSC referral (upon request from the referring State or the UNSC),[6] and (2) the decision not to proceed in the interests of justice (on the own initiative of the Pre-Trial Chamber).[7] In the first case, the Court

[3] For an interpretation along these lines, see "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation" where the Pre-Trial Chamber ('PTC') claimed that Article 53(1) created a presumption in favour of opening an investigation: "In the presence of several plausible explanations of the available information, the presumption of article 53(1) of the Statute, as reflected by the use of the word "shall" in the chapeau of that article, and of common sense, is that the Prosecutor investigates in order to be able to properly assess the relevant facts" (International Criminal Court ('ICC'), Situation on registered vessels of the union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, 16 July 2015, ICC-01/13-34, para. 13 (http://www.legal-tools.org/doc/2f876c/).

[4] On the nature of the preliminary examination, see Hector Olasolo, "The Prosecutor of the ICC before the initiation of investigations: A quasi judicial or a political body?", in *International Criminal Law Review*, 2003, vol. 3, p. 87.

[5] Statute of the International Criminal Court, 17 July 1998, Article 15(4) ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/).

[6] ICC Statute, Article 53(3)(a), see *supra* note 5.

[7] ICC Statute, Article 53(3)(b), see *supra* note 5.

cannot compel the OTP to start an investigation, but can merely ask the Prosecutor to reconsider.[8] In the second case, while the language of the provision is ambiguous,[9] it appears from the Rules of Procedure and Evidence that if there is no confirmation from the Pre-Trial Chamber, the Prosecutor must proceed.[10] Some decisions are not subject to judicial review: the decision to open an investigation after a State or UNSC referral and a decision not to proceed further *proprio motu*.

What does this framework say of the nature of preliminary examinations? First, from a theoretical perspective, if Article 53 was thought of as providing a clear legalized process, then one would expect that judicial oversight would have been provided for in a systematic way. The fact that Article 53 is in the Rome Statute does not necessarily mean that it of itself creates any legal obligation or integrates the preliminary examination in the judicial process. In our view, the key consideration is whether there is judicial or quasi-judicial oversight. In the absence thereof, it makes no sense to speak of a legal process or even of an obligation in the abstract.

In the current state of affairs, it seems rather that Article 53 has, at best, a dual nature: on the one hand, it could be considered as providing an imperative legal framework to be followed by the Prosecutor during a preliminary examination in situations where his or her decision to proceed would be subject to judicial review; on the other hand, it could be considered as merely indicative of possible elements to take into consideration for the Prosecutor to decide to proceed or not, in situations where no judicial review is provided for.

Second, it is apparent that Pre-Trial Chambers can never force the OTP to initiate an investigation based on their own determinations on jurisdiction or admissibility. As noted previously, the only moment where judges have authority to trigger the commencement of an investigation is

8 ICC Statute, Article 53(3)(a), see *supra* note 5.

9 Article 53(3)(b) provides that: "the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber". It is however not clear what it means for a decision not to proceed to be "effective", given the fact that a decision not to proceed does not technically have any legal effect.

10 ICC, Rules of Procedure and Evidence, 9 September 2002, Rule 110 ('[ICC] RPE'): "When the Pre-Trial Chamber does not confirm the decision by the Prosecutor referred to in sub-rule 1, he or she shall proceed with the investigation or prosecution" (http://www.legal-tools.org/doc/8bcf6f).

when the Prosecutor had decided not to proceed based on the interests of justice, but this is due to the particular nature of exercise on the evaluation of the "interests of justice", which only occurs when the Prosecutor has determined that the crimes would fall under the jurisdiction of the Court and that the case would be admissible.[11] As a consequence, it becomes clear that, whatever the language of Article 53(1) might suggest, decisions to investigate are largely – when not exclusively – within the realm of prosecutorial discretion.

This has an impact on evaluations of quality from a legal perspective. While all discretion can be subject to some control and oversight, there is always a margin of appreciation that escapes a rational and objective analysis. In this sense, calls for full transparency and control when it comes to the exercise of prosecutorial discretion when deciding to open a formal investigation are something of an illusion, especially given that the prosecution is unlikely to be open about certain criteria that come into play, for example: (i) the likelihood of co-operation by States, (ii) the likelihood of obtaining custody of potential defendants, (iii) the quality of evidence for certain crimes, which might explain a more focused charging strategy, and (iv) budgetary considerations, which might justify focusing resources on more promising investigations. These common-sense criteria for anyone closely following the workings of international criminal justice will always appear as unacceptable in the highly morally charged context of international criminal law where the fight against impunity is seen as the consideration that trumps all others.

28.2.1.2. The 'Investigative' Nature of a Preliminary Examination

It is clear from the wording of the Rome Statute, particularly in the context of *proprio motu* enquiries, that the preliminary examination is, at the very least, a pre-investigation. This is particularly clear in Article 15, where it is indicated that the OTP *can* rely on information the Office receives, but it also has the power to "seek additional information".[12] Therefore, the preliminary examination is not limited to an assessment of the information presented to the OTP. The moment the OTP decides to initiate

[11] For a recent discussion on the "interests of justice" in Article 53 of the Rome Statute, see Maria Varaki, "Revisiting the 'Interests of Justice' Policy Paper", in *Journal of International Criminal Justice*, 2017, vol. 15, p. 455.

[12] Cf. ICC Statute, Article 15(2), see *supra* note 5.

investigations based on information that crimes within the jurisdiction of the Court might have been committed, his or her work is to start building a case from evidence whatever the stage of the proceedings. One cannot artificially distinguish what it means to build a case at the different stages of the proceedings. The standard of proof can be different depending on the stage of the proceeding, which means that the assessment made of the evidence will be different, but this does not mean that there are different ways to build a case.

Moreover, the OTP should, from the moment it undertakes to build a case, bear in mind that as officers of the Court they have the duty to examine incriminating and exonerating circumstances equally.[13]

A policy of the OTP that would portray the preliminary examination as a mere 'assessment' of information provided to them and not an investigation or pre-investigation would mean forgetting about the purpose of a preliminary examination. To be able to decide whether to ask for the opening of a formal investigation, one has to take active steps to find out what happened in a given situation. The OTP cannot simply be at the mercy of the sources that volunteer information. Therefore, the Office itself also needs to seek information, which is *de facto* an investigative step. This means, concretely, that the OTP should, from very moment it starts analysing information presented to them, have a systematic approach of the evidence to set the ground work for building a case.

From the moment the prosecution starts a preliminary examination, it is their duty to: learn about the recent history of the country concerned by the situation, analyse facts, cross-reference information, interview political leaders, academics, journalists, lawyers, civil society leaders (including church leaders), local NGOs, take victims and/or witness statements, organize field mission, and so on. These steps constitute the core of an investigation regardless of the stage of the proceedings. And these steps are the first landmarks of building a legal case. This approach is exactly what distinguishes the Prosecutor of the ICC from an NGO or any other quasi-investigative bodies, such as UN commissions of Inquiry Any evidence collected (that may eventually be presented to the Pre-Trial Chamber) by the OTP must be the result of a neutral, unprejudiced, serious (pre-)investigation. If the OTP does not act independently and does

[13] ICC Statute, Article 54(1), see *supra* note 5.

not seek information on its own, the Office will never be able to assess the seriousness of the information it receives and thus the concrete need to open an investigation.

In sum, just because the preliminary examination is not legally a 'formal investigation' does not mean that the actions undertaken during a preliminary examination are essentially different from those in a formal investigation. The term 'formal' only means that the 'case' that the OTP has built during the preliminary examination is sufficient to move to a next step, when there is a referral from a State or the Security Council, or authorization by the Pre-Trial Chamber. Moreover, whereas in the latter case the judges will give the OTP a clearer picture of the scope of his or her investigation, this procedural step does not mean that the OTP had not been investigating as such. On the contrary, if the OTP has not built a proper case during a preliminary examination, it will be quite unlikely that authorization to open a formal investigation would be granted. This does not mean that at the end of a preliminary examination the investigations are finished – far from it. The investigations of the OTP, if a formal investigation is opened, will continue and the evidence collected will have to allow the OTP to prove the case to reach a higher standard of proof (for example, the OTP will collect more testimony, forensic evidence, consult experts, and so on).

Furthermore, the analysis made during a preliminary examination will set out the framework of a future formal investigation. This means that the factual narrative arising from and the potential perpetrators identified during a preliminary examination will be the factual foundation of the case to be further built during the OTP's formal investigation. This means, in practice, that because the OTP will be building a case from the very beginning, they are going to be identifying during the preliminary examination not only contextual elements and details of possible crimes, but also information relating to possible perpetrators.

The need to see preliminary examinations in the general context of investigations is summarized aptly by Carsten Stahn:

> the connection between preliminary examination and investigation needs to be improved. The Statute seems to imply that there is a clear-cut distinction between preliminary examination and investigation, according to which preliminary examination focuses on situation-related analysis while investigations involve the framing and testing of cases. Prac-

> tice has shown that boundaries are more fluid. As part of the gravity test, the OTP has to make an assessment of hypothetical cases. There is a need to draw connections between incidents and suspects, even before the formal start of investigations. In 'hard cases', a preliminary examination may require onsite presence on the ground, and deeper engagement with the situational context. This would improve the quality of assessment and allow better hypotheses.[14]

28.2.2. The Temporal Dimension of Quality Control

There is also a temporal dimension to quality control. It is difficult to judge the quality of the preliminary examination, whatever the perspective, without considering the expected outcome of the process. Indeed, the preliminary examination phase is but the first step in a procedure that will have to go through various hurdles, such as the issuance of an arrest warrant, the confirmation of charges and the trial itself. What is expected of the preliminary examination necessarily depends on the expectations of these other phases. For example, the way the preliminary examination is conducted will likely have an impact on the nature and quality of evidence presented at later stages of the proceedings, even if the OTP does not have formal investigative powers at this stage nor do States have a duty to cooperate.

Also relevant from a temporal perspective is the extent to which the perspective of victims would be considered in presenting a complete, even if not necessarily detailed, overview of the nature, scope and diversity of the violence suffered.

28.2.3. Quality Control of the Preliminary Examination Phase: A Question of Perspective

These considerations come into play when considering the perspectives of the different participants of the criminal process.

More generally, there obviously cannot be a rigid objective definition of quality control of the preliminary examination phase, with boxes to be ticked, one that is universally applicable. Indeed, what one considers

[14] 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, p. 413.

of 'quality' is necessarily contingent on the normative preferences of the various stakeholders in the process. Different stakeholders will have different objectives, which can range from financial efficiency to the quality of investigations. Others might approach the question from the perspective of the interaction with domestic jurisdictions, through concepts of 'positive complementarity'.[15] Under this approach, the quality of the preliminary examination might be assessed through a broader lens of how the OTP might contribute to domestic capacity-building and the conduct of their own investigations and prosecutions.

More specifically, three perspectives stand out as more particularly relevant for the evaluation of the quality of a preliminary examination.

From the perspective of the prosecution, the efficiency of the investigation is also not necessarily straight forward. Indeed, when you consider what strategy should be adopted towards evidence, should the OTP aim at securing minimal evidence to justify the formal opening of an investigation, which is, in the case of referrals by States Parties and the UNSC, not subject to judicial review, and in the case of a *proprio motu* investigation, subject to a fairly minimal oversight by pre-trial judges? Should the OTP see further and already try to assess, independently whether this evidence, when it comes under scrutiny, is likely to survive judicial debate?

From the perspective of victims, the objectives will not necessarily be aligned with those of the OTP. While victims of crimes looked at by the prosecution will be more likely to support the preliminary examination, victims which are not on the OTP radar – or who have suffered crimes that the OTP will not be looking at – will have a different agenda. For all victims wishing the ICC to intervene, one dimension which will affect their perception of the preliminary examination, whether it can be deemed as successful and as a criterion of 'quality control', is whether the outcome reflects their particular understanding of the situation in terms of responsibility. This puts a special burden on the prosecution, independently of its own desire to do so, to be seen as balanced.

[15] Carsten Stahn, "Taking Complementarity Seriously: On the sense and sensibility of 'classical', 'positive' and 'negative' complementarity", in Carsten Stahn (ed.), *The International Criminal Court and Complementarity.* Cambridge University Press, Cambridge, 2011, pp. 233–282.

From the defence's perspective, the situation is different. The quality of the preliminary examination will only have one yardstick of evaluation: whether it has respected the rights of the accused.[16]

What does this mean specifically in the context of the preliminary examination? The defence will ask that the prosecution take steps from the beginning to secure evidence in a way that can be later challenged, when it comes to chain of custody or authenticity.

As another corollary of the protection of the rights of the accused at the preliminary examination phase, the prosecution must take seriously its obligation to investigate exonerating and incriminating evidence equally. This is necessary not just as a legal obligation, but a practical one as well. First, a serious enquiry during the preliminary examination will ensure that the OTP builds strong cases in the future from the start. Second, such an approach might also elicit useful information for the defence, which likely has less capacity to investigate than the Prosecutor. It has fewer means and less access to relevant information, particularly in cases where the political opponents of the potential defendant will be in power. While States do not have a formal obligation to co-operate with the OTP during the preliminary examination, the OTP can use the institutional weight of the ICC to obtain relevant information, including for the defence. This is all the more crucial because the earlier evidence is secured, the better quality it is likely to be, whether it is eye-witness testimony or forensic evidence. Of course, this preliminary investigation by the prosecution cannot and should not replace the autonomous capacity of the defence to investigate, and any discussion on the adequacy of means provided for the defence in the international context. The prosecution cannot build a case for and against the defence at the same time. Instead, it should be continuously aware that during the preliminary examination it might be in a position to have access to evidence that might be useful for the defence

[16] While this yardstick is presented from the 'perspective of the defence', it should not be confused with a 'defence perspective'. Indeed, the rights of the accused are enshrined in the Rome Statute. Referring to this criterion to assess the quality of a preliminary examination is therefore nothing other than applying the Rome Statute. Dov Jacobs, "A Tale of Four Illusions: The Rights of the Defense before International Criminal Tribunals", in Colleen Rohan and Gentian Zyberi (eds.), *Defense Perspectives on International Criminal Justice*, Cambridge University Press, Cambridge, 2017, p. 561.

and might not be available later on, and to take all necessary steps to secure this investigation.

28.3. Jurisdiction and the Potential Defendant

Under Article 53(1)(a), the first part of the OTP's evaluation is whether "the information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed".[17] While, technically, this provision refers specifically to the material (that is, subject-matter) jurisdiction of the Court and not, for example, its personal jurisdiction, this does not mean that individual involvement cannot be looked at in that context, as highlighted in the case law.[18]

As noted in the OTP Policy Paper on Preliminary Examinations, among the factors that could be looked into is the "alleged perpetrators, including the *de jure* and *de facto* role of the individual, group or institution and their link with the alleged crimes, and the mental element, to the extent discernible at this stage".[19] It should be noted, however, that given the collective and organizational nature of most international crimes, the persons prosecuted are often not the direct perpetrators of the alleged crimes. As a result, looking into alleged perpetrators does not necessarily mean identifying possible suspects for prosecution.

Such a determination of the role of individuals or groups makes sense both factually and legally. Factually, it would be somewhat artificial to distinguish between what is alleged to have happened and the authors of those acts, especially as sources used by the OTP during the preliminary examination are more than likely to provide some analysis of the authors of the alleged crimes. Legally, as a criminal court, as opposed to a human rights fact-finding commission, the ICC cannot avoid discussion of perpetratorship. An act is only technically a crime when both the *actus reus* and the *mens rea* are established. How can a finding, even of a pre-

[17] ICC Statute, Article 53(1)(a), see *supra* note 5.

[18] Morten Bergsmo, Pieter Kruger and Olympia Bekou, "Article 53", in Otto Triffterer and Kai Ambos (eds.), *Rome Statute of the International Criminal Court*: *A Commentary*, C.H. Beck, Hart, Nomos, 2016, p. 1372.

[19] OTP, *Policy Paper on Preliminary Examinations*, 1 November 2013, p. 10 (http://www.legal-tools.org/doc/acb906/).

liminary nature, of the possible commission of an international crime be made without some discussion of possible perpetrators and their intent?[20]

This section will first assess what it means to identify a potential perpetrator from a practical perspective, before looking at the current practice of the ICC.

28.3.1. Identifying a Potential Perpetrator during Preliminary Examination (from a Practical Perspective)

Building a case is not a theoretical exercise, which is why the Prosecutor will necessarily, by the time of the preliminary examination, have information at his or her disposal that relates to the alleged existence of a war or mass attack against civilians, to the alleged commission of crimes and to alleged perpetrators. This information will of course not be presented in such a systematic manner. There will not be one specific document indicating that a murder has been committed, another document that contains information that relates to a common plan of government to target civilians and a report that gives information on an alleged perpetrator. Each piece of evidence sent to the OTP will contain information of a different nature. When building a case, it is the task of the investigator assessing the evidence to try to establish the seriousness of the information to analyse the evidence, to organize it and to verify its authenticity, its credibility and supplement the information received with other sources of information. Only then, after having started building a case will the investigator be able to determine if the information available during the preliminary examination is sufficiently serious to establish that a crime within the jurisdiction of the Court may have been committed in a given situation.

One type of evidence that will be important is the testimony of victims (which can be included in NGO reports or taken directly by the OTP). This testimony will cover different facts. The victim often explains what he or she has suffered but also who attacked him or her, as well as the broader context of the attack. This means that specific testimony, even

[20] Interestingly, international criminal law has to some extent developed as a body of law where discussion of the perpetrators has somewhat taken a back seat as opposed to establishment of the commission of crimes, as can be seen from the structure of international judgments, notably at the *ad hoc* tribunals, where hundreds of pages are devoted to discussing the crimes, with minimal or no discussion of the actual intent of the direct perpetrators of the crimes, before the accused and his hypothetical *mens rea* is even considered.

anonymous, can provide both information on the alleged crime and on the alleged perpetrator. Every detail can be of importance.

In particular, the information about the potential perpetrator can be crucial because it can be cross-referenced with other available information. It is fundamental to keep in mind that when it comes to international crimes the perpetrator that the OTP might target for prosecution is usually not the alleged perpetrator of the crime reported by the witness. So the investigator of the OTP will have to find a link between the 'direct perpetrator' and the person that is responsible for him or on whose behalf the 'direct perpetrator' was acting. Therefore, all information in the victim statement can be an important lead and the information cannot be artificially logged into a specific category of information. For instance, the victim, in his/her statement, can explain in detail where the incident happened, at what time, who was present, and so on. This can be a lead to an assessment of the context of the crime but also to an investigation of the potential perpetrator. Indeed, if one cross-references just the information available in a statement where the victim describes the uniform or badge worn by the attacker, it may be possible for the investigator to have an idea of who the alleged perpetrator may be by ascertaining (1) what squad of the army wears the described uniform and (2) if members of that specific squad have been deployed at the location mentioned by the victim.

Additionally, this same victim statement found in an NGO report will also have to be cross-referenced with other evidence available: meeting with the author of the report, interviewing State officials, the military, members of civil society, other victims, and so on. If the investigator follows the leads of the anonymous victim statement and this lead is corroborated by other sources, the investigator will be in a position to identify an alleged perpetrator. This analysis also applies to any other type of information that might have been communicated to the OTP during a preliminary examination or that the OTP obtained during a preliminary examination.

As a consequence, if the OTP analyses the information during a preliminary examination and starts building a case, they will undoubtedly investigate the possible perpetrator of the alleged international crime. Not to mention that, in practice, most sources that reach out to the OTP concerning crimes that might have been committed will point in the direction

of a person or persons that they consider to be responsible of those crimes.[21] This is why it is virtually impossible, from a practical perspective, to artificially distinguish between evidence collected relating to crimes and evidence relating to the possible perpetrators of crimes.

28.3.2. Current ICC/OTP Practice

The following analysis is based on the public redacted versions of OTP requests to open an investigation. It should be noted in that respect of all requests, the OTP has provided a confidential list of possible perpetrators that could be the target of future cases at following a formal investigation. This list is submitted under Regulation 49 of the Regulations of the Court which provides that the statement of facts in support of a request to be authorized to open an investigation should include: "The persons involved, if identified, or a description of the persons or groups of persons involved".[22] What one can note is first that this reference to "persons of groups of persons involved" was not included in the Rome Statute or the Rules of Procedure and Evidence, but added by the judges when drafting the Regulations of the Court. Second, there is no formal obligation to specifically identify individuals ("if identified"), merely a general description of the involvement of persons or groups of persons. Third, this obligation does not explicitly involve providing any information on modes of liability.

Moving on to the practice of the OTP in particular situations, one can note a number of differences, depending on the request.

In the request for authorization to open an investigation in Kenya,[23] discussion of alleged perpetrators and/or potential suspects is minimal. The OTP refers on occasion to the "perpetrators",[24] and mentions the fact that "political leaders, businessmen and others had enlisted criminal ele-

21 ICC, Situation in Gabon, *Requête aux fins de renvoi d'une situation par un Etat partie auprès du Procureur de la Cour pénale internationale*, 20 September 2016 (http://www.legal-tools.org/doc/3b6e3e/).

22 ICC, Regulations of the Court, 26 May 2004, Regulation 49(2)(c) (Regulations) (http://www.legal-tools.org/doc/2988d1/).

23 ICC, Situation in the Republic of Kenya, Request for authorisation of an investigation pursuant to Article 15, 26 November 2009, ICC-01/09-3 (http://www.legal-tools.org/doc/c63dcc/).

24 *Ibid.*, para. 57–58

ments and ordinary people to carry out attacks against specifically targeted groups".[25] The section entitled "persons or groups involved" is composed of two paragraphs and refers to low level perpetrators who committed the violence on the ground, "persons in position of power" who "appear to have been involved in the organization, enticement and/or financing of violence targeting specific groups", "political leaders of all sides", as well as the security forces. One can note that while there is some discussion of the organized nature of the alleged crimes for the purposes of establishing the contextual elements of crimes against humanity, there is no direct discussion of modes of liability. Moreover, possible perpetrators or those that might end up being the target of a formal investigation are never named. One could therefore say that the OTP was very careful to remain very general in its request, in order to preserve the possibility for the formal investigation to yield more specific results.

The request for authorization to open an investigation in the situation of the Ivory Coast[26] is very different. Within three paragraphs of the request, Laurent Gbagbo is named and the violence is described as being "pursuant to a policy to retain Laurent Gbagbo in power by all means",[27] and there is no mention of possible violence on both sides in the introduction. Later on in the request, however, the Prosecutor mentions the existence of a "list of persons or groups belonging to or associated with the pro-Gbagbo and pro-Ouattara sides that appear to bear the greatest responsibility for the most serious crimes, with an indication of their specific role".[28] Under the heading of "persons or groups involved", the possibility of both sides having committed crimes is also mentioned.[29] In the subsequent discussion on the crimes, the Prosecutor states that "pro-Gbagbo forces committed widespread and systematic attacks against civilians associated with his political opponent in pursuance of a policy of the State of Côte d'Ivoire under the leadership of former President Gbagbo to launch violent attacks against political opponents or persons perceived to

25 *Ibid.*, para. 63.

26 OTP, Situation in the Republic of Côte d'Ivoire, Request for authorisation of an investigation pursuant to article 15, 23 June 2011, ICC-02/11-3 (http://www.legal-tools.org/doc/1b1939/).

27 *Ibid.*, para. 3.

28 *Ibid.*, para. 46.

29 *Ibid.*, para. 70–71.

support the political opponents in order to retain power by all means".[30] While modes of liability are not directly referred to, this is the closest indication that the OTP did explore the intent of those who had allegedly organized the violence. In the next paragraph, the Prosecutor affirms: "the information currently available to the Prosecution does not suggest that there is a reasonable basis that crimes against humanity were committed also by pro-Ouattara forces".[31] This statement is striking because, of all four requests to open an investigation, this is the only where the OTP explicitly reaches a conclusion – be it preliminary – that one side of a conflict did not commit a particular crime. This makes sense, because there is no legal necessity to do so under Article 15 in order to obtain the opening of a formal investigation. Indeed, a decision authorizing the Prosecutor to open a formal investigation will not limit the scope of the investigation in terms of crimes or alleged perpetrators, irrespective of the evidence brought forward by the Prosecutor in his original request. There is therefore no need to explain what crimes were not committed, only explain what crimes were committed in order to justify the opening of an investigation.

The request to open an investigation in Georgia,[32] similarly to the request in the Kenya situation, does not go into much detail either on the direct perpetrators of the crimes or on those that might bear the greatest responsibility for the purposes of being identified as potential defendants. There is also no discussion of modes of liability. The only individual mentioned specifically in the section on "persons or groups involved" is President Eduard Kokoity, presented as the *de facto* President of South Ossetia[33] and later on in the request the holders of various positions of importance in the South Ossetian administration or military are also named,[34] as well as "a south Ossetian sniper, Oleg Galavanov".[35] Con-

30 *Ibid.*, para. 74.

31 *Ibid.*, para. 75.

32 OTP, Situation in Georgia, Corrected Version of "Request for authorisation of an investigation pursuant to article 15", 16 October 2015, 17 November 2015, ICC-01/15-4-Corr, (http://www.legal-tools.org/doc/eca741/).

33 *Ibid.*, para. 63.

34 *Ibid.*, para. 94–95. It should be noted that these names are given not directly for the purposes of identifying possible perpetrators or potential accused, but to determine the institutional links between South Ossetian forces and Russia by showing that a number of senior figures in the South Ossetian army are also part of the Russian military.

versely, the structure of the Russian or Georgian military is not detailed, nor are specific military or civilian leaders of post holders mentioned.

In the report issued by the OTP when deciding to not open a formal investigation in the situation on registered vessels of Comoros, Greece and Cambodia, one can note that the Prosecutor provides a minimalist discussion of the alleged perpetrators, referring throughout to the "IDF", without any information on names, ranks or modes of liability.

In relation to the situation in Burundi which was opened on 25 October 2017 by a Pre-Trial Chamber,[36] while the OTP has not made available a public redacted version of its request, one can note in the decision itself that only the President of Burundi is explicitly named in the section concerning the assessment of jurisdiction.

Finally, in the request to open an investigation in Afghanistan, the Prosecutor, in a section entitled "persons or groups involved", provides some general discussion on groups that might have been implicated in the commission of the crimes, but does not indicate the role of specific individuals, other than mentioning their role as leaders of such or such group.[37]

28.3.3. Assessment of the OTP Practice

What conclusions can thus be drawn from OTP practice to date? First of all, none of the documents produced includes any direct discussion of modes of liability. One can note that the Kenya request is probably the most detailed in distinguishing the direct perpetrators of the violence and those who had organized it, financed it and incited it. Moreover, the Ivory Coast request is the only one that seems to indicate the existence of an

35 *Ibid.*, para. 184.

36 On the controversy surrounding the issuance of the decision, a mere two days prior to Burundi's withdrawal of the Rome Statute becoming effective, see Dov Jacobs, "Peek-A-Boo: ICC authorises investigation in Burundi, some thoughts on legality and cooperation", in *Spreading the Jam*, 11 November 2017.

37 OTP, Situation in the Islamic Republic of Afghanistan, Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 20 November 2017, ICC-02/17-7-Conf-Exp, paras. 53–71 (http://www.legal-tools.org/doc/db23eb/).

overall plan that could be linked with a mode of liability of indirect co-perpetratorship.[38]

One can wonder to what extent the increasingly flexible approach by judges in relation to modes of liabilities in the early stages of the proceedings and during trial affects the work of the OTP during the preliminary examination. Pre-Trial Chambers initially refused to confirm multiple modes of liability, considering that a person could not be considered to be both a direct perpetrator and an accomplice of the commission of a crime. For example, Pre-Trial Chamber II in 2011 held that: "Although the Prosecutor may generally charge in the alternative, he should be consistent throughout his Application about the actual mode(s) of liability that he intends to present to the Chamber. Moreover, the possibility for the Prosecutor to charge in the alternative does not necessarily mean that the Chamber has to respond in the same manner. In particular, the Chamber is not persuaded that it is best practice to make simultaneous findings on modes of liability presented in the alternative. A person cannot be deemed concurrently as a principal and an accessory to the same crime".[39] Starting with the *Ntaganda* confirmation of charges decision,[40] Pre-Trial Chambers started to accept that cumulative modes of liability could be confirmed. The consequence of this flexibility is that there is no incentive, from the prosecution perspective, to focus too much attention on modes of liability during the preliminary examination (this is equally true during the confirmation of charges hearing and even the trial).

To this situation must be added the pervasive use of Regulation 55 in most cases at the ICC thus far, which allows the Chamber to consider a legal re-characterization of the facts to fit another crime or mode of liability than the one charged. The result of this legal framework is that there is

38 There is some indication of such an alleged coordinated plan in the Burundi decision of 25 October 2017, but it is unclear whether the Chamber has drawn such conclusions, or whether they were initially put forward by the OTP in its request.

39 ICC, Situation in the Republic of Kenya, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, PTC II, Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, 8 March 2011, ICC-02/11-3, para. 36 (http://www.legal-tools.org/doc/6c9fb0/).

40 ICC, Situation in the Democratic Republic of Congo, *The Prosecutor v. Bosco Ntaganda*, PTC II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda, 9 June 2014, ICC-01/04-02/06-309 (http://www.legal-tools.org/doc/5686c6/).

less emphasis on the requirement for the prosecution to be specific about the modes of liability at any stage of the proceedings, which necessarily affects its work during the preliminary examination.[41] This is not merely a procedural development, it says something about how these trials and how the role of the alleged perpetrator are perceived. Indeed, to put it simply, modes of liability are often seen as a mere technical hindrance on the implementation of the principle that the perpetrators must have done something wrong. Again, given the possibility that Regulation 55 might be used up until the final stages of the proceedings, there is less need for the Prosecution to be precise in relation to modes of liability during the trial, which necessarily changes how these questions are approached during the preliminary examination.

A second takeaway from the OTP practice is that there does not seem to be a unified practice when it comes to identifying specific individuals within the request for authorization.[42] While no individual was named in the Kenya and Comoros situations, the same is not true in the Côte d'Ivoire and Georgia requests.

One can wonder if there should there be a unified practice at all? Possibly not, to the extent that the content of the request will depend on the availability of information on details of perpetrators in one situation but not another.

One risk of identifying certain possible perpetrators in the request, especially if they come from only one side of the conflict, is that it might suggest an imbalance in the approach of the OTP to the investigation, which might affect its credibility and legitimacy. The OTP could answer that this naming takes place in the context of a preliminary examination, and therefore does not provide any conclusion on the responsibility of the given individual. While technically true, this answer ignores the symbolic function of the work of the ICC and the disconnect between the legal na-

41 Ironically, one of the justifications for Regulation 55 was that it would compel the OTP to be more precise in its charging policy. In fact, the exact opposite has occurred and the use of Regulation 55 has led to less specificity in both the charging policy and the charges confirmed. On Regulation 55, see Dov Jacobs, "A Shifting Scale of Power: who is in charge of the charges at the international criminal court", in William Schabas, Yvonne McDermott and Niamh Hayes, (eds.), *The Ashgate Research Companion to International Criminal Law*, Ashgate, 2013, p. 205.

42 With the caveat that the analysis is based on publicly available documents.

ture of a procedure and the way it might be perceived from the outside. The fact that an official document issued by the OTP mentions a particular individual will necessarily give the impression that this individual is already the target of the OTP, as early as the preliminary examination. To avoid this risk, the OTP could possibly adopt a policy of generally not mentioning any names in the requests to open formal investigations, at least publicly.[43]

28.4. Admissibility and the Potential Defendant

Besides jurisdiction, another criterion to be taken into account during the preliminary examination is whether the case would be admissible under Article 17.[44] As part of this assessment, the Prosecutor is bound to verify whether domestic investigations and prosecutions exist, and, if they do, whether they are conducted in respect of certain individuals which could, at a later stage, be potential defendants before the ICC. Another aspect of the admissibility test is gravity and this might also involve the determination of potential defendants. This section will address these two aspects in turn, before providing a short critical assessment. It should be noted that the following discussion focuses exclusively on the core of this chapter, that is, whether potential perpetrators are identified during this phase of the proceedings. It does not purport to provide a general discussion of the admissibility test and how it is applied, which would be beyond the scope of this chapter.

28.4.1. Identifying alleged perpetrators when assessing complementarity.

This section will first highlight OTP official policy in that respect, before looking at how it applied in OTP requests to open an investigation and how the various Chambers have decided on the matter.

28.4.1.1. OTP Policy

In relation to complementarity, the OTP Policy Paper on Preliminary Examinations indicates that: "At the preliminary examination stage there is

[43] It should be noted here that the question here is whether potential perpetrators should be named in the request, not whether they should be the subject of the preliminary examination or even be approached in that context. As noted below, they should (Section 28.5.).

[44] ICC Statute, Article 53(1)(b), see *supra* note 5.

not yet a 'case', as understood to comprise an identified set of incidents, suspects and conduct. Therefore the consideration of admissibility (complementarity and gravity) will take into account 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".[45]

The OTP later clarifies that: "Where there are or have been national investigations or prosecutions, the Office shall examine whether such proceedings relate to potential cases being examined by the Office and in particular, whether the focus is on those most responsible for the most serious crimes committed",[46] a statement corresponding to "its stated policy of focussing on those bearing the greatest responsibility for the most serious crimes".[47]

Nevertheless, nowhere in the policy paper is there any explanation as to what is meant by "those bearing the greatest responsibility", which is problematic given the somewhat subjective moral assessment that is required for such a determination. Does one focus on the direct perpetrators, or on those possibly higher up in the command structure, which seems to be a traditionally accepted way to understand the concept of "those bearing the greatest responsibility" in international criminal law?

The Regulations of the OTP do not shed light on the issue, merely indicating that: "The joint team shall review the information and evidence collected and shall determine a provisional case hypothesis (or hypotheses) identifying the incidents to be investigated and the person or persons who appear to be the most responsible".[48]

The 2016-2018 OTP Strategic Plan issued in 2016 provides the following explanation: "Where deemed appropriate, the Office will implement a building-upwards strategy by first investigating and prosecuting a limited number of mid- and high-level perpetrators in order to ultimately have a reasonable prospect of conviction for the most responsible. Pursuing this in-depth and open-ended approach, the Office will first focus on a wide range of crimes to properly identify organisations, structures and

45 OTP, *Policy Paper on Preliminary Examinations*, para. 43, see *supra* note 19.

46 *Ibid.*, para. 49.

47 *Ibid.*, para. 45.

48 Regulations, Regulation 34, see *supra* note 22.

individuals allegedly responsible for their commission. It will then consider mid- and high level perpetrators in its investigation and prosecution strategies to build the evidentiary foundations for subsequent case(s) against those most responsible. The Office will also consider prosecuting lower level perpetrators where their conduct was particularly grave and has acquired extensive notoriety".[49]

This explanation calls for two remarks. First, it shows a desire on the part of the OTP not to provide a clear and objective definition of who is considered to be the most responsible, even if the suggestion seems to be here that "most responsible" is somehow linked to the position of the perpetrator. Second, whatever is meant by "most responsible" it is not seen as a limiting criteria on who might actually be prosecuted, given that all levels of perpetrators might be a target for the OTP.[50]

The will on the part of the OTP to keep their options open is further confirmed in the Policy Paper on Case Selection and Prioritisation issued in 2016, where it is indicated that: "The notion of the most responsible does not necessarily equate with the *de jure* hierarchical status of an individual within a structure, but will be assessed on a case-by-case basis depending on the evidence. As the investigation progresses, the extent of responsibility of any identified alleged perpetrator(s) will be assessed on the basis of, *inter alia*, the nature of the unlawful behaviour; the degree of

[49] OTP, Strategic plan 2016–2018, 6 July 2015, p. 16 (http://www.legal-tools.org/doc/7ae957/).

[50] One could also question the fact that case selection might be based on the fact that conduct has "acquired extensive notoriety". This criterion, which makes prosecution partly dependent on whether a particular situation or case has received media attention, is difficult to justify in light of the complex dynamics which make certain issues newsworthy or not. In that respect, one can note that the Appeals Chamber rejected the idea that the "social alarm" created by a crime could be a relevant factor to be taken into account as part of the gravity assessment. However, more recently, it seems to have received some revival in the Comoros PTC decision, where the Majority expressed the following view: "As a final note, the Chamber cannot overlook the discrepancy between, on the one hand, the Prosecutor's conclusion that the identified crimes were so evidently not grave enough to justify action by the Court, of which the raison d'être is to investigate and prosecute international crimes of concern to the international community, and, on the other hand, the attention and concern that these events attracted from the parties involved, also leading to several fact-finding efforts on behalf of States and the United Nations in order to shed light on the events" (*Situation on registered vessels of the union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, para. 51, see *supra* note 3).

their participation and intent; the existence of any motive involving discrimination; and any abuse of power or official capacity".[51]

28.4.1.2. OTP Practice

Does the practice of the OTP provide more clarity?

In the Kenya request, the OTP simply indicates that, "[b]ecause no national investigations or proceedings are pending against those bearing the greatest responsibility for the crimes against humanity allegedly committed, the Prosecutor submits that the cases that would arise from its investigation of the situation would be currently admissible".[52] There is, however, mention of a list of names of those bearing the greatest responsibility for the alleged crimes, established by the Waki Commission and provided in a sealed envelope to the OTP.[53]

In the Côte d'Ivoire request, the Prosecutor seems to have taken a more specific approach by providing a list of names of those it considered to bear the greatest responsibility: "the Prosecution has attached two confidential, ex-parte, annexes. Annex 1B presents a preliminary list of persons or groups belonging to or associated with the pro-Gbagbo and pro-Ouattara sides that appear to bear the greatest responsibility for the most serious crimes, with an indication of their specific role. As set out in the Office's Prosecutorial Strategy, the category of persons bearing the greatest responsibility includes those situated at the highest echelons of responsibility, including those who ordered, financed, or otherwise organized the alleged crimes".[54]

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[51] OTP, *Policy Paper on Case Selection*, 15 September 2016, para. 43 (http://www.legal-tools.org/doc/182205/). The OTP refers in a footnote to Rules 145(1)(c) and 145(2)(b) of the Rules of Procedure and Evidence as guidance. These provisions relate to sentencing and aggravating circumstances and one can wonder to what extent they should logically be taken into account in the preliminary examination phase, particularly in assessing admissibility of the case. Indeed, if aggravating factors for sentencing are taken into account during case selection, what is the point of having aggravating factors at all in the Statute or RPE? This is true both for complementarity and for gravity, PTCs having themselves had recourse to such criteria in their determination of the gravity of the situation (see for example, Kenya decision, para. 62).

[52] Situation in the Republic of Kenya, Request for authorisation of an investigation pursuant to Article 15, para. 55, see *supra* note 23.

[53] *Ibid.*, para. 15.

[54] Situation in the Republic of Côte d'Ivoire, Request for authorisation of an investigation pursuant to article 15, para. 46, see *supra* note 26.

The mention of this list is, however, preceded by the following caveat: "The Prosecution's selection of the incidents or groups of persons that are likely to shape future case(s) is preliminary in nature and is not binding for future admissibility assessments, meaning that the Prosecution's selection on the basis of these elements for the purposes of defining a potential 'case' for this particular phase may change at a later stage, depending on the development of the investigation".[55] In other words, those which might be the target of a potential prosecution might be subject to change in the course of the actual investigation.

In the remainder of the request, the Prosecutor does not specify what is meant by "those who bear the greatest responsibility", simply concluding that: "Because no national investigations or proceedings are pending in Côte d'Ivoire against those bearing the greatest responsibility for the most serious crimes falling within the jurisdiction of the Court allegedly committed in Côte d'Ivoire since 28 November 2010, the Prosecution submits that the potential cases that would arise from its investigation of the situation would be currently admissible".[56]

In the *Mavi Marmara* report, the OTP provides no direct assessment of those it considered might bear the greatest responsibility for the crimes, although in subsequent proceedings regarding its report, it explained that, albeit in the context of gravity, "the Report shows that the Prosecution expressly considered key indicators in this regard in its gravity analysis – notably, that the available information did not suggest that the Identified Crimes were systematic or resulted from a deliberate plan or policy, having regard especially to the commission of the Identified Crimes on just one of the seven vessels of the flotilla and the manner in which those crimes were committed. These factors suggested that the potential perpetrators of the Identified Crimes were among those who carried out the boarding of the Mavi Marmara, and subsequent operations aboard, but not necessarily other persons further up the chain of command".[57] Further, as "the Report shows, the Prosecution's analysis did not support the view

55 *Ibid.*, para. 45.

56 *Ibid.*, para. 53.

57 ICC, *Situation on registered vessels of the union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, Public Redacted Version of Prosecution Response to the Application for Review of its Determination under article 53(1)(b) of the Rome Statute, 30 March 2015, ICC-01/13-14-Red, para. 60 (http://www.legal-tools.org/doc/0e4e4c/).

that there was a reasonable basis to believe that "senior IDF commanders and Israeli leaders" were responsible as perpetrators or planners of the apparent war crimes".[58]

This seems to suggest a rather straightforward approach to "those who bear the greatest responsibility" as being linked to the position within the military command.

In the Georgia request, the Prosecutor annexed an *ex parte* "preliminary list of persons or groups that appear to be the most responsible for the most serious crimes, with an indication of their specific role",[59] but does not provide specific information on this list in the request itself. The discussion on complementarity focuses exclusively on the absence of progress in domestic enquiries and lack of prosecutions.

The Prosecutor also provides a similar caveat as in the Côte d'Ivoire request: "The Prosecution's identification of the incidents or groups of persons that are likely to shape future case(s) is preliminary in nature and should not be considered binding for future admissibility assessments. Should an investigation be authorised, the Prosecution should be permitted to expand or modify its investigation with respect to these or other alleged acts, incidents, groups or persons and/or adopt different legal qualifications, so long as the cases brought forward for prosecution are sufficiently linked to the authorised situation".[60]

In the Afghanistan request, the Prosecutor apparently provided an *ex parte* list of persons or groups most likely to be the object of an investigation,[61] and explains, relying on the case law of the Court, that "as for the level of specificity and detail required to make an admissibility determination, the Prosecution has borne in mind the nature of the present stage, the low evidentiary threshold which applies, and the object and purpose of the article 15 stage".[62]

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58 *Ibid.*, para. 62.

59 Situation in Georgia, Corrected Version of "Request for authorisation of an investigation pursuant to article 15", para. 276, see *supra* note 32.

60 *Ibid.*, para. 277.

61 Situation in the Islamic Republic of Afghanistan, Public redacted version of "Request for authorisation of an investigation pursuant to article 15", para. 264, see *supra* note 37.

62 *Ibid.*, para. 263.

28.4.1.3. ICC Case Law

Given the approach taken by the OTP, it remains to consider how various Chambers have decided upon the issue.

In the 2010 decision to authorize an investigation in the Kenya situation, the Pre-Trial Chamber had to resolve the question of what the admissibility of a "case" could mean at the situation phase and found that: "since it is not possible to have a concrete case involving an identified suspect for the purpose of prosecution, prior to the commencement of an investigation, the admissibility assessment at this stage actually refers to the admissibility of one or more potential cases within the context of a situation".[63]

The Pre-Trial Chamber went on to specify that: "admissibility at the situation phase should be assessed against certain criteria defining a "potential case" such as: (i) 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 (ii) 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)".[64]

This test is picked up in subsequent case law,[65] but interestingly, no Pre-Trial Chamber has explicitly included in the complementarity branch of admissibility the question of "those bearing the greatest responsibility".[66]

Another interesting point to note in the case law, is that Pre-Trial Chambers are very careful to situate this complementarity assessment in

63 ICC, Situation in the Republic of Kenya, PTC II, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19, para. 48 (http://www.legal-tools.org/doc/338a6f/).

64 *Ibid.*, para. 50.

65 ICC, Situation in the Republic of Côte d'Ivoire, PTC III, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, ICC-02/11-14, para. 191 (http://www.legal-tools.org/doc/7a6c19/). ICC, Situation in Georgia, PTC, Decision on the Prosecutor's request for authorization of an investigation, ICC-01/15-12, 27 January 2016, para. 37 (http://www.legal-tools.org/doc/a3d07e/).

66 However, this criteria reemerges in the context of the gravity assessment (see *infra*, Section 24.4.2.).

the context of the preliminary nature of the examination, with the consequence that such assessment is not definitive.

For example, the Pre-Trial Chamber in the Kenya situation found that "the Prosecutor's selection of the incidents or groups of persons that are likely to shape his future case(s) is preliminary in nature and is not binding for future admissibility assessments. This means that the Prosecutor's selection on the basis of these elements for the purposes of defining a potential "case" for this particular phase may change at a later stage, depending on the development of the investigation".[67]

Similarly, the Appeals Chamber has remarked that: "For the purpose of proceedings relating to the initiation of an investigation into a situation (articles 15 and 53 (1) of the Statute), the contours of the likely cases will often be relatively vague because the investigations of the Prosecutor are at their initial stages. The same is true for preliminary admissibility challenges under article 18 of the Statute. Often, no individual suspects will have been identified at this stage, nor will the exact conduct nor its legal classification be clear".[68]

28.4.2. Assessing Gravity

The Regulations of the OTP provide little guidance on how potential defendants are taken into account in the gravity assessment, simply stating that: "In order to assess the gravity of the crimes allegedly committed in

[67] 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, para. 50, see *supra* note 63. This approach was confirmed in the decision to open an investigation in the situation in Burundi: "The Chamber recalls that the Prosecutor's evaluation of these criteria is preliminary in nature and may change as a result of an investigation" (ICC, Situation in the Republic of Burundi, PTC I, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", 25 October 2017, ICC-01/17-X-9-US-Exp, para. 143 (http://www.legal-tools.org/doc/8f2373/)).

[68] ICC, Situation in the Republic of Kenya, *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Appeals Chamber, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", 30 August 2011, ICC-01/09-01/11-307, para. 39 (http://www.legal-tools.org/doc/ac5d46/).

the situation the Office shall consider various factors including their scale, nature, manner of commission, and impact".[69]

According to the 2013 policy paper: "The manner of commission of the crimes may be assessed in light of, *inter alia*, the means employed to execute the crime, the degree of participation and intent of the perpetrator (if discernible at this stage), the extent to which the crimes were systematic or result from a plan or organised policy or otherwise resulted from the abuse of power or official capacity, and elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination, or the use of rape and sexual violence as a means of destroying groups".[70]

This paragraph suggests that the conduct of the potential defendant could be taken into account in several ways: (1) "the degree of participation and intent of the perpetrator" and (2) "the abuse of power or official capacity". It is not entirely clear what these expressions mean, because there is no explanation of what a "degree of intent" is (presumably, there is either criminal intent, or no criminal intent) or what kind of intent would be more or less grave, nor is there a definition of what might constitute "abuse of power or official capacity". Moreover, the policy paper is very clear ("if discernible at this stage") that such determination of the conduct of the potential defendant is not a definitive prerequisite at this stage.

Also interesting to note is that the Prosecutor never puts forward as a distinct gravity criterion the fact that the person might "bear the greatest responsibility". In fact, the OTP, in the policy paper, relies on the case law of the Court to minimize this requirement: "The Appeals Chamber has dismissed the setting of an overly restrictive legal bar to the interpretation of gravity that would hamper the deterrent role of the Court. It has also observed that the role of persons or groups may vary considerably depending on the circumstances of the case and therefore should not be exclusively assessed or predetermined on excessively formulistic grounds".[71]

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69 Regulations, Regulation 29(2), see *supra* note 22.

70 OTP, *Policy Paper on Preliminary Examinations*, para. 64, see *supra* note 19.

71 *Ibid.*, para. 60.

Indeed, in 2006, the Appeals Chamber had rejected the gravity criteria that the Pre-Trial Chamber had devised of focusing only on highest ranking perpetrators on the basis that: "The predictable exclusion of many perpetrators on the grounds proposed by the Pre-Trial Chamber could severely hamper the preventive, or deterrent, role of the Court which is a cornerstone of the creation of the International Criminal Court, by announcing that any perpetrators other than those at the very top are automatically excluded from the exercise of the jurisdiction of the Court. The particular role of a person or, for that matter, an organization, may vary considerably depending on the circumstances of the case and should not be exclusively assessed or predetermined on excessively formalistic grounds".[72]

Given the minimal importance given by the Prosecutor to the conduct of the potential defendant in the gravity assessment in light of the Appeals Judgment of 2006, it is unsurprising that there is little information on this aspect in the first request filed by the Prosecutor. There is therefore no mention of potential perpetrators in the gravity assessment part of the Kenya request.

However, despite the fact that this was not a criteria relied on by the OTP in its request, the Pre-Trial Chamber considered in the decision to open an investigation that: "As for the first element ["the groups of persons involved that are likely to be the object of an investigation for the purpose of shaping the future case(s)"], the Chamber considers that it involves a generic assessment of whether such groups of persons that are likely to form the object of investigation capture those who may bear the greatest responsibility for the alleged crimes committed. Such assessment should be general in nature and compatible with the pre-investigative stage into a situation".[73]

There is some indication of what is meant by "those who may bear the greatest responsibility" later on in the decision, where the Court notes

[72] ICC, Situation in the Democratic Republic of the Congo, Appeals Chamber, Judgment on the Prosecutor's appeal against the decision of Pre-Trial Chamber I entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", 13 July 2006, ICC-01/04-169, paras. 75–76 (http://www.legal-tools.org/doc/8c20eb/).

[73] 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, para. 60, see *supra* note 63.

that: "With respect to the first element concerning the groups of persons likely to be the focus of the Prosecutor's future investigations, the supporting material refers to their high-ranking positions, and their alleged role in the violence, namely inciting, planning, financing, colluding with criminal gangs, and otherwise contributing to the organization of the violence".[74] This seems to suggest that the high-ranking position of the potential defendant is a key element in the determination made by the Chamber. This appears, on the face of it, at odds with the Appeals Chamber decision from 2006 quoted previously. The fact that the Pre-Trial Chamber was applying the test at the "situation" phase rather than at the "case" does not affect this apparent discrepancy in the case law, because the underlying rationale of the Appeals Chamber was to avoid sending out a message that lower level perpetrators would not be prosecuted before the ICC, a rationale which applies whether at the situation phase or the case phase.

Following this decision, the OTP logically adopted the criteria as his own in subsequent requests,[75] noting each time that potential defendants were high-ranking officials, persons in position of command or persons with levels of responsibility in the commission of the crimes.[76] And all decisions authorizing an investigation so far have applied this criterion consistently.

One decision that stands out in that respect is the decision requesting the Prosecutor to reconsider its decision not to open an investigation in the *Mavi Marmara* situation. As noted above, the Prosecutor had indicated, in considering that the situation did not meet the gravity threshold, that no "'senior IDF commanders and Israeli leaders' were responsible as

74 *Ibid.*, para. 198.

75 Situation in the Republic of Côte d'Ivoire, Request for authorisation of an investigation pursuant to article 15, para. 55, see *supra* note 26; Situation in the Islamic Republic of Afghanistan, Public redacted version of "Request for authorisation of an investigation pursuant to article 15", para. 336, see *supra* note 37.

76 Situation in the Republic of Côte d'Ivoire, Request for authorisation of an investigation pursuant to article 15, para. 57, see *supra* note 26; Situation in Georgia, Corrected Version of "Request for authorisation of an investigation pursuant to article 15", para. 337, see *supra* note 32; Situation in the Islamic Republic of Afghanistan, Public redacted version of "Request for authorisation of an investigation pursuant to article 15", para. 338, see *supra* note 37.

perpetrators or planners of the apparent war crimes".[77] The Pre-Trial Chamber did not find this determinative. It held instead that:

> Contrary to the Prosecutor's argument at paragraph 62 of her Response, the conclusion in the Decision Not to Investigate that there was not a reasonable basis to believe that "senior IDF commanders and Israeli leaders" were responsible as perpetrators or planners of the identified crimes does not answer the question at issue, which relates to the Prosecutor's ability to investigate and prosecute those being the most responsible for the crimes under consideration and not as such to the seniority or hierarchical position of those who may be responsible for such crimes. […] there appears to be no reason, in the present circumstances and in light of the parameters of the referral and scope of the Court's jurisdiction, to consider that an investigation into the situation referred by the Comoros could not lead to the prosecution of those persons who may bear the greatest responsibility for the identified crimes committed during the seizure of the Mavi Marmara by the IDF.[78]

This decision seems to be at odds with prior case law of the assessment of gravity at the situation phase.[79] Moreover, the assertion that the investigation would lead to the prosecution of those who bear the greatest responsibility for the identified crimes, when stripped of any qualifier (such as rank), is somewhat empty. Indeed, it is obvious that, taken in its literal sense, an OTP investigation will focus on those most responsible for the commission of a crime (as opposed to those not responsible). That is not a gravity criterion, that is common sense. As a result, the Pre-Trial Chamber in the Comoros situation, rather than just doing away with the

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77 *Situation on registered vessels of the union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, Public Redacted Version of Prosecution Response to the Application for Review of its Determination under article 53(1)(b) of the Rome Statute, para. 62, see *supra* note 57.

78 *Situation on registered vessels of the union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, paras. 23–24, see *supra* note 3.

79 Interestingly, one Judge, Cuno Tarfusser, sat both on the PTC in the Kenya situation, where the high-ranking level of potential Accused was initially adopted as a gravity criteria, and on the Comoros Bench, which rejects it.

requirement that the investigation focus on "those who may bear the greatest responsibility", kept it, but emptied it of any meaning.

28.4.3. Critical Evaluation

In light of the current practice at the ICC, one could raise doubts on the opportunity of devolving so much time and resources to a determination of admissibility at such an early stage of the proceedings, during the preliminary examination.

28.4.3.1. Is a Determination of Admissibility a Legal Requirement during a Preliminary Examination?

It is not entirely clear from the Rome Statute that such an assessment is legally required. Of course, Article 53 does explicitly mention the question of future admissibility of a case as an element to take into account in deciding whether to open an investigation. However, this should not be equated with a *legal* requirement. Indeed, as noted previously, Article 53 has a dual nature in the Rome Statute depending on the existence of a judicial control over prosecutorial discretion. Moreover, it can be noted, specifically in the context of *proprio motu* investigations, that Article 15(4) tasks the Pre-Trial Chamber explicitly to verify "that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court", not to verify admissibility.[80]

What led to this situation is probably a confusion between, on the one hand, the OTP having to take into account whether a case would be admissible as a policy consideration in deciding whether to open an investigation, which is what the Statute says in our view, and on the other hand, the idea that opening an investigation actually requires a formal determination of admissibility, which, in our view is not the case. Indeed, it is not for the OTP to decide whether a case is admissible or not, it is part of the judicial function. This conclusion that an admissibility determination is in fact not a formal legal requirement to open an investigation also finds some support in the case law of the Court.

[80] In that respect, while beyond the scope of the current contribution, one can question how the PTC interpreted the Statute in order to determine that the language of Article 17 (relating to the admissibility of a "case") could somewhat be applied in the "situation" phase because the drafters somehow decided to let the Judges decide such an important matter.

For example, in deciding that the Pre-Trial Chamber decision for the Prosecutor to reconsider its decision not to open an investigation in the Comoros situation was unappealable, the Appeals Chamber clearly said that the impugned decision, even though it used the language of admissibility, was not strictly a decision on admissibility that could be appealed under Article 82(1)(a) of the Rome Statute.[81]

A more striking example is the decision allowing the Prosecutor to open an investigation in Georgia. In that decision, the Chamber was not in a position of making a definitive finding that potential cases that were being investigated in Russia would be admissible at the ICC. However, instead of either requesting further information or declaring the potential cases inadmissible, the Chamber allowed the Prosecutor to proceed, including on those contentious cases, pushing back to the formal determination of admissibility to a later stage: "It is therefore more appropriate to allow the Prosecutor to conduct her investigation, which will naturally extend to issues of admissibility, and for the question to be authoritatively resolved at a later stage if needed".[82]

Finally, it is difficult to argue that a determination of admissibility is a legal requirement to be satisfied to open an investigation, while at the same time accepting that, during the actual investigation, the OTP is free to completely change the parameters of potential cases, or even choose entirely different cases than the ones he put forward when deciding to open an investigation, which is the current situation today, as noted previously. If the determination of the admissibility of potential cases was legally decisive in deciding to open an investigation, then, at minimum, the OTP should be bound to stick to those potential cases during the formal investigations. This would obviously be contrary to prosecutorial discretion in choosing specific cases to pursue and therefore reinforces the conclusion that admissibility during the preliminary examination is at best a policy consideration.

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81 ICC, *Situation on registered vessels of the union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia*, Appeals Chamber, Decision on the admissibility of the Prosecutor's appeal against the "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", 6 November 2015, ICC-01/13-51 (http://www.legal-tools.org/doc/a43856/).

82 Situation in Georgia, Decision on the Prosecutor's request for authorization of an investigation, para. 46, see *supra* note 65.

28.4.3.2. Does a Discussion of Admissibility Have Any Practical Merit during a Preliminary Examination?

Even if one were to consider that a judicial determination, or at the very least a judicial discussion, of admissibility was required during a preliminary examination, one can wonder if it has any value in the current situation.

Indeed, given the OTP's discretion to determine the scope of potential cases, it will always be in a position to frame its request in order to make the situation as a whole admissible by focusing on those cases that – in the event that there are or have been relevant domestic prosecutions – are not being dealt with by domestic authorities. This applies equally to the gravity assessment because the Prosecutor simply has to claim to want to focus ultimately on those persons holding positions of responsibility within a State or organization.

Ultimately, as noted above, because the Prosecutor has full discretion to choose what cases to prosecute within a given situation, it does not seem to make much sense to devote so much time discussing the admissibility of 'potential cases' in the abstract during the preliminary examination.

Avoiding discussions on the admissibility of potential cases might also contribute to reducing the length of preliminary examinations, which is a common criticism. Indeed, the length of preliminary examinations to date seems to be in part due to, on the one hand, the difficulty in obtaining relevant information about domestic proceedings for the purpose of determining the admissibility of potential cases and, on the other, to the 'positive complementarity' approach adopted by the OTP in a number of situations, notably Colombia.[83]

28.5. The Status of the 'Accused' during a Preliminary Examination

As noted in Section 28.1., it is difficult to identify the exact position of the potential defendant during a preliminary examination, when alleged perpetrators are normally not the primary focus of the OTP's enquiry. The Rome Statute is silent on this issue, notably because the preliminary ex-

[83] Annie Pues, "Towards the 'Golden Hour': A Critical Exploration of the Length of Preliminary Examinations", in *Journal of International Criminal Justice*, 2017, vol. 15, p. 440.

amination is mostly not *per se* subject to the judicial process.[84] This does not mean that interaction with potential defendants cannot be subject to some judicial framework, even in this early phase of the proceedings, particularly through the operation of Article 55 of the Rome Statute. Moreover, taking things forward, there should be some thought into addressing the particular position of the potential defendant during the preliminary examination and providing some specific legal status for him or her to be heard by the OTP.

28.5.1. The Importance of Taking into Account the Potential Defendant during the Preliminary Examination

It is our opinion that from a policy perspective, the OTP could and should try to open lines of communication with possible perpetrators identified during a preliminary examination. This is a safeguard for the quality of a preliminary examination and further down the line for the quality of a formal investigation and for the proceedings as a whole.

If the OTP is allowed to reach out, in a defined framework, to a potential perpetrator during a preliminary examination,[85] it will inevitably spur the OTP do to so. Thus the OTP will be able, from the very beginning, to concretely assess the seriousness of the information received. Indeed, once the OTP has analysed all the information received from a broad spectrum of different sources, even from a potential perpetrator, it can have a clearer picture of what might have taken place in a specific country at a specific time and then the OTP can decide on solid grounds if it wishes to open an formal investigation or not. Plus, the OTP would be beyond reproach of any bias and there would be no doubt that starting from the preliminary examination it is examining incriminating and exonerating circumstances equally. Analysing a situation taking into account only 'one side of the story' bears an inherent risk of prejudice. This is why the OTP should always balance incriminating evidence that is presented to them with exonerating information at their disposal. To be beyond any reproach and fulfil their duty as officers of the Court, the OTP has to examine equally all obtainable information from the very start. It is the duty of the OTP on a policy and legal level to ensure that the rights of a poten-

84 See *supra* Section 24.1.

85 As we are going to explore the different statuses of a person who is targeted during a preliminary investigation we will refer to this person as a *potential perpetrator*.

tial perpetrator are respected from the very beginning. In doing so the right to a fair trial is also ensured from the beginning. The OTP cannot, especially at such an early stage, ignore the presumption of innocence of potential perpetrators. To build a case in an unprejudiced manner the OTP has to explore all the leads at their disposal and the potential perpetrator is undeniably one of those leads. Finally, it would benefit the Court as a whole because making sure a potential perpetrator can fully exercise his or her rights from the beginning of the proceedings is essential in giving meaning to rights that are enshrined in the Rome Statute and is essential to make sure that the ICC adheres to its own values.

More specifically, if a person is targeted during a preliminary examination because, for example, victims or NGOs are accusing him or her of being the perpetrator of a crime, he or she should have the opportunity to put forward his or her side of the story. This is even more so during a preliminary examination, which often occurs in a context broadly covered by the media and thus the opinion of the international community is usually already decided. In such a context, it is critical that the prosecution does not assume that the allegations presented to his or her office are well-founded. It is then the duty of the OTP to examine the situation impartially and seriously. Only then can the OTP decide if it is reasonable to open a formal investigation.

Article 15(2) provides: "The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court". It is not because the Article does not expressly mention the potential defendant that he or she is not a reliable or appropriate source. Quite on the contrary, keeping a balance between opposing parties is crucial to maintain a non-biased approach to the situation at hand. In addition, not opening such lines of communication with all parties to a conflict, including possible perpetrators, might give rise to the question of whether the fact that the person that was targeted during a preliminary examination without having been heard or put in a position to defend him or herself is the reason why a formal investigation might have been opened in the first place. If the potential perpetrator that was targeted during a preliminary examination had been able to give valuable information to the OTP during a preliminary examination some or maybe all

allegations might have appeared unfounded. In addition, denying the possibility to a potential perpetrator targeted during a preliminary examination to be heard may be counterproductive as suspicion of bias may arise.

But, of course, the question is now, in what capacity should he or she have been approached? A witness? A suspect? A defendant? One could consider that once a formal investigation is opened, his legal status will become clearer and so might his rights. But is it not too late? And how does the OTP have a clearer picture of the situation at hand if they do not reach out to one of the main actors of the situation they are investigating?

28.5.2. The Applicability and Scope of Article 55 during the Preliminary Examination

One provision of the Rome Statute which can arguable apply during the preliminary examination to provide some protection to the potential defendant is Article 55 which concerns the "rights of persons during an investigation" and provides that:

> 1. In respect of an investigation under this Statute, a person:
>
> (a) Shall not be compelled to incriminate himself or herself or to confess guilt;
>
> (b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
>
> (c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and
>
> (d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

It is not entirely clear during what phase of the proceedings this provision applies. On the face of it, this provision seems to apply during "an investigation", which suggests that it would not apply during the preliminary examination. Such a reading, however, would lead to strange

results.[86] Indeed, contrary to when a Pre-Trial Chamber authorizes the opening of an investigation under Article 15, there is no formal (that is, judicially controlled) moment when an investigation is opened, which would render the temporal scope of the protection of this Article ambivalent. Persons should have the same protection, irrespective of the trigger mechanism used. Moreover, a broad interpretation would be justified by the application of Article 21(3) of the Rome Statute which provides that: "the interpretation and the application of law pursuant to this article must be consistent with internationally recognized human rights".

There is little case law on the application of this article. However, it is interesting to note that in *Gbagbo*, the defence had argued that after his arrest on the 11 April 2011, Laurent Gbagbo had been detained without proper due process (access to courts, access to his lawyers) and that the circumstances of his detention constituted cruel and unusual punishment akin to torture, because he was held in poor facilities, in isolation and little access to the outside world, despite his dire health conditions.[87]

The defence argued that Laurent Gbagbo should benefit from the protection of Article 55 from his arrest up until his surrendering to the Court in November 2011.[88] This period covered the preliminary examination which was only transformed into a formal investigation in October 2011, with the decision of the Pre-Trial Chamber to authorize a formal investigation, following a request that was submitted in June 2011. In its decision, the Pre-Trial Chamber at least implicitly accepted that this provision could apply before the opening of a formal investigation. Indeed, it rejected the defence's claim that Article 55 applied, not on the basis that it did not apply during the preliminary examination, but because the defence had not, according to the Judges, established that the alleged violations of Laurent Gbagbo's rights could be linked to the OTP.[89] This suggests that

86 Christopher K. Hall and Dov Jacobs, "Article 55", in Otto Triffterer and Kai Ambos (eds.), *Rome Statute of the International Criminal Court, A Commentary*, C.H. Beck, Hart, Nomos, 2016, p. 1397.

87 ICC, Situation in Côte d'Ivoire, *The Prosecutor v. Laurent Gbagbo*, Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129), 29 May 2012, ICC-02/11-01/11-129-Corr-tENG (http://www.legal-tools.org/doc/1a94c2/).

88 *Ibid.*

89 *Ibid.*, para. 97.

the Pre-Trial Chamber accepts that, on principle, the Article does apply during the preliminary examination.

If the provision applies, under what conditions can it be invoked? The *Gbagbo* case provides yet again some guidance in that respect. In that case, the defence had invoked a general obligation on the part of the prosecution to ensure that a person of interest for the OTP has his rights respected, for example, to enquire whether Laurent Gbagbo was detained under adequate conditions. The defence argued that Laurent Gbagbo was clearly held in custody for the purposes of being sent to the ICC and that this could be deduced easily from statements made by Ivorian officials at the time.[90] This was combined with the fact that, at the time, there was clear evidence that Laurent Gbagbo was already an identified target for the OTP.[91] The conclusion of the defence was therefore that Laurent Gbagbo fell under the protection of Article 55.

The Chamber adopted a stricter test than the one proposed by the defence and found that the protection of Article 55 only arose if it were established that the alleged human rights violations had been committed either by the OTP or by Ivorian authorities on the OTP's behest.[92]

In the case at hand, the reasoning of the Chamber was as follows: "With respect to the allegations of the Defence, the Chamber considers it decisive that the alleged violations of article 55(1) of the Statute were not perpetrated by the Prosecutor or by the Ivorian authorities on behalf of the Prosecutor or any organ of the Court. The Chamber in fact notes that Mr Gbagbo was arrested in the course of an operation carried out, as the Defence points out, by Mr Ouattara's forces. He was subsequently transferred to the north of Côte d'Ivoire and kept in detention there. Thus, the information provided shows that Mr Gbagbo was arrested and detained by

90 *Ibid*.

91 *Ibid*., para. 236. See Section 24.5. *infra.* While the evidence might have been considered as circumstantial at the time, it is interesting to note that recent information seems to suggest more clearly that Laurent Gbagbo was indeed held by Ivorian authorities at the request of the Prosecutor of the ICC from the moment of his arrest (see Fanny Pigeaud, "Procès Gbagbo: les preuves d'un montage", in *Mediapart*, 5 October 2017).

92 ICC, Situation in Côte d'Ivoire, *The Prosecutor v. Laurent Gbagbo*, PTC I, Decision on the "Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129)", 15 August 2012, ICC-02/11-01/11-212, para. 9 (http://www.legal-tools.org/doc/0d14c3/).

the Ivorian authorities and subsequently charged with economic crimes in circumstances seemingly unconnected to the proceedings before the Court. Article 55(1) of the Statute is thus not applicable".[93]

The reasoning of the Chamber can be challenged on a number of levels. First, the emphasis of the Chamber on the way Laurent Gbagbo was arrested is misplaced given that his subsequent custody was, as noted previously, arguably entirely aimed at ultimately sending him to the ICC. There is no logical reason why the protection of Article 55 should depend on such a contingent factor as whether the Prosecutor has to officially ask for a person to be put in custody (which might trigger the protection of Article 55) or whether the person just happens to be in custody already (which would not trigger the protection of Article 55). Second, the fact that Laurent Gbagbo was being prosecuted domestically for economic crimes is not persuasive. Indeed, not only is that not incompatible with the fact that the person can also be the object of an investigation from the OTP, but in the Ivory Coast case, the Ivorian authorities explicitly excluded grave crimes to avoid any admissibility problems at the ICC.[94] It is thus somewhat ironic that the judges took into account the fact that Laurent Gbagbo was charged with economic crimes "in circumstances seemingly unconnected to the proceedings before the Court", when these charges were designed specifically with the proceedings before the Court in mind. Third, it seems rather restrictive to require that the Prosecutor directly commit or order others to violate a person's human rights. As noted elsewhere: "It is less than likely that the Prosecutor will directly order a person to be tortured. More likely, the person will be subject to mistreatment by national authorities without any formal link with the Prosecutor being established. In light of this, it would be more in conformity with the broad protection enshrined in article 55 for the Court to consider that once a person is under investigation, they fall under the protection of the ICC and that the Prosecutor has a duty to ensure that the

93 *Ibid.*, para. 97.

94 Situation in Côte d'Ivoire, Corrigendum of the challenge to the jurisdiction of the International Criminal Court on the basis of articles 12(3), 19(2), 21(3), 55 and 59 of the Rome Statute filed by the Defence for President Gbagbo (ICC-02/11-01/11-129), para. 245, see *supra* note 87.

rights of that person, especially if they are being detained, are respected by the local authorities".[95]

28.5.3. A New Formal Status for Potential Defendants?

On the one hand, opening lines of communication with a potential perpetrator could benefit the quality of the preliminary examination as it allows the OTP to conduct an unprejudiced preliminary examination. On the other hand, if one of the targeted perpetrators of a preliminary examination is interviewed, this might constitute a risk for him or her in the future. For example, what he or she might say could be used against him or her later in a formal investigation. The OTP may also argue that if one of their staff wants to meet with a potential perpetrator it might constitute a risk for them. And this might be true in some circumstances, because a person interviewed by the OTP during a preliminary examination can thereafter allege that he or she was coerced, that his or her rights might not have been respected, and so on. Safeguards for the OTP and the potential perpetrator are a necessity. This is why the status and thus the rights of these targeted perpetrators, which until now have been invisible, should be clarified. For example, if approached by the OTP, they should be informed in detail of the risks of meeting with the OTP, the risk of testifying and certainly the possibility to be assisted by counsel, just to mention some obvious rights.

Therefore, it is fundamental that if the lines of communication between the OTP and the potential perpetrator where to be opened more than they are today, this should occur in a defined legal framework. The person should have a specific status and the Rome Statute should guarantee his or her rights. Some will argue that the person may not be a suspect yet. But this really depends on the situation; from one preliminary examination to another it can be clear if a person is already targeted by the OTP. But assuming that we are in the situation in which a person is clearly under suspicion during a preliminary examination, we consider that it should be formally announced to that person. As a suspect, he or she should benefit from all the rights provided by Article 55 of the Rome Statute, waiting for a formal investigation is too late and is simply ignoring the power of the OTP during a preliminary examination.

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[95] Christopher K. Hall and Dov Jacobs, 2016, para. 4, see *supra* note 86.

The rights provided by Article 55 of the Rome Statute can be considered roughly to be an equivalent of the '*Miranda* rights'[96] in the United States. There, if a person is in police custody or is being interrogated by the police, he or she is considered a suspect and as a suspect he or she has to receive the *Miranda* warnings. The same situation should apply at the ICC.

Meeting with a suspect that is targeted during a preliminary examination must be feasible thus there must be a legal framework that allows the OTP to meet with that person. And we should emphasize that a preliminary examination by the OTP covers, by definition, potential grave crimes. In these circumstances it is even more crucial to protect the target of a preliminary examination if he or she would to be interviewed by the OTP. He or she cannot be simply treated as a 'person of interest' (who has no specific rights) or even a witness. There must be a balance between the benefits for the OTP to interview a target of their preliminary examination and the rights of that person.

The status of '*témoin assisté*'[97] (assisted witness) in France is an interesting example in helping to determine what the status of a person targeted during a preliminary examination might be. The *témoin assisté* is a person that is under investigation by an investigative judge[98] but that has not been indicted yet. This person is considered a *témoin assisté* because he or she has been specifically named either by a victim or in a criminal complaint.[99] The *témoin assisté* has more rights than a simple witness but

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96 United States Supreme Court, *Miranda v. Arizona*, Judgment, 13 June 1966, 384 U.S. 436:
You have the right to remain silent;
Anything you say can be used against you in a court of law;
You have the right to consult with a lawyer and have that lawyer present during the interrogation;
If you cannot afford a lawyer, one will be appointed to represent you;
You can invoke your right to be silent before or during an interrogation, and if you do so, the interrogation must stop.
You can invoke your right to have an attorney present, and until your attorney is present, the interrogation must stop.

97 Code de Procédure Pénale, 2 March 1959, Article 113–1 ff (French Criminal Procedure Code) (http://www.legal-tools.org/doc/388101/).

98 The investigative Judge in France (Juge d'instruction) is in charge of investigation only concerning crimes (not for felonies) (French Criminal Procedure Code, Article 79, see *supra* note 97) and he has to investigate incriminating and exonerating circumstances equally.

99 French Criminal Procedure Code, Article 113–2, see *supra* note 97.

less than a person that has been indicted. For example, the *témoin assisté* has to be heard in the presence of his or her lawyer, the *témoin assisté* has the right to be confronted to the person that accuses him or her and the *témoin assisté* can see part of the evidence collected by the investigating judge. But the *témoin assisté* cannot request that investigative steps be undertaken. The *témoin assisté* does, however, have the ability to request to be indicted because then he would benefit from all the rights guaranteed to the defence (and not just some of them).[100] This is an interesting example, because during a preliminary examination it is unavoidable that victims or NGOs will expressly name some people as being perpetrators. Sometimes, it is also possible that a situation will be referred to by a State Party that will identify by name who they think are responsible.[101] Sometimes, it also possible that the Prosecutor him or herself makes it clear whom he or she is targeting during the preliminary examination (as in the Ivory Coast situation).[102] In those circumstances, if the Prosecutor, like the French investigative judge, would like to reach out to the potential perpetrator, he should be able to so in a determined legal framework that would guarantee the rights of the 'suspect' or the '*témoin assisté*'.

Acknowledging the existence of these potential perpetrators of a preliminary examination and his or her rights is also fundamental because sometimes the time lapse between a preliminary examination and a formal investigation can be short. Until now, in most cases, the time lapse between the two is quite long, but this is not always the case. In the *Gbagbo* case, for example, it went very quickly: three months. This short time-lapse is not surprising as the OTP was already making statements targeting Laurent Gbagbo just before its request to the Pre-Trial Chamber for leave to open a formal investigation. In the case, Laurent Gbagbo could already be considered a defendant more than a suspect or '*témoin assisté*'. In such a situation, it would have been beneficial to Laurent Gbagbo to be officially informed (not by the press) that he was a target of the OTP's preliminary examination. And if Laurent Gbagbo's status during the preliminary examination was recognized in some way, he and his lawyers could have chosen to act in a determined legal framework. Instead, he was

100 French Criminal Procedure Code, Article 113-6, see *supra* note 97.

101 See for example, Situation in Gabon, *Requête aux fins de renvoi d'une situation par un Etat partie auprès du Procureur de la Cour pénale internationale*, see *supra* note 21.

102 *Infra*, Section 24.5.4.

identified as a target by the Prosecutor but invisible in the procedure. For example, what happened to the information and evidence his lawyers send to the OTP within the context of the preliminary examination? And maybe because there was no legal framework the Prosecutor never reached out to the Government of Laurent Gbagbo during the preliminary examination in the Ivory Coast situation. In this particular case, opening lines of communication between the Laurent Gbagbo and the OTP might have been beneficial to the OTP on two different levels: first, the OTP could have interceded with the Ivorian authorities concerning the detention of Laurent Gbagbo in Côte d'Ivoire, and second, the OTP could have obtained, from the very start, information about the rebels that had been active in Ivory Coast for over a decade and committed crimes in Abidjan and the rest of Ivory Coast during the post-electoral crisis.

The quality of the case that has been built during the preliminary examination cannot be stressed enough and the *Gbagbo* case is a clear example of the importance of a real investigation starting from the preliminary examination. Indeed, in the *Gbagbo* case, until now, only one of the two sides to the conflict has been prosecuted as such. What about the other side? The OTP has declared that they will investigate both sides.[103] Until now this has not been the case. During the preliminary examination the OTP exclusively focused on a few specific perpetrators and only on one side. This has impacted the whole proceedings. If, during the preliminary examination the OTP would have opened lines of communications with one of the persons they were targeting, they might have obtained more information about the situation and get a clearer picture of what had happened. Ignoring the potential perpetrator during a preliminary examination is a policy that is not sustainable anymore, especially as it is a reality that the OTP does target specific individuals as of a preliminary examination.

[103] ICC, *Prosecutor v. Gbagbo and Blé Goudé*, Transcripts of 28 January 2016, ICC-02/11-01/15-T-9-ENG, p. 42, lines 12–18: "Our investigations in the country are ongoing, but they do take time. And I encourage the people of Côte d'Ivoire to be patient, and I urge the national authorities to continue to cooperate with my office in its activities. My office will seek to ensure justice and accountability on all sides. This should be clear, my office is investigating both sides of the conflict. And this is what the office's legal mandate requires, this is what the victims deserve, and that is what the Prosecution is committed to and is working to achieve." (http://www.legal-tools.org/doc/73746b/).

28.5.4. Illustrating Differences in Approach: The Côte d'Ivoire and Gabon Situations

28.5.4.1. The Côte d'Ivoire Situation: Targeting an Individual with No Communication

In the *Gbagbo* case, it was clear that from the start that the OTP targeted Laurent Gbagbo and members of his government. As early as the preliminary examination, Laurent Gbagbo was presented by the Prosecutor of the ICC as a defendant more than a suspect or a potential target. As a matter of fact, it is our position that for a preliminary examination to be unprejudiced it is unavoidable, even indispensable, that from the moment that the OTP starts examining a situation they will examine who the potential perpetrator of the alleged crimes may be. As we already explained previously, it is hard to build a case or even assess the seriousness of situation where crimes have been committed without mentioning by whom they might have been committed.

During the Ivory Coast preliminary examination, ICC documents and press releases show that the OTP focused from the very beginning on a specific side and that the OTP had already targeted specific individuals during the preliminary examination. For example, in a press release from the OTP dated 21 December 2010, the Prosecutor Luis Moreno-Ocampo made the following statement on the situation in Côte d'Ivoire: "First, let me be clear: I have not yet opened an investigation. But, if serious crimes under my jurisdiction are committed, I will do so. For instance, if as a consequence of Mr. Charles Blé Goudé's speeches, there is massive violence, he could be prosecuted. Secondly, if UN peacekeepers or UN forces are attacked, this could be prosecuted as a different crime. I think African states play a critical role in this, to find a solution to the problem. But if no solution can be found and crimes are committed, African states could be willing to refer the case to my Office and also provide forces to arrest those individuals who commit the crimes in Côte d'Ivoire. Therefore, violence is not an option. Those leaders who are planning violence will end up in the Hague".[104]

The Prosecutor's press release in December 2010 explicitly pointing towards Charles Blé Goudé as a potential perpetrator occurred not

[104] ICC, *Statement by ICC Prosecutor Luis Moreno-Ocampo on the situation in Côte d'Ivoire*, 21 December 2010, ICC-OTP-20101221-PR617 (http://www.legal-tools.org/doc/3ffcf8/).

only at a very early stage of the proceedings but at the very beginning of the crisis in Ivory Coast, when there were no elements at the Prosecutor's disposal to determine what was actually going on in Ivory Coast.

After this press release it became clearer that the main target of the preliminary investigation of the OTP was Laurent Gbagbo. For example, during an interview with France 24 as early as January 2011, the Prosecutor warned the Gbagbo camp explicitly and exclusively of the risks of prosecution by the Court.[105] On 7 April 2011 – even before the capture of Laurent Gbagbo by the rebel forces – the Chief of the Situation Analysis Section of the OTP stated that Laurent Gbagbo "may be granted amnesty at the national level, in which case he will not be prosecuted in the national courts, but that will not shield him from prosecution at the international level".[106] This statement is also very clear: the OTP has already taken a stand: Laurent Gbagbo will be the main target of the OTP's preliminary investigation. One must keep in mind that at the moment this statement was made the war in Ivory Coast was not over,[107] so no one in Ivory Coast was in a position to decide if amnesty would be granted to Laurent Gbagbo. This premature statement made by the OTP shows that they had already pointed to Laurent Gbagbo and treated him as the main suspect of the post-electoral violence. Still in April 2011, during an interview in a Kenyan television documentary on Laurent Gbagbo's prosecution by the ICC, the Prosecutor responded to the question of whether Laurent Gbagbo would be prosecuted one day by saying that he would come to a "bad ending".[108] There is no doubt that the OTP clearly focused its examination on Laurent Gbagbo, even prior to its 23 June 2011 request to the Pre-Trial Chamber for leave to open a formal investigation into the situation in Côte d'Ivoire.[109]

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105 *France 24* video, "Le Procureur met en garde le camp Gbagbo", 27 January 2011.

106 *Afrik.com*, "Côte d'Ivoire: 'pas d'amnistie qui tienne pour Gbagbo', selon la CPI", 7 April 2011.

107 The legal qualification of the situation is still being discussed in the case *The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé* but both the Prosecution and the Defense seem to agree on the fact that at least from the end of the crisis there is, at least, a non-international armed conflict in Ivory Coast. For this reason, we use the term 'war' here.

108 *K24TV* video, "3 sides of a coin", 17 April 2011 (available on YouTube).

109 Situation in the Republic of Côte d'Ivoire, Request for authorisation of an investigation pursuant to article 15, see *supra* note 26.

But based on what evidence did the OTP so openly target Laurent Gbagbo? It is certain that the circumspection inherent in the position of Prosecutor and respect for the presumption of innocence to which he is bound by the Court's Statute imply that he could not have reached such a conclusion without being privy to concrete facts to support his statements, and thus that he was in possession of evidence on which to base such an assertion. This means that during a preliminary examination a case was already being built and if a case was being built a potential perpetrator is identified.

28.5.4.2. The Gabon Situation: An Indication of Future Policy of the OTP towards a Potential Perpetrator?

In the Gabon situation it is even clearer that the OTP will be confronted during the preliminary examination with information provided by very different sources alleging that crimes within the jurisdiction of the Court might have been committed both by the State itself and by the political opposition; but more interestingly for us the OTP will be confronted with information that will clearly identify alleged perpetrators.

To understand how the Gabon situation can be a turning point concerning the place of a potential perpetrator targeted during a preliminary examination we have to briefly present the legal situation. On 21 September 2016, the OTP received a referral regarding the situation in Gabon since May 2016 with no end-date. The referral made by Gabon identifies as potential perpetrator Jean Ping. In their assessment of the evidence they sent to the OTP, Jean Ping would have committed the crime of incitement to commit genocide and the crime of persecution namely by setting fire to official buildings.[110] Three months later, on 15 December 2016, Jean Ping, leader of the Gabonese democratic movement, Gabonese civil society officials and victims of the repression led by the Gabonese authorities against the country's population together filed, through their Counsel Emmanuel Altit, a communication with the OTP.[111] The communication was the result of three months of investigations conducted in Gabon and abroad and had as goal to demonstrate the existence of crimes against

[110] Situation in Gabon, *Requête aux fins de renvoi d'une situation par un Etat partie auprès du Procureur de la Cour pénale internationale*, see *supra* note 21.

[111] "Crimes against humanity committed in Gabon by Security Forces/Communication filed at the International Criminal Court", in *Jean Ping* (personal web site), 15 December 2016.

humanity committed by the Gabonese authorities. According to the communication, the Gabonese security forces implemented, in particular on 31 August 2016 in Libreville, a planned attack against the population to enable the loser of the presidential election, Ali Bongo, to remain in power and prevent any democratic expression of the population.

Therefore, in the Gabon situation the OTP had to examine on the one hand a referral that identifies, by name, Jean Ping as a potential perpetrator and on the other hand a communication that identifies as potential perpetrators members of the Gabonese security forces.

During this preliminary examination the OTP could choose to open lines of communication with both the author of the referral and the author of the communication. In that scenario, the OTP could not be perceived as biased. But to be able to do so, the OTP would probably feel more comfortable to act within a legal framework. However, it can also act in good faith and with common sense and decide to meet with both parties while respecting the right established in Article 55. This is in light of the most important right both potential perpetrators benefit from: the presumption of innocence.

In the Gabon situation, the OTP went to Gabon between 20 and 22 June 2017 as part of its preliminary examination. During this mission they met with opposing parties. The OTP's new approach is very encouraging. In doing so the OTP can hope to obtain maximum co-operation during its pre-investigation while still maintaining a sense of balance between opposing parties to a conflict. But of course this has to be premised on an independent investigation, where the members of the OTP also act on their own or seek additional information from both parties. It cannot only be a public relations operation; it has to be followed by facts.

The Gabon situation is the perfect opportunity to put in place, during the preliminary examination, the examination of incriminating and exonerating circumstances equally but also to examine thoroughly the seriousness of the information received by the both parties in addition to information provided by victims, representatives of the civil society, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources. For example, the European Union Election observation mission on Gabon published a report on 12 December 2016 stating that anomalies in the electoral process call into question

the integrity of the process of consolidating the results and the final result of the election.[112] It would make sense that the OTP also reach out the European Union Election observation mission on Gabon to obtain more information.

If a first effort is to be acknowledged it is not clear if the lines of communication timidly opened by the OTP will be pursued in the future. To be on the safe side, it would be best to create a framework that allows these lines of communication to be opened without any risk and also allows the OTP to be transparent about their pre-investigation as early as the preliminary examination.

28.6. Conclusion

On a concluding note, it would be mistaken to view this chapter as being merely a 'defence perspective' to be lumped in a one out of many factors to be shaken and stirred into the cocktail of quality control. Ignoring potential defendants, and more generally the 'other side', is not just detrimental to the rights of the accused, it is illustrative of a state of mind that undermines the quality of preliminary examinations at their core: that of a *de facto* investigation.

As highlighted throughout, making sure that no one, including potential defendants, is invisible during a preliminary examination and the subsequent investigations is a beneficial policy for everyone, not just for the potential defendant. Indeed, opening lines of communications with all parties to a conflict ensures the neutrality and impartiality of the OTP because they will be perceived as following the evidence, which is the foundation of any good case, rather than starting with a particular perpetrator in mind. It will also ensure the quality of the preliminary examination because the OTP will have access to all aspects of a situation and be in a better position to assess the evidence at its disposal.

Ultimately, this will enhance the quality of the investigation and facilitate the work of the judges in assessing the evidence and the fairness of subsequent proceedings.

The Prosecutor of the ICC is arguably the most visible figure of the Court and is often perceived as the voice of victims around the world and

[112] Cf. Rapport Final de la Mission d'observatoire électoral de l'Union Européenne en République Gabonaise, p. 4 (http://www.legal-tools.org/doc/1eb7f9/).

the beacon providing hope for justice for mass atrocities. This is of course an unreasonable and misguided weight to put on one organ of a complex institution. However, what is true is that, given its essential role in launching investigations, the OTP does have the key to making sure that all proceedings in a particular situation or subsequent case are fair and efficient, which contributes to the overall legitimacy of the system, and it all starts with the quality of the preliminary examination. Indeed, preliminary examinations conducted by the OTP are the first step towards ensuring the ICC is filling its expected role towards the international community as a whole, and it is fundamental that this first step is taken in the right direction.

Publication Series No. 33 (2018):

Quality Control in Preliminary Examination: Volume 2

Morten Bergsmo and Carsten Stahn (editors)

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ISBNs: 978-82-8348-111-2 (print) and 978-82-8348-112-9 (e-book).