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Quality Control in Preliminary Examination: Volume 2

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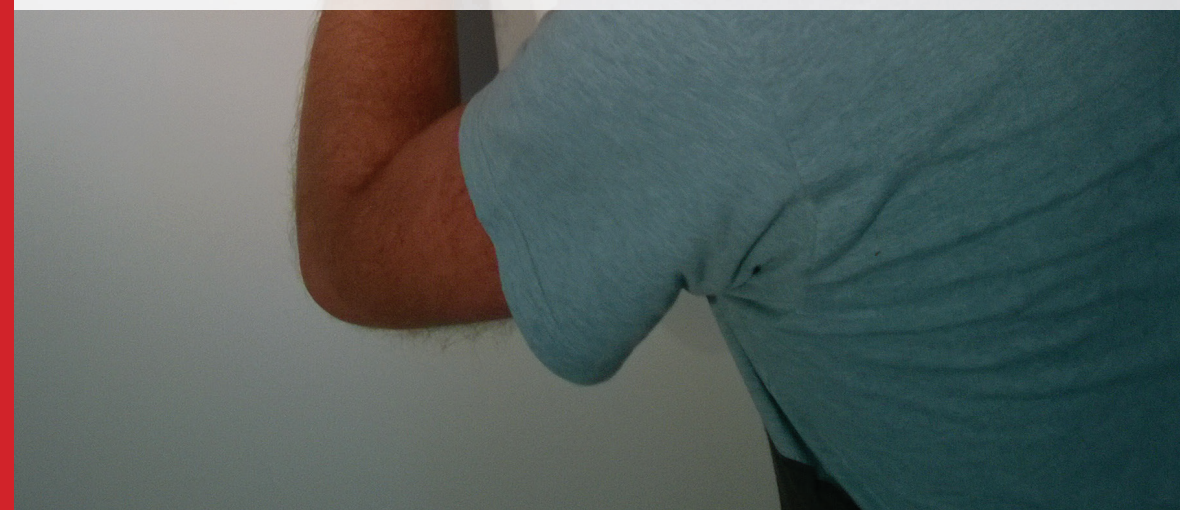

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Front cover: *Alberto Gandolfi inspects his fresco of Hugo Grotius in Florence. Trained for years in fresco painting and restoration, including at the Accademia di Belle Arti di Firenze, he employs the fresco techniques used since the 1400s in Florence, 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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Quality Control in the Preliminary Examination of Civil Society Submissions

Andreas Schüller and Chantal Meloni*

Pre-investigations within criminal justice systems have recently garnered much attention with regard to core international crimes. Careful scrutiny is warranted as this is one of the most sensitive stages of such proceedings, often characterized by a complex mixture of factors such as: broad prosecutorial discretion, limited public communication, delays, high public expectations, and political pressure.

Civil society organizations ('CSOs') involved in such proceedings as triggers of (pre-)investigations into egregious crimes and mass human rights violations have a unique vantage point in these proceedings. Those CSOs, which are usually in close contact with victims of such violations, are particularly well-placed to observe the pre-investigation stage of criminal proceedings, including experiencing how deficiencies in preliminary examinations can be fatal to the prosecutorial process.

This chapter aims to provide some observations and critical remarks drawn from the practical experience of the authors in their work as part of a CSO as well as from an academic standpoint, both (1) at the domestic level, specifically in Germany, and (2) at the International Criminal Court ('ICC').

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29.1. Quality Control at the Preliminary Examination Stage: The Role of Civil Society Submissions and Practice at the Domestic Level in Germany

In seeking criminal justice for core international crimes, the domestic level plays the most important role. According to the complementarity principle of the Rome Statute, it is primarily the responsibility of States to investigate and prosecute core international crimes. In addition, a number of human rights and international humanitarian law treaties include obligations for States to investigate and prosecute, for example, grave breaches of the Geneva Conventions or human rights crimes such as torture or enforced disappearance.

While the jurisdiction of the ICC depends on ratifications or declarations by States as well as referrals by States and the United Nations Security Council ('UNSC'), domestic courts can usually exercise jurisdiction if core international crimes have been committed on the State's territory, by a State's national, against a State's national or under the principle of universal jurisdiction. Universal jurisdiction means that a State can assume jurisdiction because the nature of the crime means it is of concern for the international community as a whole; there is no need for a link to the territory or a national of that State.[1]

The scope of the jurisdiction will depend on the particular State's legislation, which will, in the best case, be in full accordance with all international obligations. Especially with regard to universal jurisdiction, many States have limits to this form of jurisdiction such as the requirement that a suspect of a core international crime is present on the State's territory, not allowing for investigations against suspects resident outside the country, if no national of that State is involved.

For civil society, the jurisdictional requirements and the limitations that often apply are of utmost importance, especially for those expert groups that work transnationally in different jurisdictions as well as for CSOs that are seeking access to justice globally for a group of victims. Differences in jurisdictions often entail differences in litigation strategies. This is one of the most important factors when it comes to case strategies,

[1] TRIAL International with ECCHR, FIBGAR, FIDH and REDRESS, *Make way for Justice #4: Momentum Towards Accountability*, 2018, p. 101 (http://www.legal-tools.org/doc/b01bcf/).

in addition to political circumstances and access to witnesses and further evidence.

Besides the jurisdictional aspect, the criminal procedure of each State varies. Therefore, although the authors have experience with regard to jurisdictions and preliminary examinations in a number of European States and beyond, the following part focuses on the practice of preliminary examinations and the role of civil society in Germany (Section 29.1.2.). Turning to Germany, it is crucial to understand the general role of civil society in developing strategic criminal complaints before examining quality control of preliminary examinations of civil society submissions (Section 29.1.1.).

29.1.1. The Role of Civil Society in Developing Criminal Complaints: From Fact-finding to Submissions Triggering Preliminary Examinations

To understand the role of civil society submissions in preliminary examinations, both at the domestic and international level, it is important to analyse the processes leading up to the filing of a submission and the commencement of a preliminary examination.

Where large-scale human rights violations occur or in conflict situations, civil society plays a crucial role not only in documenting these violations, but also in developing ways to sanction them. Hence, victims, activists, lawyers, local CSOs and others often connect with international expert CSOs and jointly discuss strategies about how to achieve criminal justice.

The earlier local and international groups engage in the process, the better. A discussion process about strategies over months or years often leads to knowledge building and sharing on all sides whereby international experts learn about the specific conflict, culture and country while local groups learn about international law, jurisdiction and legal practice. Already at this stage, the usually intense discussions focus on selecting the best sets of cases for criminal complaints in a domestic transitional justice mechanism, third State or international jurisdictions. An early case selection strategy also impacts the way incidents are documented. In many conflicts, local groups focus on crime-based evidence, such as information about a specific aerial attack or a massacre, but no information is gathered about the perpetrators, units or the command system behind the crimes. Evidence on the latter is crucial for prosecutions, but it is in most

instances the most difficult information to gather. With early focussed strategic discussions, the way can be paved for seeking information on perpetrator structures in combination with crime-based evidence for the coming years.[2]

In discussing case selection and litigation strategies, there are many factors to be considered. For instance, it is significant whether the focus lies on the gravest and most outrageous incidents or rather on the best-documented ones. The latter might have higher chances in terms of prosecutions, but the former might have a bigger impact in terms of justice for victims, enforcement of legal standards, or deterrence. Another option is to focus on groups of perpetrators and the policies behind the commission of the crimes and to seek information about incidents matching these policies. Within this case selection process, jurisdictional requirements play a significant role, as many States require a specific citizenship of a victim or perpetrator or the presence of the suspects in that State's territory. This means that considerations in case selection may include potential travel movements of suspects as well as the nationality of victims or perpetrators.

Thus, there is often a long and intense phase before filing a submission and entering preliminary examinations in order to present the best cases of interest to affected communities and societies with realistic chances of leading to full criminal investigations. This process also requires the best possible documentation of incidents as well as the attribution to specific groups of perpetrators. Case selection based on the demands of local groups and victims often has more value in terms of the impact of prosecutions than prosecutor-driven case selection within preliminary examinations, in which more technical, evidence-based considerations tend to prevail over interests of victims. Civil society submissions in preliminary examinations can thus contribute to a stronger case selection with improved long-term impact as compared with what tends to be a short-term, merely prosecution-focused, case selection.

Taking, for example, the cases of international crimes committed in Syria and parts of Iraq since 2011, factors for strategic discussions for a

[2] See, especially taking a (self-)critical view on power dynamics between international NGOs and local communities, our ECCHR-colleagues' article, Wolfgang Kaleck and Carolijn Terwindt, "Non-Governmental Organisation Fact-Work: Not Only a Technical Problem", in Morten Bergsmo (ed.), *Quality Control in Fact-Finding*, Torkel Opsahl Academic EPublisher, Florence, 2013, pp. 403–26 (http://www.toaep.org/ps-pdf/19-bergsmo).

criminal complaint in Germany – in which the authors' organization is involved – included choosing sets of cases from crimes committed in the context of detention, chemical attacks, attacks on city centres, sexualized violence, and genocidal attacks against minorities such as the Yazidis. In addition, jurisdictional requirements played a crucial role in case selection discussions. Whereas Germany has 'pure' universal jurisdiction and thus can investigate international crimes regardless of whether or not there is a link to Germany, other States require the presence of a suspect on its territory or for the victim to be one of its citizen. As such, case selection in the context of Syria often also depends on the nationality of a victim or information about the whereabouts of suspects. These factors certainly limit the case selection options and make it much more dependent on the chance occurrence of such links as compared with the more comprehensive investigations available from jurisdictions like Germany. Here it is more feasible to further discuss in which cases suspects at the top of a chain of command are known, can be named by 'linkage witnesses' (witnesses with insider knowledge), and thus become targets for arrest warrants. At this point, civil society can assist in finding linkage witnesses through networks of local activists or refugee communities, but at the same time they can also arrange for a lawyer to advise key witnesses who do not want to talk for security or political reasons.

In addition, the communication strategy around the presentation of a submission is crucial. There are situations in which there is no public communication to avoid risking the loss of evidence if suspects are publically informed that they might soon be under criminal investigation. On the other hand, many cases depend on a strong communication strategy in which messages by victims, local activists, lawyers and expert CSOs reach different audiences to build support. This aims at garnering public support for the cases, reaching out to other potential witnesses and victims and helping war crimes units within prosecution authorities to internally secure the allocation of further resources given the public attention and importance of the cases, but also at building public pressure on prosecutors to act on the cases and begin investigations.

Finally, by submitting a case and making it public, CSOs involved in such proceedings as triggers of (pre-)investigations often experience both foreseen and unforeseen developments. With a filing of a criminal complaint and public communication around it, if it is done in a professional way, groups gain a lot of trust within communities as they are pub-

lically standing up for the victims and affected communities and supporting their quest for justice. This often leads to more victims and witnesses approaching the groups for advice and potentially joining the complaint and related activities.

Thus, when CSOs present submissions within already existing preliminary examinations or in order to initiate them, there is often a longer process with numerous strategic discussions in order to present cases with the biggest impact for the affected communities and on the groups of perpetrators involved. This differentiates civil society submissions from preliminary examinations initiated by a prosecution service. The latter often focus on a rather technical case selection for prosecutions or are merely opportunistic – even though still necessary in terms of fighting impunity – for example, when low-level suspects reside on a State's territory.

29.1.2. Preliminary Examinations in Germany and the Role of Civil Society Submissions

Once a criminal complaint has been filed, the next phase starts, often with an initial period of preliminary examinations. In Germany, examinations and investigations can be differentiated in three types: (1) monitoring procedure (without investigatory powers); (2) structural investigation (with full investigatory powers); (3) formal investigation of a specific case against known or unknown suspects.[3]

Only the first type is comparable to preliminary examinations under the Rome Statute. Unlike the Office of the Prosecutor ('OTP') of the ICC with its Policy Paper on Preliminary Examinations, giving this phase a certain structure in terms of content as well as decision-making, the monitoring procedure in Germany has neither transparent policies nor structure.[4] It basically serves as an opportunity, even before examining jurisdictional questions, to gather a pool of publically available information

[3] See, for the German laws and practice of preliminary examinations, Matthias Neuner, "German Preliminary Examinations of International Crimes", in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 1*, Torkel Opsahl Academic EPublisher, Brussels, 2018, chap. 6. See also the article of two German Federal Public Prosecutors, Thomas Beck and Christian Ritscher, "Do Criminal Complaints Make Sense in (German) International Criminal Law?", in *Journal of International Criminal Justice*, 2015, vol. 13, no. 2, pp. 229–35.

[4] Office of the Proscutor ('OTP'), *Policy Paper on Preliminary Examinations*, 1 November 2013 (http://www.legal-tools.org/doc/acb906/).

which includes submissions from CSOs in order for the Federal Public Prosecutor General (*Generalbundesanwalt*) to be in a position to react in case a suspect enters German territory and thereby making the exercise of universal jurisdiction obligatory. At any point in time, the Federal Public Prosecutor General can also move from the monitoring procedure to a structural or formal investigation.

The standard required under German criminal procedural law for this step is one of 'initial suspicion' that a crime has been committed. In the case of a suspect or a victim of German nationality or the presence of a suspect on German territory, the Federal Public Prosecutor General is legally obliged to open formal investigations. In pure universal jurisdiction cases, the Federal Public Prosecutor General has discretion as to whether to proceed to the investigatory phase, for example, in order to secure evidence.[5]

The discretionary decision must be based on factors laid down in Article 153 lit. f of the German Code of Criminal Procedure. Hence, the prosecutor can refrain from pursuing a case if no suspect is present or expected to be present on German territory, there are no victims of German nationality or there is a pending prosecution in another State or before an international court.

CSOs formally only have the right to submit criminal complaints, just as every person or legal entity can submit information to a prosecutor or police station. Other more specific rights, such as receiving information about decisions during investigations, access to files and the right to file appeals against decisions, are reserved only for the victims.

In Germany, there are a number of uncertainties and shortcomings in the practices of preliminary examinations and monitoring procedure by the Federal Public Prosecutor General.

29.1.2.1. Selection Criteria in Universal Jurisdiction Cases

There is no transparency on the criteria for opening structural investigations on a general situation in which core international crimes have been committed. This step is the most important one, moving from a monitoring procedure to an investigation with full investigatory powers. The im-

[5] Strafprozeßordnung, StPO, 7 April 1987, last amendment 30 October 2017, Section 153f ('German Code of Criminal Procedure') (http://www.legal-tools.org/doc/f7d369/).

portance of starting investigation proceedings is briefly explained in the following section as it is crucial to examine the preliminary examination part of the process.

In recent years, the Federal Public Prosecutor General relied on the concept of anticipatory mutual legal assistance as a criterion for opening structural investigations.[6] This means that the Federal Public Prosecutor General secures evidence in order to be prepared to act upon requests by other States or international courts in the future. In order to be prepared and not to lose evidence over time, testimonies can also be taken and stored.

At the same time this evidence can also be used in case a suspect of a crime of the same situation enters Germany. In the past cases occurred in which suspects came to Germany but left before the Federal Public Prosecutor General took action, although civil society had informed the office about the presence of the suspect and provided access to evidence.[7]

Furthermore, if sufficient evidence is gathered during structural investigations, the Federal Public Prosecutor General can separate individual investigations from the structural ones and request the issuance of an arrest warrant against a suspect at the Federal Supreme Court. The suspect does not have to be present in Germany at any point in this process, but could then be wanted internationally. A trial *in absentia* is not possible in Germany. Examples exist from the local Nuremberg-Fuerth prosecutor's office with regards to Argentinean torture perpetrators.[8] These cases were opened before Germany's Code of Crimes against International Law (including universal jurisdiction) entered into force in 2002 and were based on the passive personality principle as a number of victims were Germans. After five years of investigations, the district court in Nuremberg issued arrest warrants against former members of the military junta Jorge Rafael

6 Martin Böse, "Das Völkerstrafgesetzbuch und der Gedanke 'antizipierter Rechtshilfe'", in Florian Jeßberger and Julia Geneuss (eds.), *Zehn Jahre Völkerstrafgesetzbuch*, 2013, pp. 167–76; Wolfgang Kaleck, "Strafverfolgung nach dem Völkerstrafgesetzbuch: Ein kurzer Blick in die Zukunft – ein Kommentar zum Beitrag von Martin Böse", in Florian Jeßberger and Julia Geneuss (eds.), *Zehn Jahre Völkerstrafgesetzbuch*, 2013, pp. 177–84.

7 ECCHR, "Criminal complaint against Zakir Almatov" (available on the ECCHR's web site).

8 ECCHR, "Argentinean Dictatorship Cases: the German "Coalition against Impunity" to Press Criminal Charges" (on file with the author).

Videla and Emilio Eduardo Massera. Germany officially requested their extradition, which was denied, but the accused later faced prosecutions in Argentina as a result of collective efforts of civil society in Argentina, Germany and other States. In this process, the role of civil society in many different countries and judicial fora was crucial to push for prosecutions in the territorial State in which the crimes had been committed.

Whereas in the last years several structural investigations have been opened, including one on Libya and two on Syria and Syria/Iraq, in other cases that has not happened. Certainly, given the large numbers of victims and witnesses living in Germany from areas in which international crimes have been and are being committed (for example, from Syria, Iraq, Afghanistan, Yemen, Libya, Bahrain, Iran, Turkey, Egypt, Eritrea, Ethiopia, Sudan as well as Sri Lanka, Chechnya and Uzbekistan), not all testimonies can be taken and preserved. Thus, it is paramount to secure evidence from linkage witnesses and to cluster cases. In many cases it is not foreseeable at an early stage, whether there will be sufficient evidence accessible in Germany in order to request arrest warrants, whether a suspect will ever enter German territory, or whether there will be legal assistance requests from other States or international courts in the future. However, civil society can support demands of affected groups to focus on their cases, to open a monitoring procedure in order to collect open-source information, to further submit information from different sources and to inform the Federal Public Prosecutor General about available key witnesses, sources of evidence as well as travel plans of suspects, so that structural investigations will be opened to secure evidence and prepare cases.

One emblematic case that has not yet led to the opening of structural investigations is the case of war crimes committed by United States ('US') officials in overseas detention facilities such as Guantánamo Bay. Although victims and crime-based witnesses are living in Germany, their testimonies have not been secured. In addition, a number of other crime-based and linkage witnesses offered to provide testimonies in Germany to the Federal Public Prosecutor General on detainee treatment by the US in specific detention centres. Thanks to the publication of large numbers of internal documents through Freedom of Information Act litigation, further evidence is available to prove the connection of the relevant structures in the US military, the CIA and the US government to the alleged crimes. Taking together all these sources of accessible evidence, which have been

presented by CSOs to the Federal Public Prosecutor's Office,[9] there would be a higher likelihood than in other situations that investigations would lead to the issuance of arrest warrants by the Federal Supreme Court. Given the criteria formulated by the prosecutors themselves, that "one can assume that such media reports [about situations of relevance for international criminal law] containing enough information as to the potential commission of international crimes will lead to the initiation of an investigation procedure and to the lodging of a formal investigation",[10] the opening of investigations into US war crimes based on the information and analysis provided by civil society – which far exceeds information from regular media reporting – is long overdue. However, no reason has been given on the failure to do so.

The selection criteria of the Federal Public Prosecutor General remains opaque as to why in some situations preliminary examinations continue while in others structural and/or formal investigations have been opened. On the one hand, the situation in Syria and Iraq and the comparably large number of witnesses currently living in Germany certainly justified the opening of structural investigations in this situations in 2011 and 2014 respectively. On the other hand, cases are selected for structural investigations when evidence is secured from witnesses in Germany on international crimes committed in Libya, whereas investigative leads with regard to US war crimes are not followed, although in both cases there are only a small number of relevant witnesses in Germany.[11] This leads to the public perception of double standards in international criminal justice.

29.1.2.2. Duration of Preliminary Examinations

In other cases, where there was no prosecutorial discretion but instead a legal obligation to investigate, the Federal Public Prosecutor General failed to open formal investigations within a reasonable time by keeping cases in the monitoring procedure phase.

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9 See for submissions, ECCHR, "Germany: CIA director Gina Haspel should face arrest on travelling to Europe" (available on the ECCHR's web site).

10 Beck, Ritscher, 2015, p. 233, see *supra* note 3.

11 On double standards in international criminal justice, see Wolfgang Kaleck, *Double Standards: International Criminal Law and the West*, Torkel Opsahl Academic EPublisher, Brussels, 2015 (http://www.toaep.org/ps-pdf/26-kaleck).

In cases such as the one of an airstrike ordered by a German colonel in Afghanistan in September 2009, killing about 100 people, preliminary examinations took almost six months, despite the legal obligation to open an investigation as a German national was the suspect. After six months, the formal investigation was opened for four weeks, during which two suspects and two witnesses were heard, before the case was closed.

In another case of international crimes, in which a German citizen was killed by a US drone strike in Pakistan in October 2010, preliminary examinations took about 20 months before a formal investigation was opened in order to question a witness who had been extradited to Germany. Eleven months later, this investigation was closed. During preliminary examinations, the Federal Public Prosecutor General reviewed a number of reports, by experts and the Federal Intelligence Service, for example, but did not formally request information from Pakistan or the United States, nor take testimonies of witnesses present in Germany.

Steps such as ordering expert reports or asking other States through diplomatic channels for information can certainly be considered as part of an investigation, as they are examined in light of the question whether there is an initial suspicion whether a crime was committed. However, by keeping this process part of preliminary examinations, the Federal Public Prosecutor General has avoided any form of transparency or public scrutiny and deprived the victim of his or her right to access the files or to further contribute to the investigation. In such cases, CSOs can exercise public pressure in order to enforce the victims' rights or advise victims on how to challenge delays before domestic courts or the European Court of Human Rights.

29.1.2.3. Transparency and Public Outreach

As addressed in the previous section, there is no transparency in preliminary examinations and generally also no public outreach. Victims cannot access files and the Federal Public Prosecutor General usually does not publicize about the opening of a preliminary examination, but will in certain situations confirm, on request, that one exists.

CSOs can ask members of parliament to pose questions to the Government in order to get some information about activities by the Federal Public Prosecutor General. With such information, CSOs can then inform the public or interested persons and groups on specific requests.

As there is also no public outreach about activities within preliminary examinations, the public and especially the victims do not know what activities are being conducted, in which direction the focus on a situation might go and whether or not CSOs can even confidentially contribute information on specific parts of a conflict. In terms of quality control of preliminary examinations, civil society could make an important contribution to the monitoring procedure if basic information would be made public. In addition, the impression often prevails that German law enforcement authorities are not acting at all on international crimes cases, which is inaccurate as well. This criticism is based on a lack of information and transparency which leads to less support of those authorities in charge of international crimes investigations. More quality control here could also mean more support and also more political discussion around case selection, which is important in terms of quality control and addressing double standards in international criminal justice.[12]

29.1.2.4. Limited Rights of Victims to Appeal a Decision

If the Federal Public Prosecutor General does not open investigations, victims – but not CSOs – have a limited right to appeal the decision. CSOs can support victims in exercising their rights before the courts, including with activities to gather new facts that could prompt the reopening of an investigation.

The limitation of German criminal procedure lies in the fact that a complaint mechanism is foreseen only at the end of investigations, but not at the end of preliminary examinations or if an investigation is terminated at an early stage.[13] This mechanism is meant to provide the relevant aspects of the investigation file to the Appeals Court so that the judges can determine whether the Federal Public Prosecutor General has made the right decision not to indict a suspect based on the results of the full investigation. In order to exercise this right, the victim also needs access to the full file, otherwise the case cannot be fully presented to the Court. However, in many of the aforementioned cases, a full investigation was never conducted, nor was a decision made not to indict a suspect.

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12 German Federal Public Prosecutors also see some value in public outreach during preliminary examinations under specific circumstances, see Beck, Ritscher, 2015, p. 235, see *supra* note 3.

13 German Code of Criminal Procedure, Section 172, see *supra* note 5.

In the case of the airstrike in Afghanistan, investigations were first delayed and then closed within a month without giving the victim the right to express his views on the evidence gathered at the point of the decision. The case on the drone strike in Pakistan was also closed at a very early stage, similarly without the possibility for the victims' relatives to comment on the content of the investigation file. This would have been particularly important as the decision was based on a number of controversial facts, for instance, concerning the nature of local groups and their alleged involvement in the conduct of direct hostilities, as well as legal findings of importance on questions of international humanitarian law. As the case was never fully investigated, there was no avenue to lodge a complaint to a court whereby judges could review the prosecutor's decision whether to indict the suspect or not. As it stands, the factual and legal findings of the Federal Public Prosecutor General remain unchallenged by a court, thus it is the prosecutor who sets interpretation of international humanitarian law norms, but not judges after hearing at least two parties in a proceeding. Without a full judicial review, there is no quality control of preliminary examinations nor investigations of international crimes cases possible in Germany.

29.1.3. Conclusions on Quality Control of Preliminary Examinations in Germany through Civil Society Submissions

Civil society submissions play a key role in preliminary examinations. As shown above, those submissions are often based on intense discussions and selection processes, involving different key players, such as victims' groups, experts on criminal and transitional justice or local civil society of a concerned country. Thus, civil society submissions can reflect not only single individual cases of victims of core international crimes, but a comprehensive submission on the most emblematic cases within a context of systematic human rights or international humanitarian law violations. Civil society is in the best position to present such comprehensive submissions, as individual submissions will often lack the discussion of the political context of an affected group whereas submissions by other States or political groups will potentially serve political interests more than the interests of criminal justice.

CSOs conduct their own research with regard to information about the commission of core international crimes. As a result, civil society can identify patterns and systems of core international crimes committed as

part of a conflict or in the context of repression. At the same time, CSOs can establish contact with victims, witnesses and perpetrators of these crimes and thus provide useful links for future evidence gathering.

Moreover, many CSOs are victims' representation groups. Such groups have larger networks of victims and witnesses which can contribute to criminal justice. As those groups are often self-founded, they have the trust and confidence of other victims as well as the necessary contacts to other CSOs that can provide expertise with regard to substantive law. At the same time, they can speak and represent victims' voices and demands – something that is of paramount importance in the process of transitional justice, of which criminal justice mechanisms form only one part.

CSOs can also provide political support for investigations and prosecutions. Those offices of a prosecution service dealing with international crimes can then benefit from this overall support, in seeking more financial support from the government in order to be able to fulfil their tasks. At the same time, civil society can also shift the focus and argue why certain investigations are of greatest importance, even if politically more controversial.

Civil society submissions often contribute to the quality control of preliminary examinations. On the one hand, they support the competent prosecutor's office with valuable information and analysis; on the other hand, they support victims' rights to get their cases heard and challenge the authorities if they refuse, in violation of their obligations, to pursue investigations.

29.2. Quality Control in the Preliminary Examination: Civil Society Submissions at the International Criminal Court

As in domestic systems, the ICC must take questions of efficiency into consideration to ensure its proper functioning. The limited resources of the Court require that the Prosecutor carefully select investigations cases to pursue. The way in which the Prosecutor evaluates the myriad of communications and victims' complaints alleging the commission of crimes within the Court's jurisdiction and selects which investigation to pursue or not, is currently one of the most critical issues before the ICC. Undoubtedly, the improper exercise of the discretional power in this regard can have tremendous consequences for an institution, such as the ICC, which is, to a certain extent, still seeking to establish its legitimacy.

Unlike at the domestic level (as discussed above), the preliminary examination phase at the ICC is now regulated and heavily 'proceduralized'. In fact, despite the lack of specific provisions in the Rome Statute and its related documents, which do not even mention the term 'preliminary examination', over the years the OTP has refined its *modus operandi* with regard to the initial phase of the proceedings, and in particular, with regard to decisions whether to open an investigation. The outcome has been published in subsequent documents: the first draft was published in 2010,[14] followed by a November 2013 Policy Paper on Preliminary Examinations ('Policy Paper').[15] In respect of transparency,[16] the Prosecutor decided to make public the OTP's activities in relation to preliminary examinations. The OTP has indicated that it will regularly report on its preliminary examinations activities,[17] which has indeed been done since 2013 through yearly reports.[18] Thus, not only is the commencement of preliminary examinations made public but the OTP also provides updates on the activities in respect of the various phases of its analysis.[19] This move towards transparency, an absolute pre-condition for the effective participation of victims, non-governmental and CSOs in ICC proceedings, is welcome. However, as will be discussed, several points remain problematic in the way the ICC deals with this delicate phase of proceedings, in particular, from the point of view of CSOs which, representing the victims, have been involved for many years in a constructive dialogue with the Court.

Firstly, although the OTP must heavily rely on victims' communications and CSO submissions in deciding whether, pursuant to Article 15(3) of the Rome Statute, there is a "reasonable basis to proceed with an investigation",[20] victim and CSO participation in preliminary examinations is

14 OTP, *Draft Policy Paper on Preliminary Examinations*, 4 October 2010 (http://www.legal-tools.org/doc/bd172c/).

15 OTP, *Policy Paper on Preliminary Examinations*, see *supra* note 4.

16 ICC, *Regulations of the Office of the Prosecutor*, 23 April 2009, Rule 28(2) ('Regulat-ions') (http://www.legal-tools.org/doc/a97226/).

17 OTP, *Policy Paper on Preliminary Examinations*, para. 94, see *supra* note 4.

18 OTP, *Report on Preliminary Examination Activities*, 14 November 2016 (http://www.legal-tools.org/doc/f30a53/).

19 OTP, *Policy Paper on Preliminary Examinations*, para. 95, see *supra* note 4. The OTP has also indicated there that it will seek to early interact with stakeholders, for example, on Article 15 communications.

20 See *ibid*., paras. 34–71, for OTP's interpretation of the standard.

very restricted. More precisely, there appears to be a gap in the ICC-designed system of preliminary examinations with regard to the tools victims and CSOs have at their disposal to defend their interests at this early stage of the proceedings *vis-à-vis* the broad prosecutorial discretion. In particular, this becomes clear when the Prosecutor fails to make any decision on whether to open an investigation and keeps the preliminary examination ongoing for years.

The latter is also illustrated by the OTP's Policy Paper that highlights that neither the Rome Statute, nor the Rules of Procedure and Evidence ('RPE') mentions a specific time period for the completion of preliminary examinations.[21] Thus, the OTP is not obliged to indicate a time limit for preliminary examinations. The rationale is to ensure that the OTP's analysis is adjusted to the specific features of each particular situation instead of being confined by arbitrary time limits.[22] Furthermore, the Policy Paper mentions that examinations must be continued until the information provides clarity on whether or not a reasonable basis for an investigation exists. This could include assessing national proceedings over an extensive period of time, as epitomized in the Colombia situation.[23] Even though the Policy Paper outlines a transparency policy by the OTP in the preliminary examination phase, the decision of whether or not to share information with CSOs and other stakeholders seems to be at the OTP's discretion.

Moreover, over the years, as the practice of the ICC developed, the amount of resources that the ICC poured into the analysis of data and information in this pre-investigative stage has grown exponentially. Notably, many elements (for instance, gravity and complementarity) which are reviewed during a preliminary examination are those which, according to the Rome Statute, shall also be reviewed, eventually, during the investigation phase. Thus, the question is whether it is useful to double the analysis in terms of both resources and expediency of proceedings, especially considering that the OTP has far fewer powers during preliminary examinations, in which it basically only relies on open source material and on

21 *Ibid*., para. 89.

22 *Ibid*.

23 *Ibid*., para. 90.

what States or CSOs submit.[24] In other words, it is questionable whether doubling the analysis (before and after opening the investigation proper) can be seen as waste of resources, a source of delays and a ground for ineffectiveness of the ICC proceedings. Both the never-ending preliminary examination of the Colombia situation and the stalled one of the UK/Iraq situation, for instance, indicate these difficulties.

29.2.1. A Preliminary Observation

Before getting into the discussion of the above-mentioned points, it can be observed that the current practice of the ICC shows that it is much more unlikely that an investigation be opened in the absence of a State or UNSC referral. Article 13 of the Rome Statute provides three trigger mechanisms for an investigation to be opened at the ICC: (1) upon referral by a State Party; (2) upon referral by the UNSC, acting pursuant to Chapter VII of the UN Charter; and (3) *proprio motu*, that is, on the Prosecutor's initiative. With regard to this last triggering mechanism, Article 15 of the Rome Statute specifies that: "the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court". Here, CSO submissions and victims' communications play a major role as a source of information pointing at the commission of crimes under the ICC's jurisdiction.

Regardless of the source of the information received, the Prosecutor is never obliged to proceed with an investigation: in fact, the Rome Statute always leaves the decision whether to open such an investigation in the sphere of the Prosecutor's discretion. Undoubtedly a referral, either by a State or by the UNSC, does not automatically imply the opening of an investigation: the power to decline the opening of an investigation into a situation even when the Court has received a State or UNSC referral lies at the heart of the independence of the ICC Prosecutor and ultimately of the ICC. Thus, the Prosecutor is always tasked with the responsibility to determine whether a situation meets the legal criteria established by the Rome Statute to warrant an investigation by the Court, pursuant to Article 53(1). Such an analysis is carried out according to the four phases that

[24] Carsten Stahn, "Damned if you do, Damned if you don't: Challenges and Critiques of Preliminary Examinations at the ICC", in *Journal of International Criminal Justice*, 2017, vol. 15, no. 3, p. 413.

have been outlined by the OTP in its successive policy documents and seem now to have been crystallized in its yearly reports published so far.[25]

The Prosecutor also clarified from the outset that: "the Office's preliminary examination activities will be conducted in the same manner irrespective of whether the Office receives a referral from a State Party or by the Security Council or acts on the basis of information of crimes obtained pursuant to article 15".[26] Thus, in theory, the analysis is the same regardless of the source of the information received, but in practice, the chances of the examination moving into the investigative phase are much greater for situations referred to the Court.[27] If one examines the various situations currently under investigation as well as under preliminary examination at the ICC, it is apparent that most of the investigations were in fact opened upon referral either by the UNSC (for example, Sudan and Libya) or by a State (for example, Uganda, the Democratic Republic of Congo, the Central African Republic ('CAR'), and Mali) – or at least with tacit agreement of the State involved, for instance, via *ad hoc* acceptance of ICC jurisdiction under Article 12(3) (for example, Ivory Coast),[28] or otherwise (as it was the case with Kenya, where the former Prosecutor had engaged in an exercise of 'positive complementarity').[29]

Thus, it appears that 'pure' *proprio motu* investigations are very rare; and (at least for now) they do not get very far. Moreover, with just the one exception illustrated below, all situations which have been referred to the

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25 See, for instance, the already mentioned most recent *Report on Preliminary Examination Activities*, see *supra* note 18. The Prosecutor shall consider in particular: jurisdiction; admissibility (complementarity and gravity); and the interests of justice.

26 OTP, *Draft Policy Paper on Preliminary Examinations*, 2010, para. 12, see s*upra* note 14.

27 *Ibid*. "In all circumstances, the office will analyse the seriousness of the information received and may seek additional information from States, organs of the United Nations, intergovernmental and non-governmental organizations and other reliable sources that are deemed appropriate. The Office may also receive oral testimony at the seat of the Court."

28 "The procedural mechanism under Article 12(3) is based on the general idea of reciprocity referring to a structural balance of rights and obligations of states parties and third states under the ICC as a treaty system". Carsten Stahn, Mohamed M. El Zeidy and Hector Olasolo, "The International Criminal Court's *Ad Hoc* Jurisdiction Revisited", in *American Journal of International Law*, 2005, vol. 99, no. 2, p. 422.

29 Chantal Meloni, "Kenya and the ICC: A Boomerang Effect?", in *ISPI Analysis*, no. 245, May 2014; ICC, Situation in Kenya, Request for authorization of an investigation pursuant to Article 15, 26 November 2009, ICC-01/09-3, para 9–11, 20–22 (http://www.legal-tools.org/doc/c63dcc/).

Court (either by a State or by the UNSC) have triggered an investigation. Indeed, the 'Flotilla situation'[30] represented the first time the ICC Prosecutor decided *not to open* an investigation after having received a referral by a State Party. Significantly, this gave, for the first time, the opportunity for the judges to review the decision not to open an investigation pursuant to Article 53(3)(a) of the Rome Statute. Notably, this also appears to be the only case so far where the referral by the State was not a pure 'self-referral' – concerning crimes committed by nationals on its own territory – but it did concern alleged crimes committed by foreigners (members of the Israeli army) on the territory of the referring State (the vessel flying the Comoros' flag) and on third States' territory (the vessels flying the Cambodian and the Greek flags). It is an open question whether the latter element played a role in the assessment of the situation by the Prosecutor, who could have applied restraint given the critical circumstances.[31]

Conversely, a UNSC referral not only exponentially increases the likelihood of an investigation, but also appears to influence the expeditiousness of the (positive) decision: upon receipt of a UNSC resolution, the decision to open an investigation into the Libya situation was made in a matter of days.[32]

It would be naïve to think it is mere coincidence that most investigations – and open cases – so far have emerged from referrals. One of the reasons for this state of affairs could be that the procedure envisaged by the Rome Statute for the opening of an investigation *proprio motu* is more complex than in the case of a State or UNSC referral: only in the first case, in fact, does the Prosecutor need to request an authorization by the Pre-Trial Chamber ('PTC'), and thus the decision is subjected to judicial scrutiny, which could complicate matters. At the same time, it should be noted

[30] The Situation of the Registered Vessels of Comoros, Greece and Cambodia was under reconsideration by the OTP at the time of writing, OTP, *Report on Preliminary Examination Activities*, pp. 69 ff., see *supra* note 18.

[31] Please see on this Chantal Meloni, "The ICC preliminary examination of the Flotilla situation: an opportunity to contextualise gravity", in *Questions of International Law*, 30 November 2016.

[32] For the whole ICC documentation, including the decision of 2 March 2011 to open the investigation in Libya upon referral received on the 26 February 2011 by the United Nations Security Council ('UNSC'), see ICC, "Situation in Libya", ICC-01/11 (available on the Court's web site).

that, so far, every request by the Prosecutor for authorization to open an investigation has been granted swiftly by the PTC.

Despite what the Prosecutor argued in the 2010 draft policy paper, there is a difference in the analysis of the information received depending on its source.[33] Notably, such a difference would have a statutory basis: with regard to a situation which has been referred to the Court, either by a State or the UNSC, the Prosecutor is obliged to initiate an investigation unless: "he or she determines that there is no reasonable basis to proceed under this Statute", pursuant to Article 53(1);[34] whereas in case of *proprio motu* preliminary examinations, the Prosecutor is obliged to proceed with a full-fledged investigation only if he or she concludes that: "there is a reasonable basis to proceed, according to Article 15(3) of the Statute".[35] Thus, "as regard the threshold to initiate an investigation the policy of the OTP differentiates between referrals (by a State Party of the Security Council) and the Prosecutor's *proprio motu* authority".[36]

Such a preliminary observation, as outlined above, is telling of the difficult role played by CSOs and victims, whose communications are

[33] See also Matthew Cross, "The Standard of Proof in Preliminary Examinations", in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 2*, Torkel Opsahl Academic EPublisher, Brussels, 2018, chap. 22.

[34] An interesting recent interpretation of this can be found in the Pre Trial Chamber ('PTC') decision that reviewed the OTP Comoros decision closing the preliminary examination: "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". The judges also affirmed that, "[m]aking the commencement of an investigation contingent on the information available at the pre-investigative stage being already clear, univocal and not contradictory creates a short circuit and deprives the exercise of any purpose". Thus: "[i]f the information available to the Prosecutor at the pre-investigative stage allows for reasonable inferences that at least one crime within the jurisdiction of the Court has been committed and that the case would be admissible, the Prosecutor shall open an investigation, as only by investigating could doubts be overcome", ICC, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, PTC I, 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-01/03-34, para. 13 (http://www.legal-tools.org/doc/2f876c/).

[35] Pavel Caban, "Preliminary Examinations by the Office of the Prosecutor of the International Criminal Court", in *Czech Yearbook of Public & Private International Law*, 2011, vol. 2, p. 203.

[36] *Ibid.*

generally the source of the information for the Prosecutor to act *proprio motu* and who have an interest in the prompt opening of the investigation by the ICC. Thus, the question is: how can such actors participate, influence and counter-balance the broad prosecutorial discretion in this early phase of proceedings? Moreover, what are the tools (if any) at the disposal of victims and CSOs to undertake quality control of the activities carried out by the Prosecutor before the opening of an investigation?

29.2.2. Can CSOs and Victims Effectively Participate and Counter-balance Prosecutorial Discretion before the Opening of an Investigation?

The participation of victims and CSOs in preliminary examinations is very restricted. Nevertheless, there are some ways in which the victims and the organizations representing their interests can attempt to influence how preliminary examinations are conducted and, in particular, the ensuing decisions of the Prosecutor. In the first place, victims and CSOs can of course submit communications and observations to the OTP to trigger a *proprio motu* investigation or to provide information to the OTP. In this sense, victims can participate in a request by the Prosecutor for authorization to initiate an investigation. Moreover, both victims and CSOs can make requests to the PTC in relation to Article 53(3)(b) reviews, pursuant to Article 68(3) of the Rome Statute and Rule 103 of the RPE and seek leave from the PTC to submit their observations.

However, perhaps the thorniest issue with regard to victims and CSO participation at the pre-investigation stage concerns the lack of means for them to challenge a decision of the Prosecutor not to initiate investigations under Article 15(6). In fact, the Rome Statute provides very limited means to push the Prosecutor to undertake an action he or she is not willing to undertake. Indeed, as the preparatory works of the Rome Statute show, most of the attention back then was focused on (limiting) the powers of the Prosecutor when deciding *to open an investigation.* At Rome, the debate over the Prosecutor's powers was essentially a fight over the proper scope of the Prosecutor's discretion: in particular, whether it should extend to the decision to initiate an investigation.[37] Maybe less

[37] The initial draft prepared by the International Law Commission in fact did not include the *proprio motu* power of the Prosecutor to initiate an investigation; for the negotiating history of the provision: see Allison Marston Danner, "Enhancing the Legitimacy and Account-

attention was devoted to the opposite scenario, that is, to the limits of discretion permitted with regard to a decision of the Prosecutor *not to open an investigation*. However, during these first years of activity of the ICC, the issue has already surfaced several times and it appears to be one of the most controversial ones facing the Court.[38]

As will be shown, in answering to what extent it is possible to push the Prosecutor to pursue an investigation into a situation or case, one needs to differentiate whether the preliminary examination was triggered by a referral, or was a *proprio motu* one. Once more, it is especially with regard to this latter scenario that victims and CSOs face major problems given the lack of remedies at their disposal.

29.2.2.1. The Submission of Communications

Victims and CSOs play a crucial role at the preliminary examination phase. In fact, when the OTP decides to pursue an investigation *proprio motu*, it must rely on information provided by victims and CSOs, who are the main actors and stakeholders that can submit communications to the OTP. It is important for victims to be able to participate, including through CSOs, in the preliminary examination phase, as it is in their interest that an official investigation be pursued.[39] In the first place it is thus necessary that CSOs and victims be properly informed on the progress of the analysis. However, it has been noted that there was a lack of information on the progress of the analysis by the Prosecutor.[40] The situation improved after the decision to periodically publish the OTP report on preliminary examination activities. However, such reports of course are focused on the scope of the examination as it has been determined and limited by the OTP itself, which does not necessarily include the whole pic-

ability of Prosecutorial Discretion at the International Criminal Court", in *American Journal of International Law*, 2003, vol. 97, no. 3, pp. 510–52, 513 ff.

38 See, for instance, the attempts done both by CSO and victims as well as by the judges, to have information on OTP pre-investigation activities and have certain crimes included in the situations under investigation, in Uganda and Democratic Republic of Congo just to mention two.

39 Cécile Aptel, "Prosecutorial Discretion at the ICC and Victims' Right to Remedy: Narrowing the Impunity Gap", in *Journal of International Criminal Justice*, 2012, vol. 10, no. 5, pp. 1367–68.

40 FIDH, *Victims' Rights before the ICC: A Guide for Victims, their Legal Representatives and NGOs*, 2007, at p. 20.

ture as communicated by the CSOs and victims; thus not all who have submitted communications are necessarily informed on whether these are being analysed, what the progress of the investigations is, whether further information is required, and what the results of the analysis are.[41] There is no provision in the Rome Statute, the RPE or Regulations of the OTP that obliges the Prosecutor to respond to communications he or she receives. Due to this shortage of information, those who have submitted communications have fewer possibilities to challenge the Prosecutor's analysis and any eventual decision not to investigate.[42] In addition, less transparency by the Prosecutor in preliminary examinations could also lead to the Prosecutor not considering certain crimes, or certain areas, or dismissing those as he or she does not possess sufficient information on. More transparency would enable victims and CSOs to provide substantial and better tailored information to the Prosecutor. Furthermore, it would provide victims and CSOs with the opportunity to shed light on other crimes that have occurred, but that might be overlooked by the Prosecutor.

29.2.2.2. Representations during Authorization to Open an Investigation

As already noted, a decision of the PTC is needed in order for the Prosecutor to initiate an investigation into those situations where no referral – either by the UNSC or by a State Party – has been received. The judicial authorization to open *proprio motu* investigations was introduced to provide a check on the Prosecutor's discretion at a very early stage, in the absence of other 'legitimacy tools' (the aforementioned referrals).[43] The requirement to get the authorization by the PTC puts an additional burden on the OTP's shoulders, in order to establish before the judges in a very early phase of the proceedings that there is a "reasonable basis to proceed with an investigation" pursuant to Article 15.

Interestingly, such a need for an authorization provides victims with an initial opportunity to make representations before the PTC.[44] Accord-

41 *Ibid*.

42 *Ibid*.

43 Thoroughly on this point, see Allison Marston Danner, 2003, p. 515, see *supra* note 37.

44 On the contrary, in the event of preliminary examinations based on a state referral or a referral by the UNSC, the Prosecutor does not need to seek authorization from the PTC to proceed and thus there is also no stage for the victims to make representations.

ing to the Rome Statute, when the Prosecutor requests authorization from the PTC to initiate an investigation, he or she must also inform the victims of his or her intention to seek authorisation;[45] in accordance with Article 15(3) of the Rome Statute and Rule 50(1) of the RPE, victims may then make representations to the PTC.[46] It shall be noted that the first quality control of a preliminary examination can be done by those who personally experienced the alleged crimes and brought them to the attention of the Prosecutor.

29.2.2.3. Intervention during the Judicial Review of the Decision Not to Open an Investigation

If, upon completion of the preliminary examination, the Prosecutor determines that there is no reasonable basis to proceed with an investigation, the Rome Statute provides for some limited possibility of judicial review. Interestingly, the mechanism of review differs depending on whether the Prosecutor acted *proprio motu* or upon referral.[47]

1. Where the preliminary examination was opened upon a referral, Article 53(3)(a) provides that the PTC may review a decision of the Prosecutor 'not to proceed' at the request of the State making the referral or the UNSC.[48] However, there is no express right for victims or CSOs to make such a request to the PTC.[49] Notably, the judges can never oblige the Prosecutor to pursue a specific investigation: at most they can "request the Prosecutor to reconsider that decision"

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45 Rome Statute of the International Criminal Court, 17 July 1998, Article 15(3) ('ICC Statute') (http://www.legal-tools.org/doc/7b9af9/).

46 *Ibid*., William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, 2010, p. 322.

47 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, no. 87, 2003, pp. 101–04.

48 In the Gaza situation referred by the State of Comoros, the PTC requested the Prosecutor to reconsider her decision not to initiate an investigation, based on her assessment of gravity, ICC, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, PTC I, 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-01/03-34, see *supra* note 34.

49 Susana SaCouto and Katherine Cleary, "Victims' Participation in the Investigations of the International Criminal Court", in *Transnational Law and Contemporary Problems*, 2008, vol. 17, no. 73, p. 94.

(not to open an investigation).[50] Moreover, as the PTC noted: "the Chamber's competence under Article 53(3)(a) of the Statute […] is triggered only by the existence of a disagreement between the Prosecutor (who decides not to open an investigation) and the referring entity (which wishes that such an investigation be opened), and is limited by the parameters of this disagreement".[51]

2. In the event that, when acting proprio motu, the Prosecutor decides not to initiate an investigation, the PTC may, on its own initiative, only review such a decision if based solely on the "interests of justice" pursuant to Article 53(3)(b).[52] Article 53 of the Rome Statute does not provide for a right of victims or other stakeholders to participate in the review of the decision of the Prosecutor not to proceed. However, Article 68(3) could be interpreted to allow victims to present their views and concerns with regard to the decision of the Prosecutor not to proceed with an investigation (also taking into account Rules 89, 92(2), and 93 of the RPE).[53] Furthermore, it shall be noted that victims, their legal representatives and CSOs can seek leave from the PTC in accordance with Rule 103 of the RPE to submit their observations on any issue; CSOs, for instance, could request leave from the PTC to submit an amicus curiae brief.[54]

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50 However, it shall be noted that according to the wording of Article 53(3)(b), when the Prosecutor's decision not to investigate/prosecute is based solely on the interests of justice and the PTC reviews it on its own initiative, "the decision of the Prosecutor shall be effective only if confirmed by the Pre-trial Chamber".

51 ICC, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, PTC I, 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-01/03-34, para. 9, see *supra* note 34.

52 ICC Statute, Article 53(3)(b), see *supra* note 45.

53 Rule 93 Rules of Procedure and Evidence ('RPE') sets out that the Chamber may seek the views of the victims or their legal representatives at any time in relation to issues referred to in Pules 107, 109, 125, 128, 136, 139 and 191. Subsequently, Rule 107 RPE provides for a possibility to make a request for a review of a decision by the Prosecutor not to initiate an investigation or not to prosecute in writing, supported with reasons.

54 Brianne McGonigle Leyh, *Procedural Justice? Victim Participation in International Criminal Proceedings*, Intersentia, 2011, at p. 237. With regard to CSO participation see ICC, Situation in the Democratic Republic of the Congo, PTC I, Decision on the Request submitted pursuant to Rule 103(1) of the RPE, 17 August 2007, ICC-01/04-373, para. 5 (http://www.legal-tools.org/doc/b9775f/).

3. In the other cases, namely if the decision of the Prosecutor is not based solely on the interests of justice,[55] and there is no request by the referring State or by the UNSC, there is no mechanism for the victims, CSOs or other stakeholders that provided information to the OTP.[56] It must be noted that in the event that the PTC decides not review the Prosecutor's decision, or does not order the Prosecutor to reconsider her decision not to proceed, there are no provisions through which victims, CSOs or other stakeholders can challenge these decisions.

29.2.2.4. Lack of Powers with Regard to a Decision Not to Open an Investigation Based on Article 15(6)

Where the Prosecutor concludes that there is no reasonable basis to proceed with the investigation, based on Article 15(6) of the Rome Statute and Rule 49(1) of the RPE, the Prosecutor needs to inform those who provided information in relation to the preliminary examinations.[57] However, different than the situation under Article 15(3) (where there *is* a reasonable basis to proceed), victims may not make representations to the PTC to challenge the decision of the Prosecutor not to prosecute since the Rome Statute does not provide victims with an express right to do so.[58]

For example, the first preliminary examination of the Iraq situation was opened on the basis of a number of communications pointing to the

[55] "In absence of a definition of the expression 'interests of justice' in the Statute and the RPE, Article 53 practically gives the prosecutor the broadest possible scope of political discretion in order to decide whether or not to proceed with an investigation", see Olasolo, 2003, p. 111, see *supra* note 47 (also differentiates between inherent discretion arising from the principle of legality and political discretion).

[56] See in this sense also the ICC, PTC II, Decision on the request for review of the Prosecutor's decision of 23 April 2014 not to open a preliminary examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014, 12 September 2014, ICC-RoC46(3)-01/14-3 (http://www.legal-tools.org/doc/bfbb8f/).

[57] To allow victims to apply for participation in the proceedings in accordance with Rule 89, the Court notifies victims concerning the decision of the Prosecutor not to initiate an investigation or not to prosecute pursuant to Article 53 of the ICC Statute. Such a notification shall be given to victims or their legal representatives who have already participated in the proceedings or, as far as possible, to those who have communicated with the Court in respect of the situation or case in question. The Chamber may order the measures outlined in sub-rule 8 if it considers it appropriate in the particular circumstances.

[58] SaCouto, Cleary, 2008, p. 94, see *supra* note 49.

commission of grave crimes by UK armed forces. On 9 February 2006, the OTP informed those who submitted communications of the fact that it would not pursue investigations.[59] There was, however, no possibility for victims and CSOs to challenge this decision before the PTC, as the Rome Statute does not foresee such a right for victims to challenge an Article 15(6) decision of the Prosecutor when acting *proprio motu*.

The fact that, under the Rome Statute, there is no review mechanism that can be triggered in such circumstances by those who provided the information deserves strong criticism. In fact, the issue was debated during the drafting of the Rome Statute, as in many domestic systems, it is possible to challenge a decision of a Prosecutor not to initiate investigations. During the negotiations of the Rome Statute, delegates from France argued that victims have the right to review a decision from the Prosecutor not to initiate an investigation.[60] Other delegates disagreed, stating that this as well as review possibilities by the Court, would affect the Prosecutor's independence.[61] The current system reflects a compromise, as the Court has been granted the possibility to review on certain occasions and victim participation has been restricted.[62]

29.2.3. Challenging the Prosecutor's Failure to Open Investigations in the absence of a Decision Not to Open an Investigation

With regard to the possibility of CSOs, victims and other stakeholders carrying out quality control on preliminary examination, the thorniest issue is that the Prosecutor, instead of taking a formal decision not to investigate (or not to proceed), often simply leaves the preliminary examination (or the investigation) open indefinitely. As a consequence, the Prosecutor's (non-)decisions cannot be challenged.[63]

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59 ICC, OTP response to communications received concerning Iraq, 9 February 2006 (http://www.legal-tools.org/doc/5b8996/).

60 Leyh, 2011, p. 265, see *supra* note 54.

61 *Ibid*.

62 Based on Article 53(3)(a) and 53(3)(b) of the Rome Statute, the Court may review certain decision of the Prosecutor not to initiate an investigation or to prosecute.

63 Redress, *The Participation of Victims in International Criminal Court Proceedings, a Review of the Practice and Considerations for the Future*, October 2012, p. 46. This policy of suspension or indecisiveness by the Prosecutor is also illustrated by a request lodged by victims in 2010 in relation to the Situation in the Democratic Republic of Congo. In 2010 in respect of the Situation in the Democratic Republic of Congo, based on Article 68(3) of

An interesting case in this regard is what happened in the situation of the CAR, which could also perhaps be relied on by CSOs and victims to obtain information and challenge the (non-)decisions of the OTP.

In 2006, the CAR Government attempted to obtain information on the status of the preliminary examination in respect of the situation that the Government itself had referred to the OTP in December 2004.[64] The Government filed a request to the PTC requesting: "that the Prosecutor provide information on the alleged failure to decide, within a reasonable time, whether or not to initiate an investigation pursuant to Rules 105(1) and 105(4) of the Rules of Procedure and Evidence".[65] The OTP submitted that it is under no obligation to submit information to the PTC absent decisions pursuant to Article 53 of the Rome Statute. Nevertheless, the request was followed by a decision of the PTC requesting the Prosecutor to provide the Chamber with an update on the status of the preliminary examination, as: "the State which referred the situation has the right to be informed by the Prosecutor and therefore to ask the Chamber to request that the Prosecutor provide the said information".[66] Eventually, the OTP

the Rome Statute victims requested the PTC to review the alleged decision of the Prosecutor not to proceed against Bemba in relation to certain crimes. However, the PTC declared that "to date no decision on 'interest of justice' grounds not to proceed against Mr Bemba with respect to crimes allegedly committed in Ituri has been taken" and thus that there is "[…] no decision for the Chamber to review and there is, accordingly, no basis for it to exercise its powers under article 53(3)(b) of the Statute", see ICC, Situation in the Democratic Republic of Congo, PTC I, Decision on the designation of a Single Judge of Pre-Trial Chamber I, 25 October 2010, ICC-01/04-583, paras. 4–5 (http://www.legal-tools.org/doc/c84b80/). This decision does imply that in a case where the Prosecutor has decided not to proceed with the investigation or to prosecute based on Article 53(1)(c) or 53(2)(c), victims can request the PTC to review the decision by the Prosecutor, Leyh, 2011, p. 267, see *supra* note 54 (http://www.legal-tools.org/doc/c84b80/).

64 The Government of the Central African Republic ('CAR') submitted its referral of the situation in the CAR to the OTP pursuant to Article 13 and 14 of the Rome Statute on 22 December 2004.

65 Schabas, 2010, p. 668, see *supra* note 46, referring to Situation in the Central African Republic (ICC-01/05), Transmission par le Greffier d'une Requête aux Fins de Saisine de la Chambre Préliminaire de la Coeur Pénale Internationale et Annexes Jointes, 27 September 2006, ICC-01/05-5-Anx2 (http://www.legal-tools.org/doc/cdd070/).

66 ICC, Situation in the Central African Republic, PTC III, Prosecution's report pursuant to Pre-Trial Chamber III's 30 November 2006, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, 15 December 2006, ICC-01/05-07 (http://www.legal-tools.org/doc/1dd66a/). The Court also

provided the PTC with the report, though explicitly stating that it was under no obligation to do so, as no decision under Article 53(1) had been made, and thus there was no exercise of prosecutorial discretion subjected to judicial review by the Chamber.[67] Nowadays, 10 years after the facts in question, the OTP is of course much more transparent with regard to the activities undertaken in the course of its preliminary examinations, as reflected in the OTP Policy Paper. Nevertheless, as already noted before, the OTP's yearly reports on preliminary examinations do not necessarily cover the whole spectrum of communications received and do not necessarily address all the requests raised by victims and CSOs.

Thus, even though the OTP's preliminary examinations into the Situation in the CAR were based on a State Party referral, the case might be significant in order to argue that in the case of *proprio motu* preliminary examinations by the OTP, victims and CSOs that provided information on the alleged crimes can request that the PTC order the OTP to provide information on its activities. In other words, it could be argued that similar to a State Party that has referred a situation, those victims and CSOs who have 'referred' a situation to the OTP by way of communications also have "the right to be informed by the Prosecutor and therefore to ask the Chamber to request that the Prosecutor provide the said information".

29.2.4. Conclusions on Preliminary Examinations before the ICC

The preliminary examination of the situation in Colombia has been ongoing for over a decade: the OTP acknowledges receipt of 181 communications pursuant to Article 15.[68] However, since CSOs and victims' participatory rights are limited in the preliminary examination phase, there seem to be few methods available for victims or CSOs to influence these preinvestigations or to obtain information on the proceedings. ICC practice and the OTP's Policy Paper indicate that the Prosecutor is not bound to time limits in respect of the preliminary examinations. Furthermore, even though the OTP has a transparency policy in relation to preliminary examinations, the Prosecutor is not obliged to respond to communications by victims or CSOs or to inform them of the status of the investigations. In-

requested the Prosecutor to provide an estimate of when the preliminary examination of the CAR situation would be concluded.

67 *Ibid*., para. 1; Schabas, 2010, p. 668, see *supra* note 46.

68 OTP, *Report on Preliminary Examination Activities*, para. 52, see *supra* note 18.

deed, until the Prosecutor has made a decision whether or not to seek authorization from the PTC in accordance with Article 15(3), there are few if any means for victims or CSOs to further this process. Moreover, no means are available for victims or CSOs to challenge a decision of the Prosecutor not to initiate investigations based on Article 15(6) of the Rome Statute.

Moreover, it shall be noted that even if the preliminary examination of the situation in Colombia has been ongoing for more than 10 years, without investigation powers, it is difficult for the OTP to receive the necessary information, for example, about policies at highest governmental level and their connection to sets of crimes that fall under crimes against humanity. The case of Colombia shows that the OTP granting too much time to allow for legislative and judicial developments in a country – while crimes continue – undermines the objectives of Rome Statute. This is because while there may be positive domestic legislative and judicial developments, the policies potentially linked to international crimes remain in place.

Similarly, the (new) preliminary examination of the situation in Iraq, which focuses on the responsibility of UK military personnel, strongly points to the need for the opening of an investigation at this stage of the proceedings. In the face of grave crimes committed in that context, which have been confirmed by several sources,[69] the preliminary examination proves to be ineffective and causes grave delays in the administration of justice.

In this regard, for the OTP to establish subject-matter jurisdiction under the Rome Statute, and confirm the credibility of witness statements received, conducting its own investigations and witness interviews would be more effective in order to make its own assessment of the allegations presented. Examining the methodology behind some witness statements taken by lawyers and CSOs is of course necessary to assess their credibility, but the focus must remain on the content of the information provided, which can be corroborated by different sources, such as official documents, including domestic decisions confirming the allegations, as well as evidence presented in individual cases through videos and photographs.

69 Nicholas Mercer, "The truth about British army abuses in Iraq must come out", in *Guardian*, 3 October 2016.

The "reasonable grounds to believe" requirement should not be interpreted as setting an overly high standard of proof at this stage. This would shift the burden of conducting fact-finding investigations – with all the resources required for this – from the OTP to CSOs. Beyond this, it also exposes those CSOs to intense scrutiny by the State under examination. Such organizations may end up becoming subject to extreme domestic political, legal and economic backlash, potentially leading to a chilling effect for other organizations that would not serve the interests of justice. In this sense, a full-fledged investigation by the ICC, thus giving the OTP investigative powers – rather than a mere preliminary examination which is based on open source materials and information provided by third parties – would be much more effective to overcome obstacles within situations such as Iraq/UK or Colombia and avoid arbitrariness and double standards.

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