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Quality Control in Preliminary Examination: Volume I

Morten Bergsmo and Carsten Stahn (editors)

**Quality Control in
Preliminary Examination:
Volume 1**

**Morten Bergsmo and Carsten Stahn
(editors)**

**2018
Torkel Opsahl Academic EPublisher
Brussels**

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

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

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ISBNs: 978-82-8348-123-5 (print) and 978-82-8348-124-2 (e-book).

Dedicated to Cosimo Mingyu Bergsmo

FOREWORD BY JUDGE LIU DAQUN

Led by its Director, Morten Bergsmo, the Centre for International Law Research and Policy has successfully held many academic activities in more than 30 countries to disseminate knowledge of international criminal law and promote exchange of ideas on many thematic subjects. I have personally taken part in many symposia and conferences on subjects such as positive complementarity, objective and subjective elements, old evidence of core international crimes, and quality control in fact-finding. Director Bergsmo, one of the co-editors of these two volumes, has been Visiting Professor at one of China's most prestigious universities, Peking University, since 2012. He has helped Chinese students and professors gain access to the latest international law sources, take part in various international activities, and be exposed to international judicial systems. He has bridged the gap between Asian countries – such as China, India and Japan – and the European Union and its members, as well as promoted exchange among different legal systems and traditions. This two-volume anthology and the Peace Palace conference on which it is based are just two of his many contributions.

Effective quality control over the preliminary examination of the situations submitted to the Prosecutor of the International Criminal Court ('ICC') is a very hot and pertinent topic in international criminal law. The legal process at an international criminal tribunal is set in motion by its prosecutor. There is no investigative judge at the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the ICC. It is the Prosecutor who decides when to initiate a preliminary examination, what to investigate, whom to prosecute and what the charges should be. Once the Prosecutor believes there are sufficient grounds to prosecute, an indictment is drafted. The Prosecutor is fully independent in making these decisions. These decisions are not just judicial ones, but also involve political, diplomatic and administrative considerations on the international arena. Because of the nature of criminal investigation and independence of the Prosecutor, it is difficult for the public, victims and governments to know what is going on. There is limited scope for the public to follow and monitor the process of preliminary examination. People may wonder how

the Prosecutor makes the decision to start preliminary examination of this situation but not that? Is there selectivity? Is there enough evidence for the Prosecutor to go to the next stage of full investigation?

Investigation and prosecution of a suspect, especially a sitting head of State, is a very sensitive matter both in judicial and political respects, and it may become a turning point in the life of an international criminal jurisdiction. I will take the indictment of Slobodan Milošević before the ICTY as an example. Milošević was the President of Serbia from 1997 to 2000 and he was indicted in May 1999, during the Kosovo war, for crimes against humanity in Kosovo. A year and a half later, charges were added for violating the laws or customs of war and grave breaches of the Geneva Conventions in Croatia and Bosnia-Herzegovina, as well as genocide in Bosnia-Herzegovina. The indictment of Milošević is now regarded as a turning point in the history of the ICTY, shifting the investigation policy from lower- and mid-ranking suspects to the most senior leaders who allegedly committed the most serious crimes. Since then, gradually more indictees had been arrested and brought to the seat of the Tribunal. The ICTY has indicted 161 persons. After the arrest of Mladić in May 2011, there was no one left on the fugitive list of the ICTY.

The indictment of Milošević came just at the right time, when he was losing power domestically and facing charges of corruption. Because of the Kosovo war, he was condemned by the European Union and North Atlantic Treaty Organization States. Since his policy was to have a pure Serbian State by persecuting Muslims and other ethnicities, he became an arch-enemy of the Muslim world and the Non-Aligned Movement. Let us not forget that resolution 827 of the United Nations Security Council establishing the ICTY was adopted by all the members unanimously, the first time after the Cold War. His indictment was generally welcomed and supported by the international community. Since then, many fugitives have surrendered to the ICTY or been arrested by local authorities. The ICTY became the most effective international criminal tribunal in terms of arrests of suspects.

In the case of the ICC, the investigation and preparation of charges against the sitting President of the Sudan, al-Bashir, also represents a turning point, but in the opposite direction. On 14 July 2008, the Prosecutor of the ICC alleged that al-Bashir bore individual criminal responsibility for genocide, crimes against humanity, and war crimes committed since 2003 in Darfur. The Court issued an arrest warrant for al-Bashir on 4 March 2009, and on 12 July 2010, a second warrant on five counts of war crimes,

crimes against humanity and genocide. From then on, the ICC has traversed a rough and bumpy road. First, because of the Sudan's friends in the United Nations Security Council, such as China and Russia, the ICC may no longer get the support of the Council, even though it referred the Sudan situation to the ICC. Second, the Court's decision has been strongly opposed by the African Union, the League of Arab States, and the Non-Aligned Movement, which together constitute almost one-third of the States Parties to the ICC Statute. Those States Parties have refused or circumvented the implementation of the arrest warrant, blaming the ICC for selective prosecution. Thirdly, the fugitive has defied the arrest warrant by travelling to almost 20 countries in the world after the indictment, including countries outside Africa such as Iran and China. The ICC has spent much time and energy on endless self-defence against criticism by African countries, even facing the threat of withdrawal of some African States Parties.

Article 42 of the ICC Statute defines the functions of the Office of the Prosecutor, that is, it must act independently as a separate organ of the Court. But that does not mean that the Prosecutor could do whatever he or she pleases. There must be some constraints and limits. During the negotiation of the ICC Statute, many delegations were already very concerned about the power of the Prosecutor. Article 57 requires the Prosecutor to submit a request to the Pre-Trial Chamber for the purpose of investigation, but the Pre-Trial Chamber's decision could only focus on whether there is a reasonable or sufficient basis to proceed to a full criminal investigation, not on the policy issue. The policy issues – like when, how and in respect of whom the Prosecutor should start a preliminary examination or investigation – are not only a matter that concerns the prosecution. Rather, it is closely related to the function and development of the Court as a whole.

In the case of the ICTY, there was a procedure that may be called 'policy review'. A group composed of the President, the Vice-President and the presiding judges of the Trial Chambers would determine whether the indictment concentrated on one or more of the most senior leaders and whether the crimes they were charged with fell within the jurisdiction of the Tribunal. If it met this standard, the Prosecutor could submit the indictment and supporting evidence to a pre-trial judge for review. If the judge agreed that there was sufficient evidence to bring the accused to trial, he or she would confirm the indictment and issue an arrest warrant. The ICC may wish to consider the adoption of similar procedures to ensure effective control over preliminary examination and investigation.

It is my view that the 2017 Peace Palace conference and this two-volume anthology are very pertinent to the issue of preliminary examinations so as to contribute to a better understanding of them, their normative frameworks, and aspects requiring improvement. Preliminary examinations have become one of the most important activities of the ICC. I believe this project could contribute to the strategic and long-term thinking on broader policy issues such as the context, rationale and role of preliminary examination, the suitability of the existing legal framework and methodologies, the impact of preliminary examination on and beyond the situations, and lessons learned from specific case studies.

Judge LIU Daqun

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FOREWORD BY AMBASSADOR MARTIN SØRBY

It has been a great pleasure for me to be involved in both the Peace Palace conference on “Quality Control in Preliminary Examination” and its output that is this two-volume anthology. The Government of Norway has supported this project, just as we supported the preceding project on “Quality Control in Fact-Finding”. We find the approach of both projects novel and important. Both concern how we work with facts relevant to core international crimes in ways that are cost-effective, fair, and lead to accountability when appropriate. Both seek to strengthen the fact-work component of the documentation and pre-investigation of core international crimes. Both pay attention to the cost of this fact-work and the need to increase cost-efficiency where possible.

The term ‘quality control’ is technical and neutral. It captures a challenge common to all criminal justice systems, not only those working on core international crimes. The term invites an open and trusting consultation on how we can improve. The term disarms. That is helpful.

We are not only considering preliminary examination in international criminal jurisdictions, but also in national jurisdictions. The aim is to analyse common challenges and ways to improve. This is important.

It is noteworthy that, at the conference, there were many from the Office of the Prosecutor of the International Criminal Court (‘ICC’). This shows how relevant this research project is to practice. It also points to the significant future potential for national criminal justice agencies to observe carefully and learn from the ICC’s daily work when distilled systematically in the way this project allows. Given the amount of resources that are invested in the ICC, it would only be natural that its work-processes become a source of study for national criminal justice actors. This is positive. And it is a reminder to the ICC how important the way it operates is.

I took away four general observations from the Peace Palace conference which I believe remain relevant here. First, from what I have seen at the conference, the presentations and discussions were very rich. There was an intense energy of inquiry, intimately tuned to practice, pushing the

boundaries of our understanding of pre-investigation. It is quite clear that this anthology will chart new territory and take us several steps forward.

Secondly, we have seen the complexity and diversity of pre-investigation practices in national and international jurisdictions. The way of doing things differ between jurisdictions, although the function and challenges of preliminary examinations are largely the same. It has been pointed out that the ICC has developed a very high level of attention to preliminary examination. With time, this awareness will translate into practice that provides invaluable lessons for national criminal justice actors.

Thirdly, the normative regulation of preliminary examination will only take us so far. As was pointed out by several speakers at the conference, quality control is ultimately a question of *awareness* or *culture* in the organizations concerned. Professionalization is a challenge faced by all criminal justice actors. The terminology of quality control should become a regular part of our language in the field, much like expressions such as ‘no peace without justice’. It should become a household term.

Lastly, we should also recognize the particular responsibility that rests with *leaders* of criminal justice agencies, including in international criminal justice. They need to set quality control examples. This is at the same time a challenge to us, the States Parties behind the international criminal justice organisations: we need to be vigilant when we select future criminal justice leaders.

Ambassador Martin Sørby
*Ambassador of Norway to the Netherlands and
Permanent Representative of the Kingdom of Norway to
the Organisation for the Prohibition of Chemical Weapons*

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On the Magic, Mystery and Mayhem of Preliminary Examinations

Carsten Stahn, Morten Bergsmo and CHAN Ho Shing Icarus*

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

Johann Wolfgang von Goethe,
Der Zauberlehrling (1797)

1.1. The Quality Control Project

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

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

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

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

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

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

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

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

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

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

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

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

1.2. Preliminary Examinations at the International Criminal Court

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

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

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

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

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

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

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

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

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

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

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

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

1.3. Functions, Meanings and Messages of Preliminary Examinations

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

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

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

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

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

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

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

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

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

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

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

admissibility, interests of justice¹²), leave *de facto* a broad scope of leeway for unconstrained behaviour. The uniqueness of preliminary examination lies in their flexible nature and their broad range of decision-making choices.

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

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

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

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

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

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

1.4. Prosecutorial Managerialism

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As Human Rights Watch has noted:

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

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

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

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

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

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

²⁵ *Ibid.*, pp. 15–16.

1.5. Discretion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Like the sorcerer's apprentice, the OTP might have locked itself in too much through its phased-based model. There is a certain tension between a sequenced and a parallel consideration of selection criteria. The idea to break preliminary examination down into phases seems to suggest that the analysis is sequenced. It implies that one phase comes after the next. According to this approach, analysis may get stuck by comprehensive scrutiny at one phase, like jurisdiction, for years, without considering information relating to other phases. Such a strict sequencing is not directly required by the Statute. It might be preferable to adopt a more flexible approach in order to avoid that the OTP get stuck in its own methodology.³² For instance, in some contexts, it might be better to pursue in relation to a part of the situation, rather than leaving the situation on the docket for years.

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

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

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

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

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

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

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

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

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

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

1.6. Re-visiting Methodologies

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

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

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

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

itself to a few thematic investigations and prosecutions³⁸ in contexts where preliminary examinations went on to investigation. This comes at a price of lack of sustainability. It might be helpful to pursue some situations in greater depth in order to leave a lasting footprint or gradually build accountability upwards. Thematic and structural preliminary examinations need to be balanced.

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

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

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

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

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

Fourth, the length of preliminary examinations deserves further attention. There is a discrepancy between words and action. Some preliminary examinations have been criticized for taking too long. Long preliminary examinations may miss the ‘golden hour’ of evidence collection.⁴² The mass of available information is likely to increase in the future, due the rise of new technologies⁴³ and the availability of a large amount of open-access materials. Some have argued that the ICC should set limits for the duration of preliminary examinations. The problem with this approach is that the appropriate length of preliminary examination is context-specific. Reasonable limits are difficult to define in abstract terms. They require a hypothesis. It may be preferable to develop internal benchmarks, and better channels of communication where situations are pending for years. New technologies may facilitate the determination of the crime-base and context. Admissibility assessments are often most complex and time-consuming. It is important to move to such assessments as quickly as possible.

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

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

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

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

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

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

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

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

1.7. Contents of the Following Chapters

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In “Politics, Power Dynamics, and the Limits of Existing Self-Regulation and Oversight in ICC Preliminary Examinations” (Chapter 19), using the situation in Palestine as an example, *Asaf Lubin* explores the current deficiencies in as well as possible reform to the ICC’s oversight of preliminary examinations, in terms of both the OTP’s self-regulation and the PTC’s quality control. In particular, he suggests four reforms: (1) rephrasing of the preliminary examination phase and the introduction of a Gantt-based review process and a sliding scale of transparency requirements; (2) redefinition of the relationship between the OTP and PTC at the preliminary examination stage; (3) redrafting the existing OTP policy papers on Preliminary Examinations and Interests of Justice, as well as adopting a new policy paper on Evidence, Evidentiary Standards, and Source Analysis; and (4) introducing a ‘Committee of Prosecutors’ as a new external control mechanism.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.8. Not a Conclusion

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

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

Part 1

The Practice of Preliminary Examination: Realities and Constraints

Constraints and Quality Control in Preliminary Examination: Critical Lessons Learned from the ICTY, the ICC, the ECCC and the United Kingdom

Andrew T. Cayley*

Selecting criminal cases for investigation and prosecution in an international jurisdiction has never been so important nor fraught with such risk. When investigations commence, victims expect justice, and that expectation grows very quickly. Successful investigations and prosecutions promote support and provide the international system with a source of legitimacy. Each time there is a slip or falter in an international investigation or prosecution, it risks making the news, unlike with most domestic prosecutions. When there is success, confidence in the system grows.

The purpose of preliminary examination at the International Criminal Court ('ICC') is a specific one: "The goal is to collect all relevant information necessary to reach a fully informed determination of whether there is a reasonable basis to proceed with an investigation. If the Office [of the Prosecutor] is satisfied that all the criteria established by the Statute for this purpose are fulfilled, it has a legal duty to open an investigation into the situation".¹ This process is unique to the ICC. The *ad hoc* tribunals and hybrid courts did not adopt this practice in their governing instruments but they all engaged in some form of pre-investigative activi-

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¹ Office of the Prosecutor, ICC (hereinafter 'OTP'), *Policy Paper on Preliminary Examinations*, 1 November 2013, p. 2, para. 2 (<http://www.legal-tools.org/doc/acb906/>).

ty to decide what should or should not be investigated and subsequently prosecuted. Pre-investigative activities, both at the international and domestic level, are vital because, as has been stated, a weak start often makes for “crooked and broken war crimes cases which undermine trust among victims, donors and the public”. At the Peace Palace conference on which these volumes are based, Professor Morten Bergsmo spoke of the moral strength required in the early stages of any international case and of the need for the truth to be spoken. Narrative can only have effect when all senior practitioners speak out themselves and recall their own experiences, mistakes as well as the consequences of success and failure in this most challenging international arena.

The aim of this chapter is to bring to bear my personal experiences and to examine the practices at the International Criminal Tribunal for the former Yugoslavia (‘ICTY’), the Extraordinary Chambers in the Courts of Cambodia (‘ECCC’) and domestically in the United Kingdom in the face of the ICC preliminary examination in respect of the allegations against UK forces in Iraq, to see what lessons can be learned for the future both for the ICC and for domestic jurisdictions addressing these core international crimes.

2.1. Pre-Investigative Activity at the ICTY

There is scant provision in the ICTY Statute or in its Rules of Procedure and Evidence that governs the pre-investigative activity of the Office of the Prosecutor (‘OTP’). Article 18(1) of the Statute states that: “The Prosecutor shall initiate investigations *ex-officio* or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed”.² So the ICTY Statute identifies two bases on which to initiate investigations: the first is grounded in the Prosecutor’s inherent powers and the second is on the basis of information received from outside sources, with the Statute providing a non-exhaustive list of those sources. While it is not expressly stated, the *ex officio* power vested in the Prosecutor appears to relate to preliminary investigations initiated upon the basis of information gathered by the OTP

² Statute of the International Criminal Tribunal for the Former Yugoslavia, adopted 25 May 1993, amended 17 May 2002, Article 18(1) (‘ICTY Statute’) (<http://www.legal-tools.org/doc/b4f63b/>).

itself, as opposed to information provided to the Prosecutor by outside bodies. There is no further explanation of what “a sufficient basis to proceed” means and there are no express provisions either in the Statute or the ICTY Rules of Procedure and Evidence which address the mechanics or conduct of the ICTY’s pre-investigative process.³ As long as the proposed investigation targets crimes which fall within the jurisdiction of the ICTY, it is admissible.⁴ No judicial or other oversight was provided for in the pre-investigative processes at the ICTY and there was no written OTP policy, as far as I recall, in the way that situations were selected for investigation. So a very great deal of unrestrained discretion was vested in the ICTY Prosecutor at the pre-investigative stage. From my personal recollections of the early days of the ICTY, I know that the *Blaškić* case, for example, commenced as a result of a Canadian prosecutor working for the OTP reading a book written by the former commander of the British Cheshire Regiment deployed to Bosnia-Herzegovina as part of the United Nations Protection Force (‘UNPROFOR’) in 1992.⁵ The book describes, amongst other things, the Cheshire Regiment’s presence as part of UNPROFOR in Central Bosnia and its challenging role in the Muslim/Croat conflict in that area between 1992 and 1993. It was in the course of this conflict, within the wider Bosnian conflict, that the allegations in *Blaškić* arose. In hindsight, it might seem somewhat surprising that a semi-autobiographical book, by a British professional soldier, became part of the basis for a major international criminal investigation. The most pertinent observation I can make here is that I recall Bosniak representatives to the ICTY, in the mid-1990s, expressing a degree of surprise that the ICTY had decided to prioritise an investigation into this particular case. Undoubtedly, serious crimes had been committed in Central Bosnia by the Bosnian Croat military forces led by nationalist political figures, but crimes that are more serious had also been committed elsewhere in Bosnia-Herzegovina during 1993 and it might have been more prudent to first prioritise other areas of Bosnia-Herzegovina for investigation. The centrepiece of the *Blaškić* investigation concerned the murder of civilians

³ See *ibid.*, Article 18; and ICTY, *Rules of Procedure and Evidence*, revision 50, adopted 11 February 1994, amended 8 July 2015, IT/32/Rev.50, part 4 (this part of the Rules only addresses how an investigation should be conducted) (‘ICTY Rules rev. 50’) (<http://www.legal-tools.org/doc/30df50/>).

⁴ ICTY Statute, Article 1, see *supra* note 2.

⁵ Lieutenant Colonel Bob Stewart, *Broken Lives: A Personal View of the Bosnian Conflict*, HarperCollins, 1994.

on 16 April 1993 in the village of Ahmići by Bosnian Croat armed forces where at least 103 Bosnian Muslims had been killed, many of whom were women, children and the elderly.⁶ The accused, Tihomir Blaškić, was a colonel in the Bosnian Croat armed forces and a local commander at the time of the offences.⁷ In 1995, when this investigation commenced, there were certainly crimes that were more serious, or patterns of crimes committed elsewhere in Bosnia-Herzegovina that required investigative priority. In addition, there were individuals who bore a much greater responsibility for serious violations of international humanitarian law than Blaškić. In July 1995, over 8,000 men and boys were murdered in and around Srebrenica.⁸ The end of the siege in Sarajevo led to between 1,000 and 1,500 deaths.⁹ Colonel General Ratko Mladić and Radovan Karadžić bore far greater responsibility for mass crimes in Bosnia-Herzegovina than Blaškić. Of course, it is easy to be an armchair critic, looking back at the early fragile days of the ICTY. We all have the benefit of the trial and appellate proceedings at the ICTY against 154 individuals and the passing of over 20 years. These two decades have shed considerable light on what were the worst crimes and which individuals committed the majority of those crimes. But in those early days of the Tribunal there was an agenda being pressed, by some, that all the ethnic groups of Bosnia-Herzegovina were equally responsible for the crimes committed. Therefore, there was a need for an equality of effort into the investigation of crimes allegedly perpetrated by the Serbs, the Muslims and the Croats. This working assumption was a simplistic approach to a highly complex war and case selection. It was also a mistake, since proven by the fact that in the few cases involving a Bosnian Muslim accused, there was either a very low sentence for those convicted (thus manifesting a low level of responsibility) or a com-

⁶ Charles McLeod, European Community Monitoring Mission, *Report on Inter-ethnic Violence in Vitez, Busovača and Zenica in April 1993*, 15 May 1993, Appendix 2 to Annex N to ECOMM H/S 720; ICTY, *Prosecutor v. Tihomir Blaškić*, Trial Chamber, Judgment, 3 March 2000, IT-95-14-T, paras. 416–17 (<http://www.legal-tools.org/doc/e1ae55/>).

⁷ *Ibid.*, para. 9.

⁸ ICTY, *Prosecutor v. Radovan Karadžić*, Trial Chamber, Judgment, 24 March 2016, IT-95-5/18-T, para. 5573 (<http://www.legal-tools.org/doc/173e23/>).

⁹ Jan Zwierzchowski and Ewa Tabeau, *The 1992-95 War in Bosnia and Herzegovina: Census-based Multiple System Estimation of Casualties' Undercount*, 1 February 2010, p. 20 (<http://www.legal-tools.org/doc/ba5283/>).

plete acquittal.¹⁰ Of the 161 persons indicted by the ICTY, only six were Bosnian Muslims – less than 0.5% of the total individuals indicted.

At first, the transition from an investigation to an indictment and charges at ICTY was a very brief and rudimentary legal process which was often a precursor to a highly complex and lengthy trial. In order for the Prosecutor to file an indictment, he or she simply had to be satisfied that there was sufficient evidence to provide reasonable grounds for believing a suspect had committed a crime within the jurisdiction of the court.¹¹ An indictment was prepared and then sent to a judge via the Registry with supporting material (which was often a limited bundle of evidence) to provide foundation for the charges.¹² The judge, who applied the same evidential standard as the Prosecutor, then heard the Prosecutor in a closed hearing and either confirmed or dismissed each count in the indictment.¹³ Rule 47 of the Rules remained unchanged from 11 February 1994 (first adopted set of rules) until 25 July 1997, when the rule was heavily modified by the ICTY Rules Committee.¹⁴ The most significant addition to Rule 47 was a new Rule 47(C), which read:

- (C) The reviewing Judge may:
- (i) *request the Prosecutor to present additional material in support of any or all counts;*
 - (ii) confirm each count;
 - (iii) dismiss each count; or
 - (iv) *adjourn the review so as to give the Prosecutor the opportunity to modify the indictment.*

The two emphasised new sub-provisions were significant because, for the first time since the ICTY's establishment, the confirming judge could demand that the Prosecutor further substantiate the allegations he was making with additional evidence and the judge could, in effect, re-

¹⁰ Sefer Halilović: acquitted, Enver Hadžihasanović: 5 years imprisonment, Amir Kubura: 2.5 years imprisonment, Naser Orić: acquitted, Rasim Delić: 3 years imprisonment (Delić died before his appeal was fully heard and determined and the trial judgment was held to stand.) Mehmed Alagić died before the beginning of his trial.

¹¹ ICTY Statute, Article 18(4), see *supra* note 2; and ICTY Rules rev. 50, Rule 47(B), see *supra* note 3.

¹² *Ibid.*

¹³ *Ibid.*, Rule 47(E) and (F).

¹⁴ ICTY, *Rules and Procedure of Evidence*, revision 11, adopted 11 February 1994, amended 25 July 1997, IT/32/Rev. 11, Rule 47(E) and (F) (<http://www.legal-tools.org/doc/30df50/>) (8 July 2015 amended version).

quire the Prosecutor to go away and amend his indictment to more accurately reflect the evidence presented. In my opinion, and based on my own experiences at the ICTY between 1995 and 2005, by 1997, the judges had been increasingly aware that indictments were being confirmed at a fairly low evidential threshold. They had also known that, post confirmation, a substantial amount of investigation still needed to be done to ensure that cases were trial ready and that charges could be proven against an accused person beyond reasonable doubt – the evidential standard at trial as required by the Rules.¹⁵

For a prosecutor, confirming an indictment at the low evidential standard of “reasonable grounds to believe” means that if your defendant is arrested the day after confirmation, you may find yourself imminently going to trial with a case that you may not be able to prove beyond reasonable doubt – which quite rightly is the evidential standard for guilt at trial proceedings. *Blaškić*, in which I was junior counsel, is a case in point. *Blaškić* was originally named in an indictment confirmed on 10 November 1995 with five other co-accused persons, including Dario Kordić, Mario Čerkez, Zlatko Aleksovski, Ivan Santić and Pero Skopljak.¹⁶ In November 1995, I recall, there was no immediate expectation of the pending arrest of any of the accused. *Blaškić*, although a Bosnian Croat, was by 1996 a senior officer in the Croatian army serving in the Republic of Croatia. Threats to withhold international and military financial aid to the Republic of Croatia, if it did not co-operate with the ICTY, led to *Blaškić*’s “voluntary surrender” to the Tribunal far quicker than anyone anticipated.¹⁷ After his voluntary surrender on 1 April 1996, *Blaškić* was immediately transported to the ICTY. On 3 April 1996, he pleaded not guilty to all 13 counts of the initial indictment. Considering that others on the indictment were still at large, and in order for the trial to progress, the prosecution moved to separate his indictment from the other accused. Six additional counts were added to more appropriately reflect *Blaškić*’s alleged conduct. The first amended indictment was issued on 22 November 1996 and, on 4 December 1996, *Blaškić* pleaded not guilty to all counts against him in this new indictment.

¹⁵ ICTY Rules rev. 50, Rule 87(A), see *supra* note 3.

¹⁶ ICTY, *Prosecutor v. Kordić et al.*, OTP, Indictment, November 1995, IT-95-14-I (<http://www.legal-tools.org/doc/0e94ad/>).

¹⁷ Philip Shenon, “Croatian General Plans to surrender to Hague Tribunal”, in *New York Times*, 31 March 1996 (<http://www.legal-tools.org/doc/7f48b0/>).

A plea of not guilty was registered to the second amended indictment, filed on 25 April 1997 with a corrigendum filed on 16 March 1999. Although all counts still stood, the second amended indictment contained more specific allegations as to the scope of his alleged culpability in both temporal and geographical terms, as well as more specific allegations with regard to the type of responsibility with which he had been charged. This amended indictment initially charged the accused with one additional count (count 2, devastation not justified by military necessity); however, this count was withdrawn by the prosecution because it had been already covered in the other areas of the same indictment. The reality is that in April 1996, when Blaškić ‘voluntarily surrendered’, the OTP was not ready for trial. Investigations furiously continued, not only through both indictments, but also well into the trial which began in June 1997. I recall the Senior Prosecutor, in his typical stoic fashion, likened the prosecution of this case to assembling a Jumbo jet while at the same time piloting it across the Atlantic. In all fairness, in 1995 the ICTY and its Prosecutor were under immense pressure to issue indictments. Accounts of on-going serious violations of international humanitarian law in the former Yugoslavia were still being widely reported by the UN and non-governmental organisations.¹⁸ The Tribunal had not achieved very much since its establishment in May 1993, although initial expectations – by a paralysed international community – were unrealistically high.¹⁹ Later the ICTY would deliver in much fuller measure, eventually trying both Radovan Karadžić and Ratko Mladić – the two individuals for whom truly the Tribunal was established. Hardly anyone, including myself, believed in 1995 that those trials would ever take place.

2.2. The Creation of the Khmer Rouge Tribunal and Pre-Investigative Activities at the ECCC

I spent November 2009 to September 2013 as the International Co-Prosecutor of the ECCC.

The French, who had arrived as a colonial power in Cambodia in the middle of the nineteenth century, superimposed their civil law system onto the traditional Khmer conciliatory system of justice. The French sys-

¹⁸ See, for example, Human Rights Watch, “The Fall of Srebrenica and the Failure of UN Peacekeeping”, 15 October 1995.

¹⁹ Diane Orentlicher, *Some Kind of Justice: The ICTY's Impact in Bosnia and Serbia*, Oxford University Press, 2018, pp. 127-129.

tem was maintained by the Kingdom of Cambodia after it was granted self-governing status in 1949 and after the country became fully independent in 1953. In 1975, the Khmer Rouge destroyed the Cambodian legal system along with all other institutions that were connected with Western liberal democratic principles.²⁰ Prosecutors, judges and law professors were murdered or forced to flee the country.²¹ Court buildings and the national law school were converted to other uses.²² At the end of the Khmer Rouge period of destruction, there were an estimated six to ten Cambodian legal professionals still alive.²³ Vietnam invaded Cambodia in December 1978 and by 8 January 1979 had occupied the entire country. Cambodia remained under Vietnamese occupation from 1979 to 1991, during which time the Cambodian legal system was heavily influenced by Vietnamese socialist legal principles. During the period 1991 to 1993, the United Nations Transitional Authority in Cambodia, amongst its many duties, assisted with legal and judicial reform. It was during this period that Anglo-Saxon common law principles came to influence the Khmer system. The new Cambodian Criminal Code of 2009 – the year I was appointed to the ECCC – was drafted by the Cambodian Ministry of Justice, assisted by French experts under the French co-operation project. There are myriad influences on what is now the law of Cambodia, but for myself, as a lawyer trained in the English common law system, and having also worked in the international criminal jurisdictions, the ECCC and the national criminal courts of Cambodia most closely resemble what I understand to be the French civil law scheme. The two most important and distinctive attributes of the ECCC are that a judge – or in the ECCC’s case, two judges – carry out the formal criminal investigation and the victims are not just witnesses but are civil parties to the investigation, trial, and appellate proceedings. Oddly, the trials themselves at the ECCC, as I recall them, were very much adversarial in nature. I remember the first international co-investigating judge, Judge Marcel Lemonde, who was French, stating to me that the civil law system would eliminate lengthy

²⁰ See generally Elizabeth Becker, *When the War was Over: Cambodia’s Revolution and the Voices of Its People*, Simon & Schuster, 1986; Michael Vickery, *Cambodia: 1975-1982*, South End Press, 1984; David Porter Chandler, *The Tragedy of Cambodian History: Politics, War and Revolution since 1945*, Yale University Press, 1992.

²¹ *Ibid.*

²² *Ibid.*

²³ Peter J. Hammer, “Killing the Khmer Rouge”, in *Journal of the International Institute*, 2000, vol. 7, no. 2.

confrontational trials because the investigating judges were supposed to “establish the truth investigating both incriminating and exonerating evidence equally”. The trial would be a short affirmative process largely upholding the findings of the investigating judges. Unfortunately, civil law principles did not achieve the aim of brief trials, most likely because of the volume of evidence involved in trials before the ECCC and the fact that many of the participants in the trials, including international judges and counsel, were from common law systems.

The ECCC was finally established in 2006 after almost 10 years of negotiations between the United Nations and the Cambodian government. On 11 April 1997, the Human Rights Commission had requested the Secretary General, in collaboration with the Human Rights Centre in Cambodia, to “examine any request by Cambodia for assistance in responding to past serious violations of Cambodian and international law as a means of bringing about national reconciliation, strengthening democracy and addressing the issue of individual accountability”.²⁴ On 21 June 1997, the First and Second Prime Ministers of Cambodia wrote to the Secretary General requesting the help of the United Nations and international community in bringing to justice those persons responsible for genocide and crimes against humanity.²⁵ The letter apparently was unexpected by Kofi Annan, then Secretary General, but was transmitted, on 24 June 1997, to both the Security Council and the General Assembly.²⁶ I have always found it utterly remarkable that this letter from the joint prime ministers was ever sent at all to the UN. By the end of June 1997, the two signatories to the letter had been in a bitter dispute, violence had broken out between their respective military forces and by 4 July 1997, Prince Rannaridh, the First Prime Minister, had fled the country.²⁷

But by 1997, accountability for these most serious crimes, which put international peace and security at such extreme risk, was at the forefront of the United Nations agenda and so every effort would be made to

²⁴ United Nations Commission on Human Rights, *Situation of Human Rights in Cambodia*, 11 April 1997, E/CN.4/RES/1997/49, para. 12 (<http://www.legal-tools.org/doc/febb30/>).

²⁵ Identical letters dated 23 June 1997 from the Secretary-General addressed to the President of the General Assembly and to the President of the Security Council, 24 June 1997, UN Doc. A/51/930 and S/1997/488, Annex.

²⁶ *Ibid.*

²⁷ Brad Adams, “Cambodia: July 1997: Shock and Aftermath”, in *Human Rights Watch*, 27 July 2007 (<http://www.legal-tools.org/doc/15b1b4/>).

ensure that mechanisms would be established to deal with both historical and current crimes. I recall that time in the late 1990s so clearly now. I was in my mid-thirties with a young family. I was working round the clock with a fantastically committed group of prosecutors, investigators, legal advisers and support staff at the ICTY. By 1999, we had completed *Blaškić* and I was junior counsel on the first prosecution for events at Srebrenica. While those real horrors were making themselves known to a disbelieving world, I recall we all felt so empowered by what we were doing. It was the most important legal work that most of us would ever do, and while it was very challenging at times, there was a constant sense of hope and optimism, which was simultaneously energising and intoxicating. That hope and optimism carried most of us through the tragedy and terrors we were dealing with every day in the courtroom or out in the field. Indeed, in the year before, in 1998, harnessing the powerful momentum generated both by the ICTY and its counterpart for Rwanda, the Rome Statute had been signed, paving the way for a permanent international criminal court. For the first time since 1945, many of us, who had grown up during the frightening uncertainty of the Cold War, truly felt we were part of a new endeavour – “a new world of law, where the strong are just and the weak secure and the peace preserved”.²⁸

The negotiations regarding the agreement to form the ECCC were “protracted and, at times, difficult”.²⁹ In 1999, a UN Group of Experts had recommended an international tribunal, like the ICTY, as the safest and fairest forum in which to adjudicate the massive crimes of the Khmer Rouge. The Cambodian government rejected this proposal and then rejected a subsequent UN proposal for a mixed court with a majority of international judges and an independent, international prosecutor. But the UN and the international community did not give up and, on 31 March 2003, the Secretary General and the Cambodian government finally settled a draft agreement on the formation of a court to prosecute the crimes of the Khmer Rouge.³⁰ The General Assembly then approved the draft agreement on 13 May 2003 and by the same resolution decided that the ECCC would be funded by voluntary contributions. This funding mecha-

²⁸ John F. Kennedy, Inaugural Address, 20 January 1961 (<http://www.legal-tools.org/doc/4f69f7/>).

²⁹ *Ibid.*

³⁰ Report of the Secretary-General on Khmer Rouge Trials, UN Doc. A/57/769, 31 March 2003 (<http://www.legal-tools.org/doc/410b6c/>).

nism unfortunately led to many problems in future years, with weary donors and the court lasting many more years than was predicted at its establishment.³¹ The agreement on establishing the court was eventually signed by the United Nations and the Cambodian government on 6 June 2003.³² The Agreement was ratified by Cambodia on 19 October 2004 and it entered into force on 29 April 2005.³³ Since the ECCC was to be a domestic court, the Cambodian legislature would have to implement legislation to create it, which they duly did by the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the prosecution of Crimes committed during the period of Democratic Kampuchea.³⁴

The ECCC that was eventually established was on the basis of a mixed Cambodian/international model – a hybrid court. For example, in the Trial Chamber there were five judges, three of whom, including the presiding judge, were Cambodian, and two of whom were international judges.³⁵ In the Supreme Court Chamber, which was the court of final instance, there were seven judges, four of whom including the president were Cambodian and three were international judges – in my time from Poland, Sri Lanka and Japan.³⁶ In terms of decision making, you needed in the normal course the affirmative votes of four out of five judges in the Trial Chamber (so all three Cambodian judges plus one international judge or both international judges and two out of three Cambodian judges – this latter permutation I never witnessed).³⁷ Reflecting the rest of the

³¹ Resolution Adopted by the General Assembly: 57/228B Khmer Rouge Trials, UN Doc. A/RES/57/228/B, 22 May 2003 (<http://www.legal-tools.org/doc/533d2a/>).

³² Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea, 6 June 2003, registration no. 41723, amended 27 October 2004, ('Cambodia/UN agreement') (<http://www.legal-tools.org/doc/3a33d3/>).

³³ Ministry of Foreign Affairs and International Cooperation, Cambodia, Instrument of Ratification on the Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, 19 October 2004 (<http://www.legal-tools.org/doc/16524b/>); and Cambodia/UN agreement, Article 32, see *supra* note 32.

³⁴ Cambodia, Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea, 10 August 2001, 27 October 2004 (promulgated), NS/RKM/0801/12 (<http://www.legal-tools.org/doc/88d544/>).

³⁵ *Ibid.*, Article 9 new.

³⁶ *Ibid.*

³⁷ *Ibid.*, Article 14 new.

court, there was a Cambodian prosecutor and an international prosecutor together called the ‘Co-Prosecutors’.³⁸ In my time as the International Co-Prosecutor, I genuinely had a very good working relationship with my national counterpart and I tried hard at all times to reach consensus with her on our activities. She did the same with me. We were not always successful. The process of dealing with disagreements between the Co-Prosecutors was an elaborate one. Where consensus could not be reached between the two, it had to be determined by a majority decision of the Pre-Trial Chamber (so four out of three Cambodian judges and two international judges). If the Pre-Trial Chamber could not reach a majority decision, the disputed action of a single Prosecutor always went forwards.³⁹ So, in fact, in the event of a disagreement, neither Prosecutor could stop the other from going forward with a prosecution.

The role of the Co-Prosecutors at the ECCC, prior to trial, was expressly limited to the supervision of a pre-investigative phase, although the Co-Prosecutors could participate in the judicial investigation along with the defence and civil parties by making requests of the Co-Investigating Judges to carry out further investigation.⁴⁰ The commencement of a preliminary examination, or preliminary investigation as it was called at the ECCC, by the Co-Prosecutors was based on either a complaint or information provided by a victim or witness to crimes, or by an organisation representing such victims or witnesses providing information to the Co-Prosecutors.⁴¹ Oddly, these complaints did not compel the Co-Prosecutors to commence a preliminary investigation. The Co-Prosecutors could include a complaint as part of the preliminary investigation, reject it, forward it direct to the Co-Investigating Judges or simply conduct their own investigation based on their own information.⁴² The extent of the Co-Prosecutors’ preliminary investigations was to determine whether evidence “indicates” that crimes within the jurisdiction of the ECCC have been committed and to identify suspects and potential witnesses.⁴³ Once the Co-Prosecutors had gathered sufficient evidence so they had “reason

³⁸ *Ibid.*, Article 16.

³⁹ *Ibid.*, Article 20 new.

⁴⁰ ECCC, *Internal Rules (Rev. 9)*, 16 January 2015, Rule 55(10) (<http://www.legal-tools.org/doc/b8838e/>).

⁴¹ *Ibid.*, Rule 49.

⁴² *Ibid.*, Rule 49(4).

⁴³ *Ibid.*, Rule 50(1).

to believe” crimes within the jurisdiction of the court had been committed, they would transmit an Introductory Submission to the Co-Investigating Judges. The Introductory Submission had to contain certain basic details including a summary of the facts, the type of offence(s) alleged, the relevant provisions of the law that defines and punishes the crimes, and the name of any person to be investigated.⁴⁴ The rule dealing with the content of an Introductory Submission has extensive provision on the Co-Prosecutors’ obligations with respect to exculpatory material. The case file submitted to the Co-Investigating Judges had to include any evidence within the actual knowledge of the Co-Prosecutors that may be exculpatory.⁴⁵ Also, there appears to be an ongoing obligation on the Co-Prosecutors to disclose to the Co-Investigating Judges any material that within the actual knowledge of the Co-Prosecutors may suggest the innocence or mitigate the guilt of the suspect or the charged person, or affect the credibility of the prosecution evidence.⁴⁶ It is worth emphasising that these extensive obligations with respect to exculpatory evidence commences at the pre-investigative stage. No other court imposed such an obligation in respect of material that undermined the Prosecution’s case at this preliminary stage of the investigative process. One suspects two factors influenced these early vital obligations in respect of exculpatory evidence being incorporated into the Rules. First, the civil law system has historically always demanded a search for the truth and an investigation that must by design investigate information that points towards both guilt and innocence. Second, the early international staff at the court had extensive experience of all the problems surrounding the collection and disclosure of exculpatory material at the *ad hoc* tribunals. Unfortunately, the Introductory Submissions of the ECCC are all confidential documents, made so because they contain preliminary unproven allegations against the accused and also to protect the safety of those witnesses who provided evidence which formed the basis of those submissions.

In hindsight, the legal procedures of this court were some of the best suited and fairest, at least on paper, of any of the courts that were specially established to deal with these mass crimes, with three significant features: (i) judicially led investigations, where, at least theoretically, the

⁴⁴ *Ibid.*, Rule 53(1).

⁴⁵ *Ibid.*, Rule 53(2).

⁴⁶ *Ibid.*, Rule 53(4).

judges were politically independent and had no investment in the outcome of any trial; (ii) an ongoing obligation on the Co-Prosecutors to disclose to the investigating judges all exculpatory material and an obligation on the independent judges to investigate both incriminating and exonerating material equally;⁴⁷ and (iii) a formal investigation, where the prosecution, the defence and victims could participate in the judicial investigation by making investigative requests of the Judges.⁴⁸

The legacy of the ECCC is still evolving. While there have been harsh critics, I forecast that history may be kinder to the court than we could anticipate today. Brad Adams, the highly respected Asia Director of Human Rights Watch, stated of the ECCC in August 2014 after the verdict in Case 002(1):

It is a sad indictment of the Khmer Rouge tribunal that after seven years and the expenditure of more than US\$200 million, Cambodians now face the prospect that only three people will be held legally accountable for the destruction of their country,” Adams said. “Men who ordered the deaths of tens of thousands of people are being allowed by Hun Sen and an indifferent international community to live out their lives in freedom, often in the same village or on the same street as their victims.⁴⁹

The debate about the paucity of results and political interference in the ECCC will rumble on, but I do question whether the ‘no court at all’ option would have been better than the ECCC. There would never have been a perfect court in Cambodia, indeed no such international court has yet been created. Moreover, there would never have been trials at the ECCC of the thousands of still living members of the Khmer Rouge in Cambodia. This was never intended by the Cambodian government or the international community. The court was established to try the senior leaders of the Khmer Rouge and those most responsible for crimes committed during the Khmer Rouge period. It is fair to claim that the court has tried all the still living senior leaders of the Khmer Rouge. The court has only tried three individuals, Kang Kek Lew (Comrade Duch), Nuon Chea, and Khieu Samphan, who can be categorised as the individuals most responsi-

⁴⁷ *Ibid.*, Rule 55(5).

⁴⁸ *Ibid.*, Rule 55(10).

⁴⁹ Human Rights Watch, “Cambodia: Khmer Rouge Convictions ‘Too Little, Too Late’”, 8 August 2014 (<http://www.legal-tools.org/doc/420cab/>).

ble for crimes committed during the Khmer Rouge period.⁵⁰ It is possible, although improbable, that there will be more trials after Case 002(2) of individuals who fall into the category of those ‘most responsible’.

The ECCC has succeeded in other tangible respects. While International Co-Prosecutor, I travelled to the many public forums the court organised across the country and I always found local Cambodians acutely interested in the progress of justice at the ECCC and seeking answers to what took place during the Khmer Rouge period. Also, survivors and relatives of victims were keen to movingly tell their family stories. I also recall that the public gallery of the ECCC, with a capacity for 500 members of the public to attend, was almost always full every day when the court was in session. By July 2017, over 390,000 Cambodians had attended proceedings before the court.⁵¹ This is a level of public participation unprecedented in any other international criminal legal institution.

It should also be emphasised that this court was faced with significant obstacles because of the substantial period of time that had passed since the commission of the crimes. No worthwhile forensic evidence remained after the passage of nearly thirty years and many witnesses had died. Those remaining often had imperfect recollection of the trauma and violence of three decades ago. The relative merit of this historic court will be debated for decades to come. One man whom I came to respect more than any other in Phnom Penh was Youk Chang, who himself suffered as a child under the regime and lost his own sister in the most terrible circumstances during the cataclysm which was the Khmer Rouge. Escaping from the Khmer Rouge regime, he eventually made his way to the United States where he rebuilt his life. On returning to Cambodia, he relentlessly drove the creation and development of the organisation called the Documentation Centre of Cambodia, which would collect and record the documentation of the Khmer Rouge regime in the most methodical and meticulous manner I have ever seen. He allowed me to accompany him as he travelled the country with his staff, teaching his fellow Cambodians about the Khmer Rouge. Youk was the most committed human rights activist I have ever met and his presence was always an inspiration for us all. He

⁵⁰ ECCC, *Closing Order Indicting Kaing Guk Eav alias Duch (Case 001)*, 8 August 2008, D99; ECCC, *Closing Order Indicting Nuon Chea and Khieu Sampahn (Case 002)*, 19 September 2007, D427.

⁵¹ ECCC, “Information for Media”, available at <https://www.eccc.gov.kh/en/information-media>, last accessed at 14 April 2018.

could be a fierce critic of the ECCC at times but his observations were mostly fair and accurate. While acknowledging the courts obvious flaws, he said this in 2017:

Without the Khmer Rouge Tribunal, Cambodia would not be able to record and preserve the history of the Khmer Rouge regime for future generations and establish a critical foundation for the rule of law, which is very vital for national reconciliation in Cambodia.⁵²

That is Youk Chang's personal life-time mission. To preserve the truth of what had taken place during the rule of the Khmer Rouge so future generations in Cambodia and across the world would never forget. Equally important for him is to create the foundations for the rule of law in Cambodia. That this decent man asserted that without the ECCC these aims would not be met is enough foundation for me to justify the creation and existence of this most challenging of the international courts.

2.3. Pre-Investigative Activities and Complementarity in the United Kingdom in Relation to the Iraq/UK Preliminary Examination

Allegations against UK armed forces operating in Iraq between 2003 and 2009 have been the subject of a preliminary examination by the ICC since May 2014.⁵³ Coalition forces, of which the UK was a part, entered Iraq in March 2003.⁵⁴ Combat operations ended in May 2003 and there then followed a period of occupation until 28 June 2004 with UK forces responsible for security and supporting the civilian administration in the city of Basra.⁵⁵ UK forces stayed another five years supporting the Iraqi authorities until their departure in 2009. Some limited number of troops stayed on until 2011.

Since 1 December 2013, I have been the UK's Director of Service Prosecutions ('DSP').⁵⁶ I am the head of the Service Prosecuting Authori-

⁵² Tom Fawthrop, "Cambodia's Khmer Rouge Tribunal: Mission Accomplished?", in *The Diplomat*, 17 July 2017.

⁵³ Fatou Bensouda, *Report on Preliminary Examination Activities 2017* (<http://www.legal-tools.org/doc/e50459/>).

⁵⁴ "British troops move into Basra", in *The Guardian*, 7 April 2003.

⁵⁵ Human Rights Watch, "Basra: Crime and Insecurity Under British Occupation", 2 June 2003.

⁵⁶ UK, House of Commons Debates (*Hansard*), 8 October 2013, vol. 568, written statements, defence.

ty ('SPA') and, as such, the lead service prosecutor in the country.⁵⁷ Under the Armed Forces Act 2006, I am responsible for the prosecution of persons subject to service law for service offences wherever they may have been committed in the world, including in Iraq.⁵⁸ Service offences include war crimes and offences that are domestic crimes under English and Welsh criminal law. Persons subject to service law in the United Kingdom are primarily members of the Royal Navy, the British Army and the Royal Air Force although, in certain circumstances, civilians can also be subject to service jurisdiction.⁵⁹

The Iraq Historic Allegations Team ('IHAT') was set up in March 2010 by the then Labour Government to address two sets of allegations against UK forces arising from their service in Iraq: first, the unlawful killing of Iraqi civilians in UK custody and second, allegations of abuse of detained Iraqis.⁶⁰ IHAT continued under the subsequent coalition government elected in 2010. It was then seen as a body that would satisfy the UK's legal obligations under the Armed Forces Act 2006 and the European Convention on Human Rights. In 2014, after the reopening of the ICC preliminary examination in respect of Iraq, IHAT would also be seen as an instrument to satisfy UK obligations under the Rome Statute.⁶¹ Although the mandate of IHAT was originally limited to allegations of abuse and the death of Iraqis in British custody, it was then expanded to include all alleged unlawful Iraqi deaths that were the result of actions of the UK forces in Iraq.⁶²

IHAT was originally composed of members of the Royal Military Police ('RMP') and was under the command of the Provost Marshall (Army).⁶³ In 2011, the Court of Appeal of England and Wales held that IHAT

⁵⁷ UK, Armed Forces Act 2006, 8 November 2006, Sections 364 and 374 (<http://www.legal-tools.org/doc/73ec98/>).

⁵⁸ Armed Forces Act 2006, 31 October 2006, ss. 50-51.

⁵⁹ *Ibid.*, Sch. 3 Pt. 1.

⁶⁰ Arabella Lang, *Iraq Historic Allegations Team*, House of Commons Library, 22 January 2016, Briefing Paper No. 7478.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ The Provost Marshalls are the head of the service police branches. There is one each for the Royal Navy, Army and Royal Air Force all having their own police forces.

was not sufficiently independent because of the involvement of members of the RMP who were previously involved in operations in Iraq.⁶⁴

The problem is that the Provost Branch [Royal Military Police] members of IHAT are participants in investigating allegations which, if true, occurred at a time when Provost Branch members were plainly involved in matters surrounding the detention and internment of suspected persons in Iraq. They had important responsibilities as advisers, trainers, processors and “surety for detention operations”. If the allegations or significant parts of them are [sic] true, obvious questions would arise about their discharge of those responsibilities. SIB, GPD and MPS members would all come under scrutiny.⁶⁵

In essence, the Court found that the RMP would be investigating culpable acts in which they themselves may have played a part.⁶⁶ In light of this judgment, IHAT had to shed its RMP investigators, come under the functional command of the Provost Marshall (Navy) and employ civilian investigators who were recruited from retired Home Office police officers.⁶⁷ The SPA confronted exactly the same challenge where uniformed lawyers from the Army Legal Services had provided legal advice and surety for detention centres in Iraq and had advised the chain of command in respect of fatal shootings of Iraqis that in many cases were now the subject of homicide investigations by IHAT. Consequently, those lawyers of the SPA who were advising on IHAT investigations had to be selected from the Royal Navy and the Royal Air Force. It also became necessary to bring in a number of civilian lawyers from the English and Northern Irish Bars as well as the Crown Prosecution Service to work on IHAT cases.

In *R (Ali Zaki Mousa) v. Secretary of State for Defence*⁶⁸ (‘AZM 2’), the Divisional Court criticised the absence of appropriate input from the DSP in the homicide cases that were being addressed by IHAT. The Court, consisting of the then President of the Queen’s Bench Division, Sir John Thomas, and Silber J., said:

⁶⁴ UK Court of Appeal (Civil Division), *R (Ali Zaki Mousa) v. Secretary of State for Defence* [2011] EWCA Civ 1334, 22 November 2011 (‘AZM’) (<http://www.legal-tools.org/doc/850e6d/>).

⁶⁵ *Ibid.*, para. 36.

⁶⁶ *Ibid.*, para. 37.

⁶⁷ IHAT (n 26).

⁶⁸ [2013] EWHC 1412 (Admin) and [2013] EWHC 2941 (Admin).

The Director of Service Prosecutions is a lawyer of very considerable distinction and experience. He should have been involved in making a decision at the outset of each case involving death referred to IHAT as to whether prosecution was a realistic prospect and, if there was something to suggest it might be, in directing the way that the inquiry was to be conducted and in a regular review of each case to see if a prosecution remained a realistic possibility.⁶⁹

These very complimentary remarks were directed by the Court at my predecessor Bruce Houlder CB QC DL. In fact, the SPA had been providing on-going legal advice on those cases under investigation by IHAT, including death cases, since 2010.

However, it was clear that by 2013, the courts required much closer involvement of SPA lawyers with on-going IHAT investigations and so, on my appointment at the end of 2013, I created an IHAT prosecution team, which would eventually be housed in secure offices separate from the main premises of the SPA at RAF Northolt in West London. Moreover, in consultation with the Director of IHAT, it was decided that at least three SPA lawyers would be co-located with the IHAT headquarters at Upavon over 80 miles away from the SPA headquarters. So, SPA prosecutors would work alongside IHAT investigators in shaping the investigations and providing legal direction on the development of cases in much the same way as lawyers in the international courts now work closely with those conducting the investigations. Such collaboration has the dual benefit of quickly prioritising and advancing cases with a realistic prospect of gathering sufficient evidence to consider criminal charges and prosecution, as well as rapidly discontinuing those without.

In the AZM 2 judgement, handed down on 2 October 2013, the Divisional Court also appointed a High Court Judge, Mr. Justice Leggatt, as Designated Judge “to have overview of the [IHAT] inquiries and to hear applications relating to general issues in dispute as to the overall conduct of the inquiries and for the judicial review of decisions made in the inquiries”.⁷⁰ IHAT and the SPA were thus required to report to Leggatt J. on a regular basis on our progress.

⁶⁹ At paragraph 182 of the first judgment given in May 2013.

⁷⁰ This is a summary of paras. 4–6 of the judgement in the Divisional Court’s Order dated 31 October 2013, para. 1(i).

The ICC had previously conducted a preliminary examination in respect of allegations linked to Iraq, which had concluded in February 2006.⁷¹ This first preliminary examination had closed making several findings. Most importantly:

After analysing all the available information, it was concluded that there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed, namely wilful killing and inhuman treatment.⁷²

However, the OTP found in 2006 that the number of victims did not meet the gravity threshold so the matter was taken no further and the preliminary examination was closed.⁷³ On 10 January 2014, the European Center for Constitutional and Human Rights ('ECCHR') together with Public Interest Lawyers ('PIL') submitted an Article 15 communication alleging the responsibility of United Kingdom officials for war crimes involving systematic detainee abuse in Iraq from 2003 until 2008.⁷⁴ The senders also submitted additional information in support of these allegations on several occasions during the reporting period.⁷⁵

On 13 May 2014, the Prosecutor of the ICC announced that the preliminary examination of the situation in Iraq, previously concluded in 2006, would be re-opened following the submission of further information on alleged crimes within the 10 January 2014 communication.⁷⁶

Within six months of my appointment as the DSP, IHAT and the SPA were confronted with an extremely challenging environment in which to operate. Our role was domestically unpopular; we were being constantly criticised in the media by lawyers acting for the Iraqi complainants; a High Court judge was overseeing our work; and the ICC was then scrutinising all we were doing. I always believed we could not be realistically chastised because I could see, with all the benefit of my international work and experience, that the processes we had adopted and were refining were focused, comprehensive and effective.

⁷¹ OTP, "OTP response to communications received concerning Iraq", 9 February 2006 (<http://www.legal-tools.org/doc/5b8996/>).

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ ICC OTP, *Report on Preliminary Examination Activities 2014*, 2 December 2014 (<http://www.legal-tools.org/doc/3594b3/>).

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

The two-pillar pre-investigative processes of IHAT were some of the most rigorous I have ever seen throughout an international career spanning 22 years and including service in the ICTY, the ICC, the SCSL and the ECCC.

The first pillar – the pre-investigative process – was developed in 2013 and 2014 to apply the earliest possible ‘sift’ to new cases received by IHAT:

1. The IHAT Command Team receives an allegation from one of two law firms or the Ministry of Defence, or IHAT itself generates a new allegation as a result of its investigation of an existing allegation;
2. The Major Incident Room and Strategic Support Team (‘SST’) check the allegation against their respective databases;
3. The SST meets to consider whether the allegation meets the ‘initial assessment threshold’, namely, whether there is a possible (new) serious offence committed by UK armed forces disclosed by the allegation. In addition, the sift identifies and prioritises cases according to a sensible list of priorities – briefly: deaths being a priority, followed by ‘serious’ ill treatment, for example, rape, grievous bodily harm, ill-treatment which may amount to a ‘war crime’ under the Rome Statute and then other less serious ill-treatment;
4. If the allegation reveals a new serious offence, the IHAT Command Team – in practice the Deputy Head – considers the papers and the SST recommendation. If he considers it appropriate, the Director of IHAT writes to the Provost Marshall (Navy), asking him to endorse the decision to investigate; and
5. The Provost Marshall (Navy) decides whether to allocate the case to IHAT. The approval of the IHAT Command Team is generally a formality.

It then goes through the second pillar – the pre-investigative process for allegations of ill-treatment:

6. The case is ‘triaged’ by the SST – in practice by the Deputy Head of IHAT. This involves a decision as to whether the case involves allegation(s) of ‘serious’ ill treatment or of other key priority offences such as rape. If it does, the process of interviewing relevant witnesses commences. If it does not, it is assessed for its possible connexion to another ongoing investigation to check for systemic issues

or patterns of crimes such as an allegation involving an individual or unit accused of a crime. Very few cases that have got this far fall out at this stage.

7. The complainant is normally interviewed first, since the information contained in the original complaint received from one of the two law firms is often very brief. The case is then subjected to a second stage triage again to check for systemic issues.
8. A Case Assessment Manager then begins to prepare a report called the Pre-Investigation Summary ('PIS') with accompanying documents. A third stage triage is conducted by the SST or the Director of Intelligence for systemic issues.
9. The Case Assessment Manager or the Director of Intelligence presents the PIS to the IHAT Command Team – in practice the Deputy Head – for checking. Once checked, the PIS and relevant documents are then presented to a designated Iraq Historic Allegations Prosecution Team ('IHAPT') lawyer for advice.
10. The lawyer then considers the case and produces a 'point brief' for the consideration of the DSP. This point brief and the PIS is then considered by the entire team of IHAPT lawyers, who discuss the case at a 'pre-meeting'.
11. The Joint Case Review Panel ('non-fatal') is attended by the IHAT Command Team, the entire IHAPT team and the DSP. The Panel reviews the case with the benefit of the IHAPT lawyer's (oral) advice (and, if this is the case, any 'dissenting judgment' from colleagues).
12. Following the meeting, the IHAPT lawyer settles their advice in writing and provide it to the IHAT Command Team.
13. The Director of IHAT or the Deputy Head then decides whether to embark on an investigation.

Allegations of unlawful killing are dealt with separately but involve a broadly similar process to that of allegations of ill-treatment.

IHAT became the subject of an increasing amount of criticism in the media, which reached a crescendo in 2016 and eventually centred on a media narrative that the investigative process was a 'witch-hunt' that was

unfair and taking far too long to reach a conclusion.⁷⁷ Service personnel under investigation felt persecuted and unsupported.⁷⁸

Alarmed by the constant negative media coverage of IHAT's activities, there was, quite rightly, increasing concern in government at the cost and length of time IHAT was taking to complete its mandate. As a result, in April 2016, the highly distinguished lawyer Sir David Calvert Smith, former Director of Public Prosecutions and a retired High Court judge, was commissioned to review the processes of IHAT and make recommendations on the current methods in place to review and process complaints. The essence of his brief was to, if possible, speed things up.

One of Calvert Smith's terms of reference included identifying how IHAT processes could be conducted in a manner that enabled, at the earliest possible time, identification of cases that could never result in a prosecution. This was important because in many instances, serious allegations, some involving homicide, had consisted of a two or three-line unsigned statement from an Iraqi witness which gave IHAT investigators very little material with which to develop a case. Calvert Smith made several recommendations to streamline the IHAT and SPA processes to speed up the investigative and decision-making processes of both organisations.⁷⁹

In 2016, in one of the regular appearances of IHAT and the SPA before Leggatt J., my deputy, Darren Reed, proposed a test to the Court which would address this problem of the often scant evidence relied on to proceed. The test was endorsed by the judge:⁸⁰

I therefore agree with the DSP that it is appropriate to ask at an early stage whether there is a realistic prospect of obtaining sufficient evidence to charge an identifiable individual with a service offence. If it is clear that the answer to this question is "no", there can be no obligation on IHAT to make any further enquiries. In some cases where the answer is not immediately clear, it may well be possible to identify one or more limited investigative steps which, depending on their

⁷⁷ "Revealed: MPs to demand end to witch-hunt of British troops in Iraq after 10-month inquiry", in *The Telegraph*, 4 February 2017.

⁷⁸ "Accused soldiers must have proper support", in *The Telegraph*, 18 September 2016.

⁷⁹ Sir David Calvert-Smith, "Review of the Iraq Historic Allegations Team" (<http://www.legal-tools.org/doc/35793d/>).

⁸⁰ UK High Court of Justice, *Al-Saadoon and others v. Secretary of State for Defence* [2016] EWHC 773 (Admin), 7 April 2016 (<http://www.legal-tools.org/doc/97d1d3/>).

outcome, may lead to the conclusion that there is no realistic prospect of meeting the evidential sufficiency test. Examples of such steps might be carrying out a documentary search or interviewing the complainant or a key witness. It goes without saying that it will be a matter for the judgment of the Director of IHAT in any particular case how the test formulated by the DSP is applied.⁸¹

This was an extremely important development because it gave judicial backing to the elimination of the many hundreds of cases where there was really no prospect whatsoever of developing a case where you could charge an identifiable individual with a service offence – for example, where you had a bare allegation of a deceased Iraqi killed by gunshot wound in Basra in 2004 but no means whatsoever of knowing who had fired the shot. Basra then was a dangerous and unstable city with many armed groups and civilians. An allegation may have been made that it was UK forces who fired the shot but of course, that had to be proven to the criminal standard. You at least required evidence identifying it was British forces who fired the fatal shot to take the allegation forward. In many cases, this was not possible. Thirteen years later, you had neither an autopsy report nor a corpse so you could not establish cause of death or recover the round to identify the calibre of the ammunition and thus link the shot with a particular type of weapon. And even if you could identify the calibre of the ammunition and link the weapon to British forces in Iraq, identifying who fired the shot after all these years was almost impossible in most cases. So, this ruling by Leggatt J. not only recognised the reality of the situation we faced in a significant number of cases, but also satisfied one of Sir David Calvert Smith’s principal terms of reference. That is, to eliminate early on those cases where there was almost no prospect whatsoever of the allegation leading to member of the UK forces.

Also in 2016, the Parliamentary Defence Sub-Committee of the United Kingdom, deeply concerned at the increasing level of legal scrutiny of the conduct of UK forces, commenced inquiry, amongst other matters, into the manner in which IHAT was conducting its enquiries and also

⁸¹ *Ibid.*, para. 283.

the level support which was provided by the Ministry of Defence to those under investigation.⁸²

Meanwhile on 2 February 2017, Phil Shiner of PIL, who was the lawyer acting for majority of the complainants in cases being addressed by IHAT, and had also filed the submissions to the ICC which led to the reopening of the preliminary examination in 2014, was struck off the Roll of Solicitors by the Solicitors Disciplinary Tribunal ('SDT') for professional misconduct in the Al-Sweady inquiry.⁸³ The SDT found allegations of misconduct when representing claims against British soldiers, including acting dishonestly, proven to the criminal standard of proof. While the findings of the SDT were limited to the Al-Sweady inquiry, the facts of which were not being investigated by IHAT, Shiner's dishonesty reverberated throughout the IHAT caseload.

The SDT findings against Shiner were devastating:

[Phil Shiner's] motivation had been to secure clients and high profile cases which brought with it reputational and financial reward. In order to ensure that nothing got in the way of that the Respondent had been willing to disregard his professional obligations, in some cases dishonestly. [...] The allegations against the British army, which were found to be false, had a significant impact on those individuals accused of carrying out atrocities.⁸⁴

Immediately on the heels of this came the findings of the Defence Sub-Committee, which published its final report on 9 February 2017. It found that IHAT was unfit for purpose and that there was deep unfairness at the heart of the organisation.⁸⁵ IHAT was described as: "a seemingly unstoppable self-perpetuating machine and one which has proved to be deaf to the concerns of the armed forces, blind to their needs, and profligate with its own resources". The Sub-Committee recommended the Secretary of State for Defence to set a firm and early date for the remainder

⁸² House of Commons Defence Sub-Committee, *Who guards the guardians? MoD support for former serving personnel: Sixth Report of Session 2016–17*, 10 February 2017 (<http://www.legal-tools.org/doc/7a0253/>).

⁸³ Solicitors Regulation Authority, "Professor Phil Shiner and the Solicitors Disciplinary Tribunal" (<http://www.legal-tools.org/doc/c95b3a/>).

⁸⁴ Solicitors Disciplinary Tribunal, *Solicitors Regulation Authority v. Philip Joseph Shiner*, Case No. 11510-2016, p. 76.

⁸⁵ Verdict on IHAT, *Professional Security Magazine*, 15 February 2017.

of the IHAT investigations to be concluded and for the remainder of its cases to be transferred to the Service Police for completion.

IHAT concluded its work on 30 June 2017 and the remainder of its cases were transferred to the Service Police Legacy Investigations ('SPLI').

The work of the SPLI is still ongoing and the SPA continues to provide advice and make decisions in respect of continuing investigations and referred cases. The SPA will carry out that role with all the rigour and scrutiny the law requires but undoubtedly, the scale of alleged wrongdoing by UK forces in Iraq has proven to be grossly exaggerated. There are several reasons for that exaggeration, including the incentive of financial gain for Iraqi complainants and the dishonesty of a once feted but now discredited human rights lawyer. The perverse financial incentive and the dishonesty of a British lawyer were not the fault of IHAT, which was presented with serious complaints it had to take at face value and act according to its mandate. Refined procedures for initial case-sifting now identify those cases which are either false or have little realistic prospect of successful advancement. In concluding this section, I would reiterate from my own engagement with IHAT, and now with the SPLI, that there are a small number of cases which involve allegations of mistreatment and deaths of Iraqis which do warrant proper inquiry and in some cases referral to the SPA for consideration of whether criminal charges should be brought under the Armed Forces Act 2006. In all these highly charged circumstances, which will dissipate with time, none of us should forget what Sir William Gage stated in his summary findings of the Baha Mousa inquiry:

Baha Mousa was a 26 year old Iraqi. He was a hotel receptionist in Basra and father of two young children. His wife died in February 2003, a month before British Forces took part in Op Telic. Early in the morning of Sunday 14 September 2003, Baha Mousa was arrested following a weapons find on Op Salerno, a series of hotel searches carried out by British Forces in Basra. Along with others, Baha Mousa was taken to the Temporary Detention Facility (TDF) at Battlegroup Main (BG Main), the headquarters of 1 Queen's Lancashire Regiment (QLR). He arrived at the TDF at about 10.40hrs that Sunday morning. He spent the most part of the next 36 hours "hooded" with a hessian sandbag over his head. He was forced to adopt "stress positions," a term used to describe any posture which someone is forced to maintain

which becomes painful, extremely uncomfortable or exhausting over time. Both techniques had been banned as aids to interrogation more than 30 years earlier. During his detention, Baha Mousa was subjected to violent and cowardly abuse and assaults by British servicemen whose job it was to guard him and treat him humanely. At about 21.40hrs on 15 September 2003, following a final struggle and further assaults, Baha Mousa stopped breathing. By that time he was in the centre room of the TDF, a small disused toilet, quite unfit as a place to hold a prisoner. All reasonable attempts were made to resuscitate Baha Mousa, to no avail. He was pronounced dead at 22.05hrs. A subsequent post mortem examination of his body found that he had sustained 93 external injuries.⁸⁶

We should remind ourselves that this was an exceptional albeit appalling event that does not represent the courageous, and law-abiding service of the majority of those British officers and soldiers who served in Iraq. Nevertheless, this chilling example shows that even a highly trained, professional and disciplined force can commit criminal acts during the stresses of a difficult military conflict. Moreover, Baha Mousa's violent death provides a powerful and continuing justification for the SPLI, supported by the SPA, to complete its mandate.

2.4. Conclusions

What is the worth of all this? The years pass and as with any field of law, and building a level of personal experience, one hopefully develops perspective and some degree of proportion in judgment. As I have highlighted already, Professor Morten Bergsmo so eloquently stated at the Peace Palace conference in June 2017, that all of us have a duty to speak the truth to those in senior positions who make the important decisions in these massive cases. That plea has particular force in respect of the early investigative decisions in these types of cases.

For all the remaining and ongoing challenges of the international criminal justice enterprise, we should each be proud of its rate of progress when compared to the evolution and civilisation of all our respective domestic criminal justice systems, which have taken centuries to reach their current levels of sophistication, rigour and fairness. International criminal

⁸⁶ The Rt. Hon. Sir William Gage, "The Report of the Baha Mousa Inquiry: Volume I" (<http://www.legal-tools.org/doc/acafaa/>).

justice has come so far and so fast in less than a single generation and much has been achieved and learnt.

It is a fact we are currently passing through a period of some atrophy and declining enthusiasm for international organisations and human rights. Not amongst the activists, who have never been more energetic, but we face a less accommodating and more complex international political environment than we did 20 years ago. The inability of the Security Council to refer Syria to the ICC is the most compelling example of this new international political landscape. But even in the shadow of that failure, individuals and organisations have courageously taken it upon themselves to gather evidence of monstrous crimes in Syria and the responsibility for those crimes. In December 2016, the General Assembly established the International Independent and Impartial Mechanism on international crimes committed in the Syrian Arab Republic, first, to collect, consolidate, preserve and analyse evidence; and second, to prepare files to facilitate and expedite fair and independent criminal proceedings in national, regional or international courts, in accordance with international law. Those national jurisdictions, where it is legally permissible, are gearing up to mount domestic prosecutions against members of the Syrian government for crimes against their own people. There is still so much to be done and to fight for in this extraordinary mission of hope.

I will conclude briefly with three sets of my most profound impressions linked to each section of this chapter:

1. Some leading figures have said that it is not the trials of these international cases that matter, the deterrent effect of the court in preventing massive crimes that does. Deterrence is vital, of course it is, but as in a domestic system, deterrence only works if the international criminal justice system generates cases which justly and effectively convict the guilty. If an individual, about to commit a crime against humanity, knows that if he does so his conduct will be competently and comprehensively investigated and prosecuted, he will think twice. If he believes the system is not up to it, there is no deterrence. At the ICTY, we learnt very early on that prior to indictment, as far possible, a case should be evidentially complete and ready for trial. And the absolute priority must always be on that evidence which proves responsibility for crimes – that evidence which links the accused to the crime or much more often to a multiplicity of crimes. The crimes themselves are always compelling and visible, but they

are the easiest part of the case to prove, whereas the evidence of personal responsibility requires the most challenging of collection plans. It involves locating incriminatory document trails and finding mid-level officials who, with inside knowledge, are prepared to turn and give evidence against those who are most responsible – with all the dangers that role entails. Documents recovered require intense and determined analysis by military and civilian analysts trained and experienced in the meticulous and painstaking process of building legal responsibility in these cases. The interviews of insider witnesses require a level of planning and preparation equal to the most complex and challenging of court room cross examinations.

2. At the ECCC, many lessons could be learnt now about the structure of future hybrid courts and the consequences of compromise, but those lessons are better left for that period after the court has finished its mandate and caseload. Part of the legal framework of the ECCC, and its operating base in the Kingdom of Cambodia, has made it extremely effective in giving the victims a meaningful and substantive role in the legal proceedings of the court – right from the start in terms of their influence and input over case selection. You could say victims and their relatives have some level of legitimate ownership of this court. I recall a Cambodian woman who had lost many of her relatives, including her mother, during the Khmer Rouge period. She had fled the regime to France as a child and returned to Phnom Penh to attend the judgment on appeal in Case 001. As a civil party, she sat inside the Trial Chamber and was moved to tears when Duch received a life term of imprisonment for his role in the S21 Security Camp. She told me she felt peace for her family for the first time in over 30 years. At the ICTY, we used to see victims only as witnesses, whereas at the ECCC they have been an integral part of the court's proceedings from the very beginning. And that was important as it gave us real purchase in seeking legitimacy amongst Cambodian victims and survivors. Like the Special Court for Sierra Leone, the ECCC has also made a point of organising outreach events across the country and engaging the Cambodian population *en masse* in the ongoing proceedings. As I have already stated, by July 2017, over half million Cambodians had sat in the public gallery following trial and appellate proceedings. Out of a total population of 16 million people, that is an extraordinary

achievement and only possible by situating the court at the scene of the crimes and making sure that bringing members of the public to observe trial and appellate proceedings is a priority for the court.

3. I have yet to properly collect all my thoughts from my time as the DSP and dealing with these allegations relating to UK forces and their time in Iraq. My instincts tell me IHAT has done a very thorough job although its role has been domestically extremely unpopular. The UK has demonstrated that complementarity can work. However, I now know we have also been misled by an English lawyer who has been found to be dishonest in making allegations against UK forces in Iraq and that has resulted in serious consequences for all the cases under consideration by IHAT and its successor body, the SPLI. The conclusions are probably manifestly obvious here and do not need to be expressly articulated by me: the domestic obligation for states to investigate allegations in respect of these very serious crimes, and the need for lawyers to go about their work with honesty and integrity. I recently presented the IHAT and SPA procedures, and the level of scrutiny we employ in every case, to a group of former and current international prosecutors and academics, at a yearly gathering at Chautauqua in upstate New York. Many were extremely impressed, some were surprised, by the degree of investment in this process, in particular when we have found so many allegations to have no substance. But that level of engagement and that level of uninterrupted investigation and determination, free of political corruption or influence, has made such a profound impression upon me having experienced several jurisdictions across the globe where the laws often only exist on paper – where law's impact, influence, and interpretation are prescribed by corrupt self-interested politicians. That is the reality in certain parts of the world and I confess I naïvely took the rule of law for granted in the UK. But on returning here after two decades absent, I have found that it is the long and cherished legacy of a democratic mandate, an irreducible minimum of effective protection of fundamental rights, including equality under the laws, finally administered by impartial and independent courts and judges. For all the challenges we have confronted in these Iraq cases, to sense that powerful legal turbine – the rule of law – invisibly turning uninterrupted day in and day out in our national courts and institutions is immensely reassuring.

The Concern for Quality Control and Norwegian Preliminary Examination Practice

Runar Torgersen*

3.1. Introduction

The topic of this chapter is the preliminary examination practice in the Norwegian legal system, and I therefore do not analyse other legal systems or international law. Given the general nature of the topic, I nonetheless hope that this domestic perspective could be of some interest to readers from other jurisdictions.

As a starting point, I will say a few words about how the distinction between preliminary examinations and formal investigation is drawn in Norwegian law (Section 3.2.). Based on this analysis, I will give an overview of the (rather limited) scope of preliminary examinations in Norwegian law in different types of cases (Section 3.3.). I then address some quality concerns in preliminary examinations (Section 3.4.). After giving a tentative definition of ‘quality’ (Section 3.4.1.), I will examine why the distinction between preliminary examination and investigation is important, by giving an overview of the most notable differences in the legal framework governing the two forms of inquiry (Section 3.4.2.). Against this background I will point to some quality concerns that call for control and comment briefly on how this is carried out in Norway (Section 3.5.).

3.2. The Distinction between Preliminary Examination and Investigation in Norwegian Law

According to the Norwegian Criminal Procedure Act, an investigation shall be carried out when there are “reasonable grounds to inquire” whether a criminal offence has been committed.¹

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¹ Criminal Procedure Act, 22 May 1981, no. 25, Section 224, para. 1 (‘CPA’).

‘Reasonable grounds’ is a requirement for *beginning* as well as *continuing* an investigation, and also applies when conducting any *investigatory step* (for instance, interviewing a witness or collecting physical evidence). If the condition is met, there is also a presumption that there is a *duty* to investigate.

The most important factor when deciding whether there are ‘reasonable grounds’ to investigate is the *likelihood* that a criminal offence has been committed. This does not entail that a fixed threshold of probability must be met – the degree of probability is relative to the severity of the offence in question. Further, it must be considered whether an investigation is *proportionate*, particularly taking into account the severity of the case. The decision whether to investigate must be based on *objective* grounds.²

Before a decision to initiate an investigation is made, the police may conduct preliminary examinations with the aim of determining whether the ‘reasonable grounds’ requirement has been met.

The actual investigation is generally referred to as a ‘purpose governed activity’, with the main purpose being to obtain a sufficient evidentiary basis for deciding whether a prosecutable criminal offence has been committed. An additional aim for the investigation is to provide a basis for the court’s determination of the issue of guilt and the appropriate sanction.³

Any inquiry with this *de facto* purpose is considered to be part of an investigation, regardless of whether a formal decision to investigate exists. Conducting an activity that constitutes investigation in this substantial sense is prohibited if the condition of ‘reasonable grounds’ has not been met. This also implies that if such grounds are established, the information gathering cannot continue as a preliminary examination, even if the inquiries concern a situation where no suspect has yet been identified. The scope of the preliminary examination is therefore limited to obtaining sufficient information to establish whether or not the ‘reasonable grounds’ standard has been met. For serious crimes, this threshold is not very high.

² Norwegian Director of Public Prosecutions, Circular on Investigation, 22 December 1999, no. 3/1999, para. III, 3.

³ CPA, Section 226, para. 1, see *supra* note 1. There are also other investigative purposes including obtaining information to prevent crime and reveal the cause of accidents.

3. The Concern for Quality Control and Norwegian Preliminary Examination Practice

Figure 1 below illustrates the relationship between the purpose of investigation and the purpose of preliminary examinations.

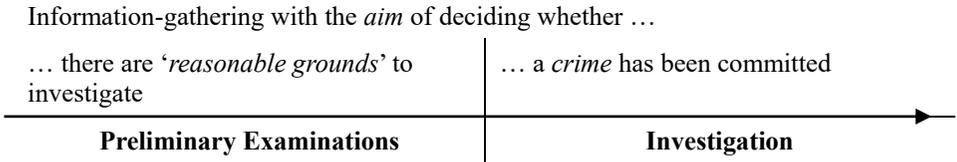


Figure 1. The purpose of preliminary examinations and investigation.

From an analytical point of view, this distinction is clear. At the preliminary stage, the question is whether to investigate or not; at the investigative stage, the question is whether a crime has been committed. However, given that there is a low threshold in Norwegian law for establishing 'reasonable grounds' to investigate, the distinction can be rather subtle.

In practice, it can therefore be difficult to decide when there is enough information available to decide whether to investigate. The general guidelines issued by the Norwegian Director of Public Prosecutions acknowledge that the process of drawing the boundary between preliminary examination and investigation involves a certain amount of discretion.⁴ Simple inquiries over a short period of time are generally accepted as preliminary examinations. In complex cases, particularly those that have international ties, more leeway is given, so that relatively thorough and time-consuming activities could be accepted at the preliminary stage. If no specific person is under suspicion, more inquiries may be accepted during preliminary examinations, including active information-gathering from open sources, police registers and other Norwegian or foreign authorities. Sometimes persons are also questioned during preliminary examinations, but the common view is that a suspect can only be interviewed at the investigation stage. Coercive measures are only available during investigations. The aim of the activity is nonetheless decisive in principle – preliminary examinations are limited to the process of gathering information to decide whether there are 'reasonable grounds' for beginning an investigation.

⁴ Circular on Investigation, para. II, 4, see *supra* note 2.

3.3. The Scope of Preliminary Examinations in Norwegian Law in Different Types of Cases

In the overwhelming majority of Norwegian criminal cases, there is no room for preliminary examinations. Based on the information received when the crime is reported, a decision is made whether to *investigate* or *discontinue* the case without investigation. Generally, any serious inquiry into a possible crime will be considered investigation.

There are however important exceptions where information is gathered in preliminary examinations for different reasons, primarily to secure sufficient information to make a justified decision whether to investigate or not. The importance of a proper basis for the decision is related to the possible damaging effects of opening a formal investigation, particularly because of the stigma of being under investigation, which can lead to unnecessary inconveniences for persons who may have been unjustly accused, for instance, unwarranted public attention, confusion or outrage. Opening an investigation can also cause unnecessary tension in the relationships with other States.

This means that preliminary examinations are typically carried out in certain types of cases by a few specific agencies. One such category consists of the cases handled by the Norwegian Bureau for the Investigation of Police Affairs. The Bureau handles allegations of police brutality and other misconduct committed by the police or prosecutors. Before a decision is made whether to investigate, the Bureau collects any case files connected to the allegations and conducts an interview with the person who made the accusation. These preliminary examinations typically do not take much time.

Cases that the Norwegian National Authority for Investigation and Prosecution of Economic and Environmental Crime is responsible for can be considered a second category. This unit deals mainly with complex crimes, and can choose quite freely whether to handle a case itself or refer it to the ordinary police. As a basis for prioritizing which cases to proceed with, preliminary examinations are quite common, and may include relatively extensive inquiries over some period of time.

A third category is made up of the cases handled by the National Criminal Investigation Service, particularly international crimes or cases otherwise involving foreign States. In Norway, very few such cases have been tried in court.

It is worth mentioning that specific provisions concerning international crimes were adopted in 2008, and we have had only one prosecution based on the new legislation.

The case concerned war crimes and crimes against humanity committed during the war in the former Yugoslavia. The Norwegian Supreme Court found that the application of the new legislation would constitute a breach of the constitutional prohibition against retroactive legislation.⁵ The accused was instead sentenced to eight years of imprisonment for illegal deprivation of liberty in accordance with the law applicable at the time when the crimes were committed. Since this decision, only one case involving international crimes has been brought before the Norwegian courts. This case was related to the genocide in Rwanda in 1994, and the act was formally prosecuted under the ordinary murder statute.⁶

We do however have quite a few preliminary examinations pending regarding international crimes. Each year, the National Criminal Investigation Service receives 30–40 cases for inquiry from the Norwegian Directorate of Immigration. Additionally, a large amount of preliminary investigations concerning international crimes are initiated on the basis of police intelligence information.

3.4. Quality Concerns in Preliminary Examinations

3.4.1. ‘Quality’ in Criminal Procedure

‘Quality’ in criminal procedure can be understood as handling cases in accordance with reasonable expectations, such as:

- correct fact-finding;
- lawful procedures, including respect for the rights and interests of suspects and victims;
- steady progress throughout the investigation and a prosecutorial decision on the merits of the accusation within reasonable time; and
- transparency and some sort of supervision.

With these expectations in mind, it is of interest to briefly explore the relevant legal implications of the distinction between preliminary examinations and investigations.

⁵ Judgement, 3 December 2010, HR-2010-2057-P.

⁶ Borgarting Appellate Court, Judgement, 16 January 2015, LB-2013-41556.

3.4.2. Lack of Regulation as a Cause of Concern in Preliminary Examinations

All prosecutorial activity must comply with the basic quality requirements, including impartiality and objectivity.⁷ However, the preliminary examination stage is not regulated in any detail in Norwegian law. By contrast, the Criminal Procedure Act includes a number of provisions concerning the investigation stage – both general requirements and regulations for specific investigative steps. The rules and practices regarding supervision as well as managing systems are also mainly directed at formal investigations. This is illustrated in Figure 2 below.

Information-gathering with the *aim* of deciding whether ...

<p>... there are ‘<i>reasonable grounds</i>’ to investigate</p>	<p>... a <i>crime</i> has been committed</p>
<p>Preliminary Examinations Few regulations</p>	<p>Investigation Detailed regulations</p>
<ul style="list-style-type: none"> • no obligation to seek favourable information • no obligation to specify the suspicion • no right for the suspect to be notified • no access to the case file • no right to refute allegations • no right to demand specific inquiries • no access to court • no right to speedy inquiries 	<ul style="list-style-type: none"> • obligation to seek favourable information • obligation to specify the suspicion • right for the suspect to be notified • access to the case file • right to refute allegations • right to demand specific inquiries • access to court • right to speedy investigation

Figure 2. Applicable regulations during preliminary examinations and investigation.

The lack of formal regulation at the stage of preliminary examinations calls for a comparison with the legal framework governing the investigation stage. Without going into any detail, I will point to some important differences.

⁷ CPA, Section 60 and Section 55, para. 4, see *supra* note 1.

3.4.2.1. Seeking Information in Favour of a Suspect

If an investigation is directed towards a specific suspect, there is an obligation for the police and the prosecutor to “seek to clarify both the evidence against him and the evidence in his favour”.⁸ No similar explicit regulation applies to preliminary examinations, and even if all prosecutorial activity must be carried out in an objective manner, there is no clear obligation to seek information in favour of a suspect at this stage.

3.4.2.2. Specification of the Suspicion

At the investigation stage, the obligation to inform the suspect makes it necessary to specify the suspicion. Also, if a prosecutor orders the police to investigate, or requests authorization from the courts to do so, he must reflect on how broadly the suspected crimes can and should be described. Without such an order or request, there is a risk that the inquiries are not sufficiently focused. This can lead to inefficient inquiries, generating excessive or insufficient information regarding the alleged crimes.

3.4.2.3. Notification and Access to Information

As a general rule – subject to important exceptions – suspects and victims are normally given notice about an investigation, the details of the allegations and access to the case file. Generally, no notice or access to the case file is given during preliminary examinations, even if directed towards specific persons.

3.4.2.4. Right to Refute the Allegations and to Offer Additional Information

Whereas during an investigation, the suspect shall be given an opportunity to refute the grounds on which the suspicion is based and to put forward any circumstances that count in his favour,⁹ no such rights are available during preliminary examinations.

3.4.2.5. Right to Demand Further Inquiries and Access to Court

During investigations, the police will ask the suspect if there are any investigative steps he wants carried out. The suspect may also petition that the courts institute judicial proceedings to dispel the suspicion, such as

⁸ *Ibid.*, Section 226, para. 3.

⁹ *Ibid.*, Sections 92 and 232.

questioning a witness in court.¹⁰ However, again, no such rights apply during preliminary investigations.

3.4.2.6. Speedy Inquiries

An investigation shall be carried out “as quickly as possible and in such a way that no one is unnecessarily exposed to suspicion or inconvenience”.¹¹ No similar regulation applies to preliminary examinations. In addition, preliminary examinations are not in the same detail as investigations registered in key statistics regarding case management and backlog monitoring of these cases draw limited attention.

3.5. Quality Control in Preliminary Examinations

When discussing the need for quality control in preliminary examinations, it is important to keep in mind the causes for concern that I have outlined above. The lack of regulations concerning preliminary examinations gives rise to a need for control mechanisms that can prevent substantive investigations from being carried out under the guise of preliminary inquiries. If this possibility is not ruled out, persons can be denied their rights, and there is a risk that the prosecution service does not adhere to applicable obligations. There is also a risk that the condition for investigative steps, ‘reasonable grounds’ for inquiry, is circumvented. At the largely unregulated stage of preliminary examinations, it is important to develop practices that secure the best quality possible concerning progress as well as the integrity of the information that is collected. Finally, the way things are done should not develop without reflection and oversight – at least within the prosecution service.

In the Norwegian system, quality control has to be carried out mainly within the prosecution service, which has three levels: first level prosecutors are integrated in the police organization; at the second level, there are prosecutors in ten regions and two national units; the third level is the Office of the Director of Public Prosecutions. The prosecution service is responsible for both preliminary examinations and investigations.

Ideally, all prosecutors handling a case should pay attention to the more or less inherent quality concerns involved in preliminary examinations, and be aware of the question of when to make a formal decision to

¹⁰ *Ibid.*, Section 241.

¹¹ *Ibid.*, Section 226, para. 4.

start an investigation. To achieve this, it is probably necessary to address the distinction between preliminary examinations and investigation in a structured manner. This can be done through general regulations and by evaluation of a selection of cases.

In 1999, the Norwegian Director of Public Prosecutions published a Circular on Investigation that certainly raised the general awareness among prosecutors regarding when an inquiry should be considered an investigation.¹² However, the circular does not detail how preliminary examinations should be carried out to adhere to basic quality requirements.

Whether or not the circular has been complied with is sometimes considered when a case is examined by a prosecutor at a higher level. Supervision can take place more or less by coincidence if a prosecutor at a higher level has to deal with the case, which can happen for several reasons (to decide whether to prosecute, during consultation initiated by a police prosecutor or when a complaint has been filed). In addition, the second level prosecutors regularly carry out inspections including evaluating a selection of cases. The supervision will pay particular attention to one or more topics that is communicated to the unit being inspected, and one such topic could be preliminary examination practices.

The most structured evaluations of preliminary examinations practices are probably carried out by the National Authority for Prosecution of Organised and Other Serious Crime ('NAST'). This second level prosecution office is responsible for the activities of the National Criminal Investigation Service (Kripas). NAST will look into the number of cases handled by Kripas that are at the stage of preliminary examinations, the time spent on the cases so far, and whether formal investigations should have been opened in any of the cases. Further, there is a dialogue as part of the supervision to get an overview of cases that are likely to make it to the stage of investigation.

All in all, there seems to be a fair attention to and control of the scope of preliminary examinations. The progress and total time spent at this stage seems to be at least fairly well monitored. However, it is not always controlled, and there is a risk that the investigation process can be delayed. Controlling the content of preliminary examinations appears to be one of the main challenges. There is reason to suspect that the inquiries in some cases may lack sufficient direction. If this is true, it could be help-

¹² See *supra* note 2.

ful to clarify what information is necessary to decide whether to start an investigation at the outset of a preliminary investigation, and to draw up a detailed plan on how the inquiries should proceed. The first step towards establishing a practice along these lines is to draw attention to the need for a more structured approach to preliminary examinations.

Preliminary Examination in the United States Military: Quality Control and Reform

Franklin D. Rosenblatt*

The disposition decision is one of the most important and difficult decisions facing a commander. Many factors must be taken into consideration and balanced, including, to the extent practicable, the nature of the offenses, any mitigating or extenuating circumstances, the views of the victim as to disposition, any recommendations made by subordinate commanders, the interest of justice, military exigencies, and the effect of the decision on the accused and the command. The goal should be a disposition that is warranted, appropriate, and fair.¹

US Manual for Courts-Martial

4.1. Introduction

This chapter considers the process of preliminary examination used by the United States ('US') military during its extended missions in Afghanistan and Iraq since 2001. First, it considers the role of non-judicial mechanisms for preliminary examination – a necessity borne by the obvious fact that most military forces are not lawyers. The chapter then considers judi-

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¹ Joint Service Committee on Military Justice, "Discussion to Rule for Court Martial 306(b)", in *Manual for Courts-Martial, United States*, 2016 edition, 2016, part II, chap. III, rule 306, Section b, p. II-26.

cial mechanisms of preliminary examination, including the circumstances under which a progression from non-judicial to judicial mechanisms is warranted, the roles and constraints placed upon those who exercise prosecutorial functions, and a consideration of how having time pressures and a series of definite laws and procedural requirements aids rather than detracts from the exercise of discretion in making decisions on initial disposition of cases. Next, it describes the unique context for preliminary examinations conducted by military forces during operations in other countries, and how the integrity and speed by which these examinations are conducted directly impact the success or failure of the military mission. The chapter concludes with ten suggested best practices from hard-earned recent American military experience.

Why study the US military? It is said: “You can always count on Americans to do the right thing – after they’ve tried everything else”.² The American military has had its fair share of failures, setbacks, and successes in evaluating and adjudicating serious incidents, including core international crimes, during its recent military campaigns. It is submitted that the US military has emerged from these years of extensive military operations with improved institutional processes, a greater appreciation that examination of incidents with intellectual integrity and impartiality ultimately helps the military better accomplish its mission, and a proper balance of restraint and empowerment on those who exercise prosecutorial roles. The military benefits from the rigidity of working within a series of pre-determined criminal offences, elements, procedural rules, and requirements for documentation and forwarding. The ends of military preliminary examination are well served by prompt processing and a bias towards speed and against undue delay in making decisions on case disposition. Other national militaries can learn from these lessons.

Among the commander’s powers is the ability to order investigations. These can be for any matter to help the commander gather facts to make a decision and or preserve a record. In most cases the investigations are conducted by regular military officers without legal training or investigative expertise, but are accomplished with the advice of assigned military lawyers. Ideally, these investigations ensure accountability for improper actions, not to second-guess, with the benefit of hindsight, soldiers

² This quote was widely attributed to Winston Churchill, but its actual provenance remains uncertain.

who have made well-intentioned but difficult battlefield decisions. These investigations are not all negative: commanders may use them to highlight good behaviour, recognize strong achievement, and publicizing the results to the rest of the force to induce others to emulate desired behaviour. When used to address misconduct, these investigations help commanders and military prosecutors make decisions on whether further action is warranted. If so, the criminal investigation may involve preliminary hearings, and the military prosecutors will use the information to ultimately recommend which offenses, if any, merit trial by court-martial or some other judicial response. Combined, these non-judicial and judicial investigations are the military equivalent of preliminary examinations. Most cases that end up being prosecuted by the military ultimately involve both non-judicial and judicial methods of case development.

In most cases, military forces do not have the luxury of years-long, drawn-out preliminary examinations. Speed and decisive resolution are prized above all else. Militaries pay a steep penalty with local populations, and thus with their own mission accomplishment, when known problems linger unaddressed. Military leaders are hardwired to not let problems linger on pressing issues for their replacement forces to address. It is absurd to imagine a press release from a military headquarters in Kabul or Baghdad saying something like: “Allegations of destruction of civilian property in X village allegedly committed by US forces remain under examination, much as we reported last year. We will issue another update next year”. This example, which plausibly resembles preliminary examinations in other contexts, is ludicrous in this case because military forces are in the realm of the immediate, not the hypothetical, and would face severe consequences for such dithering. Expressed a different way, speed is the most salient virtue for preliminary examinations in the context of military operations.

4.2. Non-Judicial Mechanisms of Military Preliminary Examination

A topic that has not received much detailed attention, whether internationally or in the American legal community, is the comprehensive *life cycle* by which military forces investigate, examine and adjudicate serious incidents in areas of conflict, whether committed by their own forces or enemy forces. This area calls out for greater attention as professional militaries are sometimes the only parties present and capable of fact-finding and investigating during the height of armed conflict, when the potential for

violations of international humanitarian law is heightened. When armed forces are capable and willing to conduct quality investigations, the potential for impunity is reduced, necessary records and evidence are preserved, and the criminal adjudication process, if necessary, can proceed on an adequate basis.

The American military's process of investigating serious incidents will therefore be described here. I served as a legal advisor to US Army units in peacetime and conflict, and has seen first-hand how a culture of investigative rigour helps military forces accomplish their assigned missions and combat perceptions that American forces enjoy impunity for offences committed. This emphasis not only ensures that serious incidents are appropriately addressed, but also serves as a powerful way to shape desired behaviour in military forces. It goes without saying that armies are mostly non-lawyers and are commanded by non-lawyers. This dynamic means that military mechanisms for preliminary examinations will necessarily draw heavily upon non-judicial initial measures. It follows that such basic fact-finding must be done in formats that can quickly be mastered by military members, whose investigative duties are an additional task from their normal military ones. This section describes these non-judicial mechanisms while the next section considers the narrower range of military judicial mechanisms.

Before deploying to our assigned combat mission in northern Iraq in 2011, the Fourth Armored Brigade Combat Team of the US Army's First Armored Division had to test our abilities during a 28-day rotation at the Army's National Training Center ('NTC') in the Mojave Desert of Fort Irwin, California. There, an elaborate scenario was designed to test our soldiers, commanders, and staff (including my staff of three legal advisors and six paralegals) in a stressful replication what the US military calls 'full spectrum operations': any variety or combination of combat, security assistance, training and partnership with local security forces, and counterinsurgency. A determined opposition force resisted our initiatives as our forces operated in a series of mock villages and towns filled with role players. The scenario was designed to 'throw the kitchen sink' at us, including our ability to fight opposing forces, partner with local forces, and to work cooperatively with the local population while minimizing harm to civilians. By replicating the stresses of combat and testing our ability to improvise to unexpected scenarios, the trainers at NTC used the exercise to forge us into a more capable and confident combat unit.

The Fourth Brigade was immediately put through a series of military challenges that tested our individual and collective training. Our legal team went through an NTC replication of a local court hearing of a terror suspect where US soldiers were asked to provide testimony. However, our most pressing initial challenge was unscripted. Out of our 4,000-strong unit, we experienced a number of soldiers who accidentally discharged their assigned weapons. As we advanced further into the rotation, the number of accidental discharges increased. These were troubling for my commanders: not only do such incidents pose a threat to the safety of soldiers and nearby civilians, but such sloppiness is also a red flag for indiscipline, inattentiveness, and lack of adequate supervision and training.

The unit commanders took action. They initiated an official requirement that all accidental discharges (rechristened ‘negligent discharges’ for greater gravity) would all be subject to mandatory investigation by an officer in the unit. The officer would be required to gather evidence, including sworn statements from witnesses, then prepare a written summary of contributing factors, including training and inexperience, and recommendations for further action. The reports, while basic, were then required to be submitted to the brigade headquarters where they would first be subject to a legal review, then a personal review by the brigade commander. These new measures were published in the daily fragmentary order so that all subordinate units would be made aware of the new standards and requirements.

The effect was immediate. Because the highest-ranking officer, our brigade commander, was personally reviewing the reports, subordinate units selected their best officers to conduct the reviews and conducted inquiries with intellectual curiosity rather than ‘pencil whipping’. Weapons discipline improved in the formation as sergeants sought to avoid the unwanted attention of investigators by ensuring their soldiers were proficient and disciplined while handling their weapons. Platoons could no longer have embarrassing incidents swept under the rug. Infantrymen paid greater attention to their training and proper procedures. During the final seven days of the Brigade’s NTC rotation, we had no negligent discharges. In this way, the emphasis of investigations focused on a *thematic problem* resulted in immediate changes of behaviour, and thus contributed to a culture of quality control.

Non-judicial investigations (most commonly called administrative investigations) can also be used to educate the armed force about what to

look out for. After our NTC rotation, the Fourth Brigade deployed to Northern Iraq. We began to hear about numerous problems with some of the contractors who were supporting our forces at various bases in the region. Several contractors withheld the passports and status documents of their employees – withholdings that took on uniquely problematic dimensions in light of our presence in a conflict area when many of the employees came from other countries and thus lacked easy means to leave Iraq and travel home. Another contractor hired a subcontractor who in turn employed persons whose legal status could not be verified in the performance of construction and cleaning jobs on US bases. This meant that our forces had difficulty determining if the employees were underage, displaced, or otherwise entitled to certain rights under American law or the American security agreement with Iraq. Discovering these incidents was alarming and brought to mind a number of prohibitions from American domestic law and international human rights standards, not to mention our common-sense understandings of basic treatment and fair dealing. But the commanders and legal advisors are not the all-seeing eyes of the Brigade: we would only be able to identify and eradicate the problem across our large assigned area of Northern Iraq if the rest of our forces also knew what to look for. Thus, just as we had done at NTC with accidental discharges, we published a brigade order requiring military investigations into the work of the contractors and subcontractors supporting our bases and status checks of civilians working in support of the military. Our legal staff contributed specifics on what to look into to assure that persons working for contractors were working lawfully, with possession of their status documents, and by their own free will (meaning that practical obstacles to their ability to arrive, leave, and change employers were eliminated). The orders process was not just a means of ordering investigations, but a mechanism to empower our soldiers at all levels. Thus, the mechanism of investigations enabled a way to discover facts and also enable our forces to be decisive in a situation that was not part of normal wartime preparations.

What do these investigations look like? They are variously called ‘informal investigations’, ‘commander’s inquiries’, or ‘preliminary inquiries’ because, unlike more formal boards of officers, they do not require a board or transcribed proceedings. The format is incredibly open-ended, as is apparent from Rule for Courts-Martial 303:

Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses.

While these investigations are often called ‘informal’, what that really means is that an investigating officer is tasked and empowered by the commander to answer a specified list of questions contained in the appointment memorandum. This memorandum is often drafted by the legal advisor who can ensure that the points to be answered are specific enough for further uses, such as determining if elements of a crime are met or whether new tactics or techniques for solving military problems are warranted. The format of the informal investigation is typically a military memorandum describing findings and recommendations, along with a series of attachments such as sworn statements or pictures in support of the findings. The format of the informal investigation is open-ended,³ which allows the commander to designate more tailored instructions depending on the facts, time available, and importance of the investigation to the accomplishment of the military mission. The open-endedness permits the commander to make any number of choices based on the needs of the moment: the time allotted to complete the investigation, the rank or expertise of the officer tasked to complete the investigation, the detailing of investigative assistance (such as interpreters, security, transportation, or technical expertise), and evidence to be gathered. In most cases, completed investigations are required to be retained by the military for a period of years and preserved as official records.

Military forces need not wait for a problem to arise in order to issue orders to investigate. One of the most consequential decisions American military commanders made was to codify circumstances when non-judicial investigations were required, and to determine at what level approval authority rested. These efforts were often compiled into an investigation matrix published for subordinate units to follow. As an example,

³ The most common formats for informal investigations are those used by the Army and Navy. See US Department of Army, *Army Regulation 15-6: Procedures for Administrative Investigations and Boards of Officers*, Washington, D.C., 1 April 2016; US Department of the Navy, *JAG Instruction 5800.7F: Manual of the Judge Advocate General (JAGMAN)*, Washington, DC, 26 June 2012. Investigations conducted under these formats often take on the names of the regulations so are colloquially referred to as ‘15-6s’ and ‘JAGMANs’ respectively.

the experience of the US Army's 101st Airborne Division in Afghanistan in 2009 appropriately illustrates these ideas. It sets criteria for any number of incidents determined by the commander with the input of legal advice: friendly fire incidents with partner or US forces, death of a soldier, death of a civilian, vehicle accidents, loss or destruction of property, violations of the law of armed conflict, and incidents likely to draw media attention. Next, the matrix lists reporting requirements so that all forces know with the effect of an order what types of incidents must be reported and to whom. Finally, the matrix includes approval authority and required follow-on actions such as further reporting to higher headquarters, retention of records, media handling, and how to address issues brought by affected civilians such as an aftermath payment under the Foreign Claims Act or other command funds designated for the assistance of local civilians. The matrix can adjust to any number of permutations to reflect the military mission, law, and changing military priorities.

Such a pre-determined investigation matrix can potentially have a powerful effect upon an armed force. By publishing this through the military orders process to the entire armed force, all are on notice of what to look for and report when incidents arise; making accepted standards of conduct better understood. Importantly, the possibility of self-dealing among military members who may violate the law or accepted standards is reduced. The history of militaries is a history of close kinship of warriors who work closely together – who will naturally seek to look out for each other when embarrassing or illegal incidents happen. For example, members of an infantry squad may feel intense direct or indirect pressure to look the other way if they observe an illegal act such as unlawfully targeting a civilian. The incident may never be reported and properly evaluated. If the incident is known to require investigation at a level higher than the squad, the possibility of self-interested adjudication is eliminated. Indeed, the incident may be appreciated in an entirely new light just based on the approval level required; military leaders can remonstrate all they wish about the gravity of avoiding civilian casualties, for example, but can truly demonstrate how seriously they take these incidents when requiring high level approval for such incidents. Setting appropriate approval levels for certain serious incidents also demonstrates fair play and reduces the chances that embarrassing incidents will meet self-serving investigations. Having said this, military units must be mindful of re-evaluating specific cases and making exceptions when even higher-level

investigations will face an actual or perceived conflict of interest – a particular concern for highly publicized incidents.

A 2013 report from the Department of Defense accurately summarized the operational advantages enjoyed when military organizations are able to swiftly report and investigate serious incidents:

While compliance with international law and domestic U.S. law is essential, U.S. fighting forces must also be perceived as, and perceive themselves as, ethical and disciplined combatants. Military Justice is critical to this perception as it is an essential tool of commanders to maintain good order and discipline. But, its effectiveness depends in large part on the ability to timely report allegations, investigate effectively, collect and preserve evidence, and make it available to commanders and courts. These kinds of investigations are also important to dispelling inaccurate or false allegations of misconduct such as causing civilian casualties. Nonetheless, investigative responses to reports of civilian casualties in a combat theater are difficult and can be dangerous. Commanders must balance the risk to their forces with the credibility and severity of the allegations and mitigate the risks when they direct investigations.⁴

4.3. Judicial Mechanisms of Military Preliminary Examination

The previous section described the essential role of military administrative investigations, often conducted by non-lawyers, that are used to gather evidence, preserve a record, and help military forces make decisions on which events merit further action, including judicial. This section describes what happens after fact-finding is complete and military forces make decisions about which incidents merit the involvement of prosecutors and the more formal, rights-based procedures of criminal investigation. Combined, these two sections comprise military preliminary examination.

The evolution of an incident from administrative investigation to judicial action is an evolution from mandate to discretion. Consider the first example from the previous section. It is entirely appropriate for military orders to demand that *all* soldiers who commit accidental discharges

⁴ Defense Legal Policy Board, *Report of the Subcommittee on Military Justice in Combat Zones*, final report, 30 May 2013, pp. 22–23.

face an administrative investigation, and the details of this requirement such as the rank of the investigator, the approval level, and the evidence required to be produced can all be predetermined. However, it would be inconsistent with the individualized approach of American law (not to mention the laws of many other countries and the most basic international human rights documents) to predetermine that *all* accidental discharges receive a certain punishment. Evolving a case from an administrative investigation to a judicial proceeding necessarily involves legal judgments such as the elements of pre-existing criminal offence (including military justice statutes), the level of criminality, and whether a judicial approach vindicates important interests, such as the wishes of the victim and the operational effectiveness of the military.

Commanders must have discretion to act, but their discretion is not unlimited. Not every violation of law merits the use of limited prosecutorial resources or the branding of criminal to a larger part of the population than necessary. Commanders must moreover be mindful not to unlawfully influence (or appear to influence) the independent exercise of discretion by others, as they may sometimes serve as quasi-judicial officials who make decisions on initial case disposition, all the way through referral of charges to court martial, and approval of the completed court martial. The disposition decision must truly be independent – a departure from normal military routine where subordinate commanders are required to adhere to a higher commander’s orders (or in the absence of orders, the commander’s intent).

Guidance concerning the commander’s discretion to act comes during initial disposition of a case comes from Rule for Courts-Martial 306(b). The factors listed there include:

- (A) the nature of and circumstances surrounding the offence and the extent of the harm caused by the offense, including the offense’s effect on morale, health, safety, welfare, and discipline;
- (B) when applicable, the views of the victim as to disposition;
- (C) existence of jurisdiction over the accused and the offense;
- (D) availability and admissibility of evidence;
- (E) the willingness of the victim or others to testify;

- (F) cooperation of the accused in the apprehension or prosecution of another accused;
- (G) possible improper motives or biases of the person(s) making the allegation(s);
- (H) availability and likelihood of prosecution of the same or similar and related charges against the accused by another jurisdiction;
- (I) appropriateness of the authorized punishment to the particular accused or offense.

A brief overview of the key personnel in this process is also required. As previously explained, military units are commanded by an officer who serves as a quasi-judicial authority, meaning that he or she is a non-lawyer who performs the judicial function of making the ultimate decision on which cases should be prosecuted. This is in contrast to many other modern militaries where commanders may provide input into which cases to prosecute but ultimately relinquish the ultimate prosecutorial authority to independent prosecutors.

US Army units at the brigade or regimental level or higher also have permanently assigned legal advisors. A brigade has three: a general counsel (brigade judge advocate), prosecutor (trial counsel), and a third legal advisor who assists with investigations and operational law. Higher level headquarters have larger legal staffs. The prosecutor may be involved with cases from cradle to grave: from the fact-finding or administrative investigation phase to advising the quasi-judicial commander which charges are warranted, all the way to marshalling judicial cases through the procedures of the court-martial process.

Interestingly, US Army units do not have assigned criminal investigators. While the Army prosecutors are part of the military unit and work for the commander, criminal investigators retain independence from other Army units and work through their own 'stovepiped' chain of command. The two most common trained Army criminal investigators are Military Police for low level offences and the Criminal Investigation Division ('CID') who have investigative jurisdiction over serious criminal investigations. As a consequence of the independence of criminal investigators, commanders may deploy to missions and not have criminal investigators at their disposal. These commanders' formations may also lack persons who are as well-trained as criminal investigators are, though they do have a full-time prosecutor and general counsel who can save some of this def-

icit by providing guidance and oversight to the conduct of investigations conducted by regular Army officers.

For lower level offenses that merit some punishment but do not rise to the gravity of courts martial, American military commanders have powers to impose non-judicial punishment ('NJP') on their members under Article 15(a) of the Uniform Code of Military Justice. Like courts martial, NJP must be based on an enumerated offence, but unlike courts martial there are no judicial proceedings or even presence of attorneys. Instead, the commander conducts the proceedings in the manner he or she sees best fit to address the offence. In return for this relative lack of structure, the accused enjoys significantly lower maximum punishments: a loss of some monthly pay, extra duties or restriction, the possible loss of rank, but not jail time, criminal conviction, or discharge from the military. NJP "provides commanders with an essential and prompt means of maintaining good order and discipline and also promotes positive behavior changes in service members without the stigma of a court martial conviction".⁵ This disciplinary tool is widely employed in the US armed forces. The main benefit of NJP is that it allows commanders to do something immediately using tools already at their disposal. In this way, it is a necessary disciplinary tool with the potential to nip problematic behaviour in the bud before conduct becomes truly criminal. The danger of NJP is that it becomes a tool of impunity that can shield offenders of more serious offences from public trials where interests of victims and the public can be vindicated – an especially important consideration for offences committed against civilians during military operations. An important procedural check on this possibility exists in the power of commanders to retain disposition authority up to a certain level. This serves as a shield against the possibility of self-dealing by lower level units who may not want embarrassing incidents to become known by their higher authorities.

Commanders have further non-judicial options other than NJP. For instance, they may take no action. They may also take administrative action, including corrective measures such as counselling, admonition, reprimand, exhortation, criticism, rebuke, extra military instruction, or the administrative withholding of privileges. Other forms of administrative action include a transfer (such as sending an offender from a deployed unit to another back at home station) and administrative removal from the

⁵ Uniform Code of Military Justice, Sub-chapter III, Section 815, Article 15(a).

service, a process known as ‘chaptering’ in the US Army because the separation actions are based on the various chapters of the officer and enlisted administrative separation regulations. Lastly, a commander may decide not to pursue charges but to forward the information to another level of command. This may be appropriate if another commander has greater interests in the adjudication of the offence, or commands the soldier or soldiers in question, or when the offence disposition is properly elevated to a higher command to avoid an actual or perceived conflict of interest by the lower level commander.

If an offense merits more serious treatment than NJP – in other words, cases that would be more properly considered at criminal trial – formal charges may be brought. These are listed on a military charge sheet and are based on the enumerated criminal offenses of the Uniform Code of Military Justice (‘UCMJ’). This includes a series of legislatively-prescribed laws, with elements and procedural rules determined in advance by presidential executive order that are published in the *Manual for Courts-Martial*. The UCMJ also permits charges of war crimes, crimes assimilated from other federal statutes, and more general catch-all offences such as conduct to the prejudice of good order and conduct unbecoming of an officer and gentleman. When charges are brought, the accused service member has a right to military counsel and may also choose to hire a civilian counsel at his or her own expense. For serious offences, before charges may be brought to trial they must first undergo a preliminary hearing under the auspices of UCMJ Article 32 in order to: ensure that probable cause exists that an offence or offences have been committed and whether the accused committed it, to determine whether a court-martial would have jurisdiction over the offence and accused, to consider the form of the charge(s), and to recommend what disposition should be made of the charge(s), from dismissal to court martial. Importantly, this preliminary hearing, often referred to in the shorthand by its number in the UCMJ, “Article 32”, is no longer considered a “preliminary investigation” since changes to the UCMJ in 2016 downgraded it to a “preliminary hearing”. Even though changes to the law were slight, this diminishment of the Article 32 resulted in hearings that were less exploratory of the evidence and more of a summary proceeding based on investigative work that had already been accomplished. Even with these changes, the hearing resembles an adversarial court system, with prosecutors and defense attorneys able to present evidence, witness testimony, and offer argument.

To illustrate how this entire process may play out, consider an example of a US soldier accused of intentionally harming a civilian during military operations. The unit may have already required that incidents involving harm to civilians undergo an administrative investigation. A unit commander at some level, with the assistance of a legal advisor, would choose an investigating officer and would task the officer with gathering evidence, writing findings, and presenting recommendations. The commander could also seek the assistance of military criminal investigators who, though not under the control of the commander, if present could investigate incidents within their purview so long as they would also qualify as serious crimes under the UCMJ. The commander may also assign investigative assistance, security, administrative support, and give transportation priority to the investigator to enable swift mission accomplishment. The investigating officer, after consulting with a legal advisor, would gather evidence, talk to witnesses, and submit a report.

With the report in hand, the commander would then enjoy tremendous discretion in deciding what to do next. The results of the administrative investigation could be shared with affected civilians in order to prove that the US forces take seriously allegations of conduct that harms civilians. It could be used to pay a claim or direct resources to fill an identified need. Regarding the soldier, the commander's discretion is similarly wide ranging. In consultation with his or her assigned legal advisor, the commander would review the initial disposition factors of Rule for Courts-Martial 306(b) in deciding what to do next. The incident can be an opportunity to teach or reinforce lessons. It can be a way to reprimand conduct that fell short of expected standards. If the gravity of the offence is low, the soldier could face an NJP proceeding with informal replications of court procedure in order to make a lasting impression on the offending soldier or others in the formation. Lastly, if the gravity of the offence merits criminal sanction, the commander could pursue court martial charges, effectively handing the reigns of the case over to his or her assigned professional prosecutor.

4.4. The Necessity to Conduct Preliminary Examination On-Scene

The US military has learned the hard way many of lessons about the need for quality preliminary examinations. When we entered the conflicts in Afghanistan and Iraq, an intensive focus on the planning and conduct of major military operations sometimes left considerations of what to do

about criminal misconduct and its consequences as afterthoughts. The US quickly learned that crimes occur everywhere troops are present and at all phases of military operations. One of the first Army lawyers in Afghanistan observed: “Wherever there are troops, there will be criminal activity”.⁶ Unfortunately, many of these incidents began to distract from other important operational and tactical gains. “Isolated misdeeds by junior soldiers or small arms units can adversely affect a theater of war, and undo months of hard work and honorable sacrifice.”⁷

The US military learned an uncomfortable paradox about wartime misconduct: at times when good behaviour is needed the most, the tendency to bring in soldiers likely to cause trouble is also greater. During the peak of American combat deployments from 2005 to 2007, relaxed recruiting standards permitted a large number of persons with felony convictions, gang membership, mental illness, or who otherwise fell short of normal recruiting standards to join the armed forces and deploy to combat.⁸ Coincidentally, during the same timeframe an Army medical study conducted between 2005 and 2007, about 10 per cent of thousands of surveyed Marines and soldiers admitted that they had mistreated non-combatants and damaged civilian property when it was not necessary to do so.⁹ This paradox cannot be considered a uniquely American phenomenon: surely anytime armed forces must massively mobilize citizens for military operations, especially countries that rely upon volunteer forces, the potential is higher that many of these new members will be likely to commit crimes requiring serious and large-scale prosecutorial efforts. These periods of large growth in military forces will often coincide with periods when criminal misconduct is at its most likely to threaten the success of the military mission.

Military operations in the modern era feature legal considerations, especially concerning human rights abuses and law of armed conflict violations, more prominently than ever. This is the era of “legally intensive

⁶ Major Jeff A. Bovarnick, *Notes from the Combat Zone*, Memorandum, US Army, 2002, p. 5.

⁷ John Nagl and Paul Yingling, “New Rules for New Enemies”, in *Armed Forces Journal*, October 2006, p. 25.

⁸ See, for example, “Army and Marine Corps Grant More Felony Waivers”, in *New York Times*, 22 April 2008.

⁹ Mental Health Advisory Team (‘MHAT’) IV, *Operation Iraq Freedom 05-07: Final Report*, Washington, DC, 2006.

conflicts”, a term may be used to describe any military campaign where legal considerations are prominent, including US operations in Afghanistan and Iraq. “Based on a very incomplete picture of what’s happening day to day in Iraq, it appears that there’s much more attention to human rights and to the laws of war than, for example, in Vietnam or Korea.”¹⁰ To an extent far beyond any military conflict of the last century, military operations now are greatly affected by the coexistence of civil society and national and international monitoring. Even after the fact, fact-finding and preliminary examination by groups such as the International Criminal Court can wait until the fog of war subsides and delve into the conduct of military forces months or even years after events occur. As a consequence, the commander’s responsibility for addressing misconduct shifts the imperative from an administrative burden to a strategic consideration.

When criminal misconduct in combat merits the initiation of judicial proceedings, in many cases there are strong advantages to conducting them on-site in combat rather than sending it back to the home country. An on-site judicial process affords immediate access to witnesses and evidence in the mission area. It makes possible a swift proceeding with all parties present. It demonstrates to the local community that offences by military members are not met with impunity. It affords an opportunity for affected locals to observe the proceedings or otherwise find out what happened. A group of international experts concluded: “Depending on the gravity of the case, offenses must be met with disciplinary action or criminal prosecution in order to maintain military performance and standing, thus assuring mission accomplishment”.¹¹

The alternative to addressing misconduct on-site is to send offenders back to their home station where their cases will not result in a distraction to the ongoing war effort. This temptation often proves far more attractive than the prospect of dealing with the onerous problems of addressing issues on-site, so this expedient solution has been frequently employed. Sending cases away permits the military unit to focus on the immediate demands of the military mission, while leaving the administrative

¹⁰ Brad Knickerbocker, “Is Military Justice in Iraq Changing for the Better?”, in *Christian Science Monitor*, 7 August 2007, quoting Loren Thompson of the Lexington Institute.

¹¹ Morten Bergsmo, Arne Willy Dahl and Richard Sousa, “Military Self-Interest in Accountability for Core International Crimes”, in FICHL Policy Brief Series No. 14 (2013), Torkel Opsahl Academic EPublisher, Brussels, 2013, p. 4 (<http://www.toaep.org/pbs-pdf/14-bergsmo-dahl-sousa>).

and judicial decision to a military organization far from the frontlines with presumably more time and resources to figure out how to proceed. While military law permits the transfer of a case's jurisdiction from one commander to another for any reason, including to free up the efforts of a commander engaged in military operation, this option had its own practical difficulties which in many cases backfired. Consider the example given by a Marine judge advocate who observed the mechanisms of criminal adjudication of the Haditha cases, a controversy involving several US Marines accused of wrongfully killing 24 Iraqi civilians in the city of Haditha in 2005 who were then sent away from Iraq back to their home station of Camp Pendleton, California:

From Camp Pendleton, trial counsel and defense counsel started from scratch with a very complex case in which they lacked basic familiarity with the unit's mission, enemy activities in the area, or other important aspects of the environment in which the misconduct had taken place. The eight cases [eight different Marines were accused of crimes] ultimately required more than fourteen months to prosecute. [...] Similarly, the Haditha case still remains unresolved, more than two years since first being brought to light.¹²

These efforts to advance criminal adjudication back at home station were not only difficult to conduct, but they also faced heavy pressure to deal with misconduct lightly. One observer noted that “domestic trial of members of a state's own military forces for war crimes is the most politically sensitive of any domestic prosecution for international crimes”.¹³ It is easy to understand why this is so: the surroundings change from that of military exigency, where the focus is on accomplishment of the military mission, to a nation watching afar where generalized feelings of patriotism and a sense of ‘us versus them’ is more prevalent. In such circumstances, it is unfortunately also likely that a desire to protect ‘our boys’ who have been in danger will outweigh more distant concerns such as civilians who were impacted by crimes or other effect of those crimes on

¹² Major John Hackel, “Planning for the ‘Strategic Case’: A Proposal to Align the Handling of Marine Corps War Crimes Prosecutions with Counterinsurgency Doctrine”, in *Naval Law Review*, 2009, vol. 57, p. 243.

¹³ Timothy L.H. McCormack, “Their Atrocities and Our Misdemeanours: The Reticence of States to Try Their ‘Own Nationals’ for International Crimes”, in Mark Lattimer and Shilippe Sands (eds.), *Justice for Crimes Against Humanity*, Hart Publishing, Portland, 2003, p. 134.

the military mission. These home station proceedings also had a special disadvantage of leaving affected civilians unable to find out about the results of the misconduct. For all they knew, the accused service members were subsequently exonerated. An international observer on the US military justice system in Afghanistan remarked:

[T]he military justice system fails to provide ordinary people, including United States citizens and the families of Iraqi or Afghan victims, basic information on the status of investigations into civilian casualties or prosecutions resulting therefrom.¹⁴

The US military experienced a particularly dramatic lesson about the connection between having a viable system of on-site courts martial and accomplishment of the military mission in Iraq in 2011, a time when the author was present in Iraq assigned as a US Army legal advisor. Towards the end of the year Iraq refused to grant American military members immunity for crimes committed against Iraqis as a condition for keeping US forces in country. The refusal was motivated by Iraqi public agitation about the perceived leniency and impunity shown by the military justice system to American military members accused of committing crimes affecting Iraqis.¹⁵ This impasse between the US and Iraq resulted in the withdrawal of all US forces under military command by the end of the year. Iraq then descended into a security crisis, which in turn through a series of related and unrelated events begot ISIS in areas with weak or non-existent government control. This downward spiral – surely not the strategically intended result of nine years of extraordinary effort and sacrifice by American military forces – was not a result of calculations of national interests by the US but instead in some measure due to complications that arose from the deficient performance of American military justice.

To its credit, the US military, especially the US Army, proved able to exercise the basic mechanisms of preliminary examination in an operational environment during its war years in Afghanistan and Iraq. However, these mechanisms often faced limits: a review of after-action reports re-

¹⁴ Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston: Addendum: Mission to the United States of America, A/HRC/11/2/Add.5, 28 May 2009 p. 2 (<http://www.legal-tools.org/doc/fd6ac8/>).

¹⁵ Michael S. Schmidt, “Anger in Iraq After Plea Bargain Over 2005 Massacre”, in *New York Times*, 24 January 2012.

veals that the full-bore application of military justice was not a viable option in the operational theatre.¹⁶ In practice, deployed forces conducted fact-finding but then sought to avoid the crushing burdens of formal judicial procedures, instead deciding to send those cases back home or granting leniency. Some of the factors frequently cited for this deficiency include: a high operations tempo, a lack of judicial officials such as judges, defense counsel, and prosecutors present with the force during operations, difficulties in obtaining expert witnesses and civilian counsel for the accused, and joint operations that scrambled clean lines of authority between the parochial services. When faced with these concerns, US civilian leadership of the military ordered a study to examine ways to improve these military functions during operations. The board concluded that the system as a whole worked rather well:

While it is clear to the Subcommittee that over ten years of combat in Iraq and Afghanistan has stressed our Services, our Service members, and our military justice system, overall, the Uniform Code of Military Justice (“UCMJ”) has provided commanders the means and methods to administer justice effectively across the spectrum of operations in both Iraq and Afghanistan. The Subcommittee’s review found that with rare exception, Service members alleged to have committed offenses during combat operations over the past decade, including civilian casualty offenses, have been dealt with fairly and efficiently – their rights preserved throughout the process.¹⁷

The board suggested a number of changes, such as adjustments to military doctrine, that could make the military even more effective when addressing and adjudicating crimes against civilians on-scene. The board’s results did not spark a massive change; in contrast, since the board released its findings in 2013 the military has not conducted a single court-martial in Afghanistan or Iraq.

¹⁶ See Franklin D. Rosenblatt, “Awakening Self-Interest: American Military Justice in Afghanistan and Iraq”, in Morten Bergsmo and SONG Tianying (eds.), *Military Self-Interest in Accountability for Core International Crimes*, Torkel Opsahl Academic EPublisher, Brussels, 2015, pp. 295–340 (<http://www.legal-tools.org/doc/8b00ed/>).

¹⁷ Defense Legal Policy Board, 2013, see *supra* note 4, at p. 3.

4.5. Enhancing a Culture of Quality Control for Military Preliminary Examination

This section applies some of the lessons learned by the US military (interspersed with some examples from other countries) to recommend practical considerations that militaries can implement to improve their doctrine and practice of preliminary examination.

Firstly, military forces can only conduct preliminary examinations if the incidents are known. Thus, armed forces should encourage all measures to ensure accurate reporting, especially of incidents that affect civilians. This is a task that may be easier said than done. Consider, for example, the pressures that faced Army Sergeant Samuel Provance in deciding whether to report the abuse he witnessed at the Abu Ghraib prison in Iraq in 2003:

When I made clear to my superiors that I was troubled about what had happened, I was told that the honor of my unit and the Army depended on either withholding the truth or outright lies. [...] Everything I saw and observed at Abu Ghraib and in Iraq convinced me that if I filed a report [about the abuse] I wouldn't be listened to, that it would be covered up. I thought that the best case scenario was that I would be considered a troublemaker and ostracized, and that potentially I might even place my life in danger.¹⁸

Secondly, the simple act of conducting investigations has powerful effect. The most important lesson for military forces is to *do them*. Consider the example from the distinguished South African jurist Richard Goldstone who in 2008 was asked by the UN Human Rights Committee to lead an independent fact-finding mission in the Gaza War.¹⁹ While Judge Goldstone's report concluded that both Israel and Hamas failed to satisfactorily investigate war crimes, he later recanted his finding that Israel had deliberately targeted civilians. This decision was based on newly provided information that the Israeli Defense Forces had conducted 400 investigations into military actions that affected civilians, in contrast to

¹⁸ Quoted in Joshua E.S. Phillips, *None of Us Were Like This Before: American Soldiers and Torture*, Verso, 2012, p. 112.

¹⁹ Richard J. Goldstone, "Quality Control in International Fact-Finding Outside Criminal Justice for Core International Crimes", in Morten Bergsmo (ed.), *Quality Control in Fact-Finding*, Torkel Opsahl Academic EPublisher, Brussels, 2013, pp. 35–53 (<http://www.legal-tools.org/doc/5b59fd/>).

Hamas, which had conducted none and appeared to be acting with, at best, a disregard for the harm to civilians from its attacks. This illustrates how simply conducting investigations demonstrates an earnestness to meet humanitarian obligations, and demonstrates to the international community a basic level of commitment on the part of a country's armed forces to comply with international humanitarian law.

Thirdly, a culture of quality control demands intellectual rigor in preliminary examination. It is not an excuse for a shoddy investigation that it occurred in dangerous conditions. The detainee abuse crisis at Abu Ghraib illustrates the value of conducting investigations with intellectual rigor and neutrality. An initial investigator was removed early on for unexpected zeal in getting to the bottom of what happened in a politically delicate situation (perhaps this is the most alarming aspect of all). The next investigator, sent to Abu Ghraib from Washington, D.C. with a capable team of assistants, used a fact-finding technique of having senior officers stand in front of formations of soldiers and asking any of them to step forward if they had witnessed detainee abuse. Not surprisingly, almost nobody stepped forward. This fact was reflected with self-congratulation in the investigative report that the detainee abuse incident was just a case of a few bad apples, and the report focused instead on the bravery and good conduct of thousands of other soldiers – an irrelevant matter to the investigation. Shockingly, no detainees were interviewed in the early investigations even though the investigations were explicitly examining detainee abuse. Until a comprehensive 2008 investigation by the Senate Intelligence Committee, three previous Army investigations either refused or were blocked from looking at culpability higher up the chain of command or from other agencies.

Likewise, the Pat Tillman controversy demonstrates human fallibility in military investigations. By the time he deployed to Afghanistan with the US Army Rangers in 2004, Corporal Pat Tillman was already the Army's most famous soldier because he had given up a multi-million dollar contract in professional football to serve his country. When he was killed, the nation mourned, but the mood grew darker when military leaders were accused of not correcting the record with what they knew from a preliminary inquiry: that Corporal Tillman was killed by friendly fire rather than a firefight with the enemy. This sense of a cover-up soured public confidence in military leaders. The officers involved were not bad people, but the episode illustrates the extraordinary pressures that befall military lead-

ers during highly publicized investigations. This episode also illustrates the ‘toothpaste’ rule: bad facts are a lot like toothpaste in that once they come out it is nearly impossible to get them back in.

Fourthly, military preliminary examinations greatly benefit from an open-ended format that is suitable to quick adoption by assigned military investigators who may not have training in investigations or the law. The commander, in consultation with the legal advisor, appoints the investigator, tailors the scope of investigation, designates resources, and, to the extent necessary, lists specific questions to be answered. This is a format well-suited for prompt investigations – since all assets fall under the commander, he or she can launch a rapid investigation literally within an hour if necessary. Staff officers, interpreters, military transportation, security, and subject matter expertise are all readily available for tasking to the investigative team. When military officials look into incidents during military operations, speed is vital and the resources on hand must be used rather than a fact-finding dream team that will take time to assemble.

Fifthly, military forces should avoid the use of classified materials in their conduct of preliminary examination if at all possible. It is common for military units to use classified information extensively while they are deployed, but investigations should avoid this whenever possible (obviously, this rule would not apply into an examination of matters that were necessarily classified, but the point is to guard against unnecessary or inadvertent creep into classified matters). One reason for this is that a classified investigation cannot be shared with affected locals who demand to know that the military has taken some form of action and may be wary that militaries tend to sweep misdeeds under the rug and allow offenders to enjoy impunity. Another reason is the obvious fact that military units have more security officials and intelligence officers than they do historians. When units complete their deployments after nine or twelve months it is common for all classified information to be wiped from servers and safes before the unit returns to home station rather than adhering to the rigorous requirements for safeguarding and storing classified information. “Over the last decade, millions of military field records from Iraq and Afghanistan have been lost or destroyed, making it difficult for some soldiers to prove their combat experiences and obtain medical benefits or

other veteran awards and services.”²⁰ The Army Center for Military History, which is now the designated repository for operational records, estimates that during some of the early years of the war they only possessed a small amount of the required records. Everything is harder for the Army and aggrieved civilians and soldiers when these necessary records are needed but cannot be found.

Sixthly, when conducting preliminary examination militaries must avoid ‘investigation fratricide’. Investigations may be conducted for several purposes but they must not be in conflict with one another. The infamous Nisour Square incident offers an important reminder of investigations gone wrong. In 2007, four Blackwater guards in Nisour Square in Baghdad opened fire and killed 14 civilians. The suspects gave initial statements to US diplomatic security officials rather than military investigators since the Blackwater guards fell under a State Department contract. The format of the statements held that they could not be used against them at trial, so the case against them in a federal criminal trial was eventually dismissed. This was a setback for military commanders since the exoneration fuelled a growing perception among Iraqis that Americans enjoyed impunity for crimes against civilians.²¹ The employees were eventually convicted during a second trial in 2014. Among other lessons, this tragic story illustrates the imperative of military forces to plan how they will coordinate with other military units and government agencies when investigations are required. Even then, a considerable amount of goodwill and cooperation is required to avoid turf wars between different organizations in high stakes circumstances. This often proves to be a daunting challenge.

Seventhly, a culture of quality control comes from sharing best practices. Armed forces should be willing to share best practices for preliminary examination freely, especially those countries who, like the US, use open-ended investigation formats. This also helps armed forces realize the self-interest in proper investigation and accountability for core offences. This helps militaries adjust military doctrine, penal codes, and standard operating procedures to ensure examinations that will stand the test of time. Many national militaries, like the US, can draw from robust and

²⁰ “Lost to History: Missing War Records Complicate Benefit Claims by Iraq, Afghanistan Veterans”, in *Seattle Times*, 9 November 2012.

²¹ See generally Major Jeffrey S. Thurnher, “Drowning in Blackwater: How Weak Accountability over Private Security Contractors Significantly Undermines Counterinsurgency Efforts”, in *The Army Lawyer*, 2008, p. 64.

creative investigative practices in the civilian sector. In the US, insider trading scandals at Enron and Apple Computer, the sexual assault scandal at Penn State University, and the Senate Intelligence Committee's probe into CIA torture, just to name a few, offer important lessons on investigative independence, scope, and intellectual integrity.

Eighthly, military forces should consider embedding investigative expertise into their formations. Investigative skill comes from training and experience. Trained investigators know how to interview witnesses, record witness statements, address obstacles to limited cooperation, gather evidence and prevent spoliation, and identify investigation weaknesses and opportunities. While the can-do spirit and responsiveness of military officers untrained in investigations is to be applauded, there is no reason their efforts cannot be further professionalized with the addition of investigative expertise, especially for countries like the US where professional criminal investigation organizations do not fall under the chain of command. This is not just to encourage militaries to add investigators. Often militaries can harness the benefits of outside investigative expertise by conducting joint and cooperative work with local civilian authorities, civil society organizations, and other federal investigative agencies. This is not always practical or even desirable but just the offer could engender goodwill and cooperation in support of common causes.

Ninthly, military commanders should issue orders concerning the circumstances of when investigations are required and at what level approval must be withheld. This order should be made widely known and preferably remain unclassified. This also has the welcome effect of informing military forces which incidents must be reported, a military order which in turn reduced the exercise of discretion to not report incidents which should be investigated. The best antidote to self-dealing among military forces who do not wish for their internal affairs to be aired by higher headquarters is to ratchet up the investigative responsibilities to an appropriate level where neutrality and independence can be achieved. High-level required approvals are also an effective way to impress upon members of the armed force the gravity of certain offences or conduct.

Tenthly and finally, legal advisors must be fully educated and enabled. As described in Section 4.4., military forces in modern 'legally intensive conflicts' rely heavily on their assigned legal advisors for a gamut of tasks including: advising investigators, developing investigation frameworks, conducting quality control of the entire process, and, in some

cases, prosecuting cases that merit a pathway to court martial or other formal judicial proceedings. These legal advisors come from a variety of backgrounds and many have limited experience in investigations and international humanitarian law due to military preference that their lawyers be broadly skilled in a wide variety of practice areas. The continuing education of military attorneys, especially those who will advise commanders and investigators during military operations, is a key task for national judge advocate general's corps. Training courses should be emphasized, including training at civilian institutions and those offered by international organizations. The US Army JAG Corps has developed an impressive series of training programs and products, including a promising recent guide designed to assist legal advisors in marshalling administrative investigations into potential violations of the laws of war.²² These efforts serve as a strong example for others to follow.

4.6. Conclusion

Military forces in the midst of operations live in austerity. In almost everything they do while performing military operations, resources are limited, including the time available to find facts and determine which incidents merit proceeding within the military justice system. Militaries are similarly limited in professional investigative and legal expertise, so non-lawyers necessarily play important roles in preliminary examination. As they are also limited by finite resources to address a large number of issues that arise in military operations, military commanders and lawyers must necessarily triage limited prosecutorial resources. But in so doing, they enjoy largely open-ended and creative opportunities to complete preliminary examination of serious incidents. When they do make their initial disposition decision, commanders have at their disposal a list of definite laws guided by a series of fixed procedural rules.

The hierarchical structure that characterizes military organizations offers both challenges and opportunities for military preliminary examination. Many of the lessons from the American military can also be applied to other armed forces in the future. Studying our lessons can help make other armed forces more accountable, and in so doing more likely to successfully accomplish their assigned military mission.

²² US Army JAG Corps, *Targeting and the Law of War: Administrative Investigations & Criminal Law Supplement*, 30 May 2017 (on file with author).

Pre-Investigation and Accountability in India: Legal and Policy Roadblocks

Abraham Joseph*

Numerous mass crimes have happened in India over the course of its post-independence journey. These may be termed as ‘riots’, ‘pogroms’, ‘mass violence’, ‘genocide’ and so on, but irrespective of the nomenclature used, they can broadly be clubbed as ‘mass crimes’ committed against all accepted notions of human rights and dignity. It is argued that these mass crimes are not spontaneous eruptions of violence, but systematic and organised acts by non-State actors with the tacit backing and support of the State. In addition, the State, represented by the local State governments, seldom steps in to control or quell the violence enough; in fact, it is even perceived – at least from the perspective of victims – to be siding with the perpetrators. However, the Indian judiciary has played a pivotal role in the protection and enforcement of human rights and remains the final beacon of hope to hundreds and thousands of victims of mass crimes.

Meanwhile, the Indian legal framework is inadequate to deal with those mass crimes. There is no definition of mass crimes in Indian law, which means genocide and crimes against humanity are, strictly speaking, not punishable by law. While the Indian government claims that the Indian legal system has automatically absorbed international crimes for which India has accepted treaty obligations, this assertion is misplaced. Since India is a dualist country, a treaty obligation that India accepts does not automatically become a part of Indian law unless there is enabling legislation to give effect to the treaty obligation. Although the Supreme Court of India has emphatically claimed in *Vishakha* that treaty obligations become an integral part of the Indian legal ecosystem and can be given effect to even in the absence of a domestic legislation on the subject (provided it is

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consistent with the Indian Constitution and other legal provisions),¹ the courts in India have never tried reading ‘mass crimes’ into Indian law except where they qualify as murder, rape, grievous hurt and other related offences.

While the mass crimes referred to below may not necessarily amount to genocide or crimes against humanity, it is argued that India’s refusal to define them as such considerably weakens its case that genocide and crimes against humanity have not happened in the country.² The burden to negate/disprove the commission of these crimes is on the State, which has assumed obligations under international law for this purpose.

Further, in India, the function of investigation is vested with the police, which is a State organ. There is no formal distinction between pre-investigation and investigation in its criminal procedural laws. Though there is a formal prosecution wing of the State, in reality there is no effective co-ordination between the police and prosecution at the investigative stage of the case. The police are more powerful than the prosecution. The prosecution team often does not have an independent voice, and even if it does, the police are free to disregard it. Although the prosecutor is required to be an independent voice of justice under Indian law, in many cases involving mass crimes, it has acted as the handmaiden of the State and of the defence. This is unfortunate to say the least.

That said, again, the Indian judiciary has played a commendable role in giving justice to the victims of mass crimes. This is most evident in cases involving the post-Godhra riots. Though the judiciary failed in handing out major convictions in the 1984 anti-Sikh pogrom, it should be attributed to the executive’s failure in building up proper cases against the accused and its indulgence in the destruction of evidence, leaving the judiciary helpless.

In response, the suggestions advanced by the writer are as follows:

1. India should recognise the concept of ‘mass crimes’ under its domestic laws. This either requires an amendment to the Indian Penal Code, 1860, to incorporate the mass crimes or the enactment of special statutes that specifically punish these crimes.

¹ Supreme Court of India, *Vishaka and others v. State of Rajasthan and others*, Judgment, 13 August 1997, AIR 1997 SC 3011 (<http://www.legal-tools.org/doc/3ff748/>).

² It has been observed that the terms ‘genocide’ and ‘crimes against humanity’ are employed rather loosely in the Indian socio-political context.

2. The police ought to be safeguarded from political interference so that they can freely investigate cases. An independent apolitical body should manage the promotions, transfers and other service conditions of police officers.
3. The police and the prosecution should co-ordinate their affairs in a closer manner, instead of only namesake collaboration. In addition, steps should be taken to make the prosecution truly independent of the State governments. The prosecution should be given powers to conduct appropriate pre-investigations into cases (to ascertain whether there is appropriate material to initiate investigation into a case).
4. Strong quality oversight over the police are necessary to ensure that the lapses that happened in previous mass crimes cases are not repeated. This should involve the setting up of an Independent Police Accountability Board that acts as a quality control check on the police.
5. The need for sanction for prosecuting State officials³ should be done away with to end the culture of impunity prevailing in the country.

5.1. Introduction

Impunity for mass crimes in India has long existed. This chapter analyzes the pre-investigation and investigation framework pertaining to mass crimes in India, as well as the legal and policy roadblocks facing the country in the effective dispensation of justice for mass crimes, specifically with respect to quality control aspects.

As alluded above, the Indian legal system makes no formal distinction between investigation and pre-investigation. The criminal procedural law does not expressly stipulate what is to be done prior to investigation. Section 154 of the Code of Criminal Procedure, 1973 stipulates that if the investigating officer is told, informed or aware about the commission of a cognizable offence, then he is required to proceed with the investigation of such case. However, despite Supreme Court rulings that there is no discretion available to an officer in such cases, the power of the police to investigate serious cases remains in practice discretionary.

³ Code of Criminal Procedure, 1973, adopted 25 January 1974, entry into force 1 April 1974, Section 197 (<http://www.legal-tools.org/doc/29b68e/>).

The chapter is divided into three sections. Section 5.2. seeks to examine the concept of ‘mass crimes’ or ‘core international crimes’ in the Indian politico-legal scenario in light of the Nellie massacre (1983), the anti-Sikh riots (1984), the Hashimpura killings (1987), the Gujarat riots (2002) and the anti-Christian violence in Kandhamal, Orissa. While these instances of mass violence are not exhaustive, they represent the major human rights violations in the country. This section attempts to chronicle them and put them in perspective for a broader evaluation in the quality control of preliminary examinations. India’s approach to international criminal law, especially the International Criminal Court (‘ICC’), will be analysed as well. Section 5.3. will examine the meaning of the pre-investigation/investigation in Indian criminal procedural law, the responsibilities of law enforcement officials for investigation (which is common for both ordinary crimes and mass crimes), and the role of the prosecutor. The lacunae facing Indian law enforcement will be highlighted. Section 5.4. will conclude the chapter with suggestions.

5.2. India and Core International Crimes

Under Indian criminal law, while murder, rape, rioting, dacoity or armed robbery, theft and other crimes are defined and made punishable under the Indian Penal Code, 1860, there is no category of crimes known as ‘mass crimes’ or ‘core international crimes’.

While India is not a signatory to the Rome Statute of the ICC and claims to have no obligation under it, it considers itself bound by customary principles of international law prohibiting and punishing mass crimes. In August 1959, it ratified the UN Convention on the Prevention and Punishment of the Crime of Genocide, 1948. In 1997, it signed the UN Convention against Torture but is yet to ratify it. The same is true for the International Convention for the Protection of All Persons from Enforced Disappearance.

However, India is a dualist country, meaning that all treaty commitments do not automatically become a part of Indian domestic law except incorporated by legislation. To start with, while India has ratified the Genocide Convention, 1948, there is no law giving effect to the provisions in India. While it has claimed that the provisions of the Convention have become a part of Indian domestic law by virtue of its ratification, there is no provision in Indian law that defines, let alone criminalizes genocide.

While there is a law in India that gives effect to the Geneva Conventions, 1949, it is applicable only in situations involving international armed conflicts.⁴ In addition, Section 17 of the relevant Act specifically states that for any case to be filed, prior sanction of the central government is required. Given this, the law is of questionable effectiveness, if not designed to fail.

As regards the Convention against Torture, 1984, while India has signed the Convention, it has never ratified it and there is no law in the country that prohibits torture despite national and international calls and widespread prevalent of the practice in India. The Supreme Court of India has given guidelines in *D.K. Basu v. State of West Bengal*, pertaining to measures to be taken by the police to ensure that there is no violation of basic human rights of the persons in police custody.

Even if it could be argued that ratifications make treaties an integral part of Indian law, as stated by the Supreme Court in *Vishaka*, it is baffling that no such effort has ever been made by the Supreme Court to read international crimes accepted under the Rome Statute. The same is true for crimes recognized and accepted under customary international law.

5.2.1. India's Objection to the International Criminal Court

In fact, India remains one the staunchest opponents of the ICC. Viewing the ICC as a Western and Eurocentric institution that disregards the sovereignty of nations, India has steadfastly refused to sign or ratify the Rome Statute.⁵ It has not been satisfied by the principle of complementarity, opining that its domestic legal system is strongly equipped to deal with mass crimes without the need to be a part of the ICC. Mass crimes as understood in international criminal law, according to the Indian government, are proscribed under domestic Indian law. Furthermore, India is concerned that the Rome Statute has not included the crime of terrorism, which it considers a grave shortcoming in the progressive codification of international criminal law.

India's latest direct encounter with the ICC was on June 2015, when Sudanese President Omar Al Bashir arrived in India. Though there was

⁴ Geneva Conventions Act, 1960, adopted 12 March 1960, entry into force 14 August 1961.

⁵ India has consistently expressed surprise as to how the international community can permit an international court to sit in judgment over alleged criminal acts committed by senior State officials.

international pressure on India not to host Al Bashir in the country or arrest him at the airport itself to be handed over the ICC, India's official position on the stand was not encouraging. As a country that is not signatory to the Rome Statute, the country does not have any obligations that may arise from the treaty. Since the obligation to arrest Al Bashir flows from the treaty, according to India, the country does not have any obligation in this regard.

5.2.2. India's Approach to International Law Obligations

Indeed, India's approach to international law and its obligations has been one marked by suspicion and distrust. The country has viewed any attempt by the global community to legislate (especially on matters of international criminal law and international human rights law) as an attempt to impede on the sovereignty of the country. Siddharth Varadarajan, founding editor of the leading Indian online news portal, *The Wire*, summarised India's approach to international law as one perennially marked by suspicion of international accountability and adjudicatory bodies with the sentiment running deep in the echelons of the Indian establishment.⁶ This was contrasted with the jubilation in the event of the favourable provisional measure order obtained from the International Court of Justice in the case of Kulbhushan Jadhav, an Indian naval officer who is facing execution in Pakistan on account of alleged espionage activities.

Given this ideological background, it is not difficult to understand India's fear of international institutions and actors and its reluctance to accept mass crimes as understood in international law to be operationalized in Indian law. With this background, it is pertinent to examine certain instances of mass violence that happened in India and constitute 'mass crimes' as understood in International law. This part would contextualize a deeper assessment of pre-investigative roadblocks in the Indian legal system.

5.2.2.1. Nellie Massacre (1983)

On 18 February 1983, Assamese Tribesmen butchered close to 3,000 Bengali immigrants across 14 villages in Nellie, Assam, in an attack that lasted for around six hours. Violence first erupted on 1 February, pursuant

⁶ Siddharth Varadarajan, "Why International Law Matters, From Kulbhushan Jadhav to Kashmiri Human Shield", in *The Wire*, 22 May 2017 (<http://www.legal-tools.org/doc/0b34bc/>).

to the decision of the Indira Gandhi government to accord voting rights to about 4 million immigrants from Bangladesh in the ensuing elections. Assamese political groups were historically at the forefront of driving away all ‘foreigners’ from Assam and the movement objected to the 1983 elections. The Nellie massacre was the result of this indoctrination and the decision to hold elections in the State. In addition, scarcity of resources and politico-economic concerns were also among the causes of the brutal massacre.

By all accounts, the Nellie massacre qualifies as a crime against humanity, even genocide, since Muslims were the specific target. However, to date, not a single person has been convicted. The Tribhuvan Prasad Tewari Commission report states that drum-beating Assamese had assembled with deadly weapons with the intention of targeting Muslims of the Naigaon district. *Tehelka*, a news portal that had access to the report, states that Jahiruddin Ahmed, the duty officer of Naigaon police station, informed the possibility of such an attack to the Armed Police Battalion stationed at Morigaon.⁷ Shockingly, the Superintendent of Police⁸ of Naigaon was kept in the dark.⁹ This clearly shows a lapse in the functioning of the concerned official. The inability of subsequent central and State governments has ensured impunity. Strangely enough, the Tewari Commission report was more vocal about the distress caused to the native Assamese population because of the presence of allegedly illegal migrants from Bangladesh. The report officially continues to remain confidential. In 2004, a Japanese scholar, Makiko Kimura, was prevented from presenting a paper on the subject in Guwahati University, which arguably remains the most exhaustive account of the incident.

5.2.2.2. Anti-Sikh Riots (1984)

Following the tragic and shocking assassination of former Prime Minister Indira Gandhi on 31 October 1984 by her Sikh bodyguards, there were mass riots in New Delhi, against the Sikh community. Over 3,000 people are believed to have been killed, with independent estimates putting the figure at close to 8,000. It is believed that these riots were the work of loyalists of the deceased Prime Minister and the Indian National Congress

⁷ Around 70 km away from the site of the massacre.

⁸ Or District Police Chief.

⁹ The report states that Ahmed did not inform the SP as the latter was not available at the relevant time.

(‘Congress Party’). While a few lower level functionaries of the Congress Party were found guilty, no senior level leader has been found guilty so far. In addition, it is believed that there was close involvement of the government and its instrumentalities in the atrocities. Some of the prominent politicians involved in the carnage subsequently went on to become Members of Parliament and secured ministerial berths in the Union Council of Ministers. It has been a widely held view that the pre-investigation was botched due to the close nexus between the police and the ruling lawmakers.

Since 1984, no government has been successful in prosecuting the culpable individuals responsible for the mass carnage. The absence of a law on genocide or even law prohibiting targeted communal violence has compounded the woes of the victims. Today, the victims are running from pillar to post to get justice but to no avail. In fact, the absence of an independent prosecutor that could have held the police accountable for its acts of omission and commission was deeply felt.

Contextualizing the background of the violence is essential to understanding the carnage in its comprehensive sense. In the late 1970s and early 1980s, Sikh extremists and separatists launched a mass movement for the creation of an independent Sikh homeland known as ‘Khalistan’ in the north-western Indian State of Punjab. In response to the growing militancy, in 1984, the central government ordered the deployment of forces in the Golden Temple in the northern Punjab city of Amritsar to flush out militants in the temple in a military operation known as Operation Blue Star. The Golden Temple is regarded as the most sacred Sikh shrines and its defilement whipped up strong anti-establishment sentiments especially amongst the more radical adherents of the faith. Prime Minister Indira Gandhi’s assassination followed. This resulted in a systematic pogrom against Sikhs in Delhi and numerous other cities with the blessing of sympathetic State agents.

Subsequent to the carnage, 587 first information reports (‘FIRs’)¹⁰ were recorded for the mass violence that resulted in 2,733 deaths (as per official records). Of the total, the police ordered the closure of 241 cases¹¹

¹⁰ “1984 anti-Sikh riots: Government recommends SIT to LG”, in *Times of India*, 7 February 2014 (<http://www.legal-tools.org/doc/7aa8f9/>).

¹¹ “HS Phoolka Writes Open Letter to Union Law Minister Demanding SIT for 1984 Cases”, in *Sikh24*, 31 May 2014 (<http://www.legal-tools.org/doc/9388ed/>).

without investigation, citing lack of evidence in what was a major blow for the victims.¹² The dubious role of the Delhi police, which is under the supervision of the central government, was severely criticised by various civil society organizations and lawyers. Shockingly, a particular official of the Delhi police told the Nanavati Commission about a conspiracy to register all murders under Section 304¹³ instead of 302.¹⁴

General, vague, and omnibus type of FIRs combining numerous incidents that took place were filed instead of separate ones. In 2005, the Justice G.T. Nanavati Commission appointed by the central government ordered the reopening of four of the closed cases in a widely welcomed measure. The Manmohan Singh government, in a historic move, apologised for the role of the Congress Party in the violence in 2005. However, the real test of justice would be the ability to provide justice to the victims of impunity and enacting a law on genocide.

5.2.2.2.1. Official Inquiry Commissions: A Saga of Failure

Numerous commissions have meticulously examined and investigated various aspects of the 1984 carnage. Despite their notable findings, not a single law enforcement official has been found guilty for acts of omission or commission. The only individuals found guilty were low-level political functionaries who were merely the foot soldiers. This should naturally open up questions pertaining to the country's role in dealing with cases of impunity. In addition to State commissions, independent private fact-finding bodies have applied themselves to the scale of the mass violence and blamed the law enforcement and top functionaries of the ruling party.

The central government constituted 10 different commissions and committees to analyse and investigate the anti-Sikh carnage. However, none of the commissions was instrumental in holding the guilty accountable. This is especially true of high-level perpetrators who were politically influential. The first commission headed by Ved Marwah, a former Indian Police Service officer, was prevented from completing its mandate on the ground that a judicial investigation under the leadership of a Supreme Court judge, Justice Ranganath Misra, was formed.

¹² It is unlikely that this would have been the situation if India had an independent prosecution machinery that is independent of the executive and the police.

¹³ Culpable homicide not amounting to murder.

¹⁴ Murder.

The Misra commission, which submitted its report in 1986,¹⁵ failure for lack of transparency. Its proceedings were in camera, the media was not allowed to report. Victims' lawyers were prevented from attending or examination of the witnesses, contrary to the canons of natural justice. In addition, victims' representatives were denied copies of affidavits. 'Anti-social elements' were held responsible for the riots without much clarity. It stated that many of the rioters belonged to lower ranks of Congress Party or were sympathizers, but concluded that neither the Congress Party nor any of its office-bearers had any role in the riots. In addition, the Misra commission recommended the formation of distinct committees to further investigate various aspects of the carnage.

The Ahuja committee fixed the death toll at 2,733, a conservative estimate believed to be much less than the actual figures. The joint committee comprising Justices Kapoor and Mittal ended in deadlock with both members unable to agree on a common line of action with reference to the scope of the committee. Kapoor argued that the committee was essentially administrative in nature without the power to indict police officials. Mittal disagreed with the reasoning, and went on to recommend further enquiries against 72 Delhi police officials. Interestingly, she suggested that departmental enquiry would not suffice and actions against the suspect officials would be required to meet the ends of justice.

The Jain-Banerjee committee was significant in its determination that FIRs should be lodged against certain suspect politicians. However, judicial interventions to stall the registration of the FIRs effectively destroyed the significant recommendations of the committee.

The Poti-Rosha, Jain-Aggarwal and the Ranjit S. Narula committees recommended the registration of FIRs against senior Congress Party politicians but subsequent executive inaction paralysed the good work of the committees.

The Nanavati commission, while significant in its determination that the carnage was organised and hinting at the involvement of powerful forces, did not move forward beyond an extent. Much to the disappointment of civil society activists, the committee failed to allocate responsibility to the actual leaders responsible.

¹⁵ Misra Commission Report, August 1986 (<http://www.legal-tools.org/doc/e7d847/>).

To conclude, while numerous commissions were appointed as fact-finding institutions, they were not able to play a significant role. While it would be premature to blame the commissions for their ineffectiveness, it is submitted that the Commissions of Inquiry Act, which is the legal basis for creating commissions of inquiry, has severe shortcomings. It is suggested that India should have a permanent full-time truth and reconciliation commission that effectively goes about the function of collecting evidence and advancing the cause of transitional justice in the wake of tragedies like 1984.

5.2.2.2.2. Civil Society Investigations and Findings

Numerous reports and investigations by civil society groups, activists and eyewitness accounts have shown that the 1984 carnage could not have happened without the complicity of the State.¹⁶

First, shortly after the carnage, a fact-finding team organized by two prominent Indian human rights organizations, the People's Union for Democratic Rights and the People's Union for Civil Liberties, published a report on its investigation into the cause of the Delhi riots, "Who Are the Guilty?".¹⁷ The conclusion pointed to a well-organized conspiracy by top leaders of the Congress Party and officials of the Delhi administration.

Second, in January 1985, the nongovernmental organization Citizens for Democracy investigated the riots and concluded that the violence were not spontaneous but organized by members of the Congress Party. The report's conclusion was vocal in its determination that incitement of majoritarian passions lay at the root of the carnage.

Third, in 2004, Ensaaf (meaning 'justice'), a Sikh rights organization, released "Twenty Years of Impunity",¹⁸ which documented the role played by the Congress Party in the 1984 violence. Abuse of State machinery and the macabre details of the carnage was highlighted in the report. The report received wide press coverage.

¹⁶ India has a very vibrant civil society, which has been at the forefront of activism in the aftermath of mass crimes. Their activism has in no measure contributed to an awareness of the need to end impunity for mass crimes.

¹⁷ PUDR and PUCL, *Who Are the Guilty?*, November 1984 (<http://www.legal-tools.org/doc/d9b7c8/>).

¹⁸ Jaskaran Kaur, *Twenty Years of Impunity: The November 1984 Pogroms of Sikhs in India*, Ensaaf, 2006 (<http://www.legal-tools.org/doc/f83b22/>).

5.2.2.3. Hashimpura Killings (1987)

The brutal massacre of 42 young Muslim men by the Uttar Pradesh Provincial Armed Constabulary on 22 May 1987 sent shock waves across the country. Vibhuti Narain Rai, a senior police officer, penned a book holding top officials of the administration and the police accountable. Rai was the Superintendent of Police of Ghaziabad, where Hashimpura is located, and was the first to uncover the communally minded role of the Uttar Pradesh Provincial Armed Constabulary.

The cold-blooded murders took place in a remote location of Ghaziabad district on the night of 22 May 1987 when nearby Meerut was witnessing communal violence. According to Rai, it was the biggest case of custodial killings since Independence and the Crime Investigation Department which was tasked with the responsibility to identify the culprits ended up siding with the perpetrators. Close to 30 years later, all the accused were acquitted for lack of evidence and Platoon Commander Surendra Pal Singh, the principal leader of the carnage, was no longer alive.

In addition, Rai mentions that the role of the Army was a gross violation of laws and breach of their official responsibilities. May 2018 marks the thirty-first anniversary of the gruesome killings.

5.2.2.4. Mass Crimes in Gujarat: Godhra and its Aftermath

Godhra is a name that will be etched in Indian public memory forever. A small sleepy town in Panchmahal District of Eastern Gujarat, the State that gifted India and the world Mahatma Gandhi, hit international headlines on 27 February 2002 for a violent incident that left several Hindu Karsevaks charred to death.¹⁹ According to the official version, a large mob of local Ganchi Muslims attacked the train pelting it with stones and setting a coach on fire, resulting in the deaths of 59 occupants of the train, many of whom were hapless women and infants. The Sabarmati Express, coming from Varanasi to Ahmedabad via Godhra Junction, had a large assembly of Hindu Karsevaks returning to Ahmedabad from Ayodhya after conducting a ceremony for the construction of a Ram temple at Ayodhya on the site of the demolished Babri Mosque.²⁰

¹⁹ Religious volunteers.

²⁰ The Hindu right of which the Karsevaks constitute an integral part ardently believe that the Mosque was constructed by the Mughal emperor Babur after demolishing a Hindu

The incident sparked off the arguably the worst communal violence witnessed in independent India.

The diabolical attack was pre-planned by local Muslim shopkeepers who lived in the surrounding areas with the aid of an inflammable liquid believed to be petrol, which was poured on the floor of the train coach before igniting it with fire. The key conspirators were Islamic clergymen and local politicians drawn from the Ghanchi Muslim community aided by foreign intelligence agencies. This version was subsequently accepted by the Nanavati-Shah commission appointed by the State government to study the incident. Despite strong assertions by the government, a counter-version of the incident has existed.

According to alternate version substantiated by the Justice Umesh Chandra Banerjee Commission set up by the central government, there was an altercation beginning with the molestation of Muslim girl followed by a fight in the coach between the Karsewaks and a Muslim tea vendor, which led to a mob pillaging the train. This version also controversially claimed that the fire was accidental and used as a ruse to instigate the communal riots that followed. According to this version, the inferno was allegedly executed by the train's occupants themselves.

However, the death of 59 innocent people is mainly attributed to the version supported by the State.

Following the burning of the coach, Hindu outfits called for a State-wide bandh or general strike on 28 February 2002 with a controversial 'parading of the burnt bodies' in Ahmedabad City. Provocative speeches with rabid communal insinuations followed vigorously. It led to co-ordinated and systematic attacks on Muslim houses and business establishments by frenzied mobs. The mobs also allegedly raped and tortured many females of the minority community. In Ahmedabad, two organised mass murders took place: one in Naroda Patiya and another at Gulbarg Society, a Muslim majority residential area.

5.2.2.4.1. Naroda Patiya Massacre

The Naroda Patiya massacre resulted in the death of 97 Muslims including 36 women, 35 children and 26 men. Maya Kodnani, a prominent Bharatiya Janata Party leader and Babu Bajrangji of the Bajrang Dal, a funda-

Temple which stood in its place. This mosque was demolished by Hindu zealots on 6 December 1992 leading to widespread violence in the country.

mentalist Hindu faction of the broader Sangh Parivar, allegedly led the attack. The massacre of the women was particularly said to be more gruesome with sexual violence against them. Kodnani and Bajrangji were convicted and sentenced to long prison terms. These sentences cemented the role of the judiciary as a protector and defender of civil liberties.

5.2.2.4.2. Gulbarg Society Massacre

Gulbarg Society saw its 35 Muslim residents being burnt alive; the victims included Ehsan Jafri, a former Congress Party Member of Parliament. Zakiya Jafri, his widow, alleged that Jafri had made frantic calls prior to his killing to the Chief Minister's office for assistance but received no help as the mob continued to burn and pillage the society despite the presence of police. She later alleged the State of complicity with the rioters especially implicating the Chief Minister of Gujarat. Gulbarg Society also had 31 missing residents who were later taken to be dead taking the body count to 69.

By the evening of 28 February, curfew was ordered in 27 towns and cities of Gujarat to control the disturbances with the deployment of Rapid Action Force in Godhra. However, by and large, the deployment of armed forces was delayed.

5.2.2.4.3. Best Bakery Case

In Vadodara, a frenzied mob attacked Best Bakery, a small Muslim-owned bakery in the city where the owner and the workers of the bakery which included 11 Muslims and three Hindus were burnt alive. The police filed a case on the basis of the information given by a 19-year-old eye witness, Zaheera Sheikh. Zaheera Sheikh's case rose in prominence on account of witness intimidation and harassment. The case on this account had to be shifted out of Gujarat and was tried in Maharashtra.

5.2.2.4.4. Bilkis Bano's Case

One of the most brutal of all cases during the Gujarat Riots, the horrific gang rape of Bilkis Bano and murder of her relatives including her baby shocked the conscience of an entire nation. The appeal judgment of the case was delivered in May 2017 in which the Bombay High Court commendably found police officials and doctors acquitted by the lower courts guilty, though refusing to award the death sentence to any of the accused. While the judgment was a landmark one, it was criticized by the writer as

not adopting international jurisprudential standards in its reasoning.²¹ Like the Best Bakery case, Bilkis Bano's case was shifted outside Gujarat (to Maharashtra) for the purposes of ensuring a fair trial for the victims.

5.2.2.4.5. Conclusion

There have been strong allegations that high-level perpetrators have not been held accountable for the riots that followed the Godhra carnage. It is well known that the law and order machinery in Gujarat failed to protect the minority community and no major official has been held accountable for the same. Even two prominent politicians who were punished with imprisonment post-conviction, Maya Kodnani and Babu Bajrangi, are frequently released from prison on whimsical medical grounds to escape the rigours of incarceration. Such measures by the pliable State government have fully eroded the near non-existent confidence of the victims despite the commendable role of the judiciary in bringing the perpetrators to justice.

5.2.2.5. Violence in Orissa against Christians

In August 2008, at least 39 Christians were killed and 232 churches were destroyed in massive violence that followed the killing of Vishva Hindu Parishad leader Swami Laxmananda Saraswati in Kandhamal in Odisha. A large majority of those who perpetrated the violence are still at large and yet to face justice. Prior to Kandhamal, Christians have been targeted in Dangs (Gujarat) and Jhabua (Madhya Pradesh). The brutal murder of Graham Staines and his two children by Hindu fundamentalists in Odisha evoked an international outcry in January 1999. The murder in many regards was symbolic of the power enjoyed by fringe Hindu groups in the country. Animosity between the majority Hindu community in India and the minority Christian community in India has fundamentally been on the issue of 'anti-conversion laws'. Sections of the Hindu right wing Bharatiya Janata Party have accused the Christian community of engaging in conversions of indigenous tribes and other low caste Hindus to Christianity. Odisha was one of the first provinces in the country to enact an anti-

²¹ Abraham Joseph, "Indian State Practice on Mass Crimes Jurisprudence: An International Law perspective on Bilkis Bano's Judgement", in *Modern Diplomacy*, 14 May 2017 (<http://www.legal-tools.org/doc/7f8ba6/>).

conversion law.²² The logic of such an enactment being to stop the conversion of people from Hinduism to Christianity.

According to a team of the Odisha State chapter of the All India Christian Council, the hard-line Hindutva groups were responsible for the ghastly acts of violence that rocked Kandhamal. Around 50 Christians were brutally killed and 730 houses as well as 95 churches were attacked. A large number of Christians were displaced and forced to seek shelter in relief camps. Even the killing of Laksmananda that was used as a justification for attacks against Christians was suspected to be carried out by Maoists. The Kandhamal violence resulted in Naveen Patnaik, the Chief Minister of Odisha severing all ties with the right wing Bharatiya Janata Party. Patnaik termed the violence as one which aroused international condemnation. The gang rape of a nun in September 2008 considerably weakened Christian-Hindu relations in Orissa. While a Central Bureau of Investigation ('CBI') enquiry for the same was demanded, the Supreme Court turned down such a request. The violence in Orissa was condemned internationally forcing the National Human Rights Commission to seek a report from the Odisha government. The United States Commission on International Religious Freedom demanded that Indian authorities take immediate steps to prevent the escalation of violence. The European Union was also at the forefront of condemning the violence and requiring India to take necessary action to deal with the situation. On 29 June 2010, Manoj Pradhan, a Bharatiya Janata Party Member of the Legislative Assembly was found guilty of the murder of Parikhita Dighal, a Christian.

To conclude, Christians and other civil society groups that were at the forefront demanding justice for the victims were dissatisfied with the role played by the local police during the Kandhamal violence. Calls for a CBI inquiry should be viewed in this aspect. This is more serious given the fact that the majority of the victims were Christians who have systematically been subjected to violence, intimidation and harassment by Hindu extremists. However, what distinguishes Kandhamal and other acts of systematic violence against Christians in the State from the 1984 Anti-Sikh Pogrom and the 2002 Gujarat violence was the relatively pro-active role played by the government in ensuring justice for the victims. The attacks against minorities in 1984 and 2002 by private mobs was to an

²² Orissa Freedom of Religion Act, 1967, adopted and entry into force 9 January 1968 (<http://www.legal-tools.org/doc/0400a4/>).

extent aided by a pliant State that sought to politically benefit from the situation.

5.2.3. Conclusion

It can be concluded that mass crimes in India have happened at regular intervals. The official response to these acts has not satisfied the victims and civil society groups. The police have either been hapless onlookers to instances of mass violence or active participants in the carnages. Police culpability in the 1984 anti-Sikh riots, the 2002 Gujarat riots and Kandhamal violence was strongly suspected and pointed out by commissions and civil society groups as well. As regards Hashimpura, the carnage was one that was the handiwork of communal police officials alone. Eighty-five percent of the Indian police comprises of the Constabulary who constitute the lowest rungs of the police establishment in each of the States. Fourteen percent comprises lower level officials like the Sub-Inspectors and Inspectors. Officials of the rank of Assistant Superintendent of Police and above (who are Indian Police Service officials) comprise just 1% of the total police force. Most of the lower level officials are extremely vulnerable to communal propaganda. The refusal/unwillingness of the Indian State to define ‘genocide’ and ‘crimes against humanity’ has weakened the case of the State that such crimes do not happen. A remarkable attempt was made to legislate on ‘communal violence’ through a bill known as the Communal Violence Bill, 2011. However, this bill was riddled with controversies and ultimately did not see the light of the day.²³ Efforts are underway to enact a law punishing mob lynching as well.²⁴ For the law enforcement, any pre-investigative determination of mass crimes is not possible such offences are not defined in Indian law. While focusing on the issue of mass crimes, it is submitted that the failure of the law enforcement, apart from other reasons is due to the absence of an independent prosecution machinery that can carry out pre-investigation of mass crimes (elaborated in greater detail in Sections 5.3. and 5.4. below).

²³ Section 3, Clause (c) of the bill read as follows: “‘Communal and targeted violence’ means and includes any act or series of acts, whether spontaneous or planned, resulting in injury or harm to the person and or property, knowingly directed against any person by virtue of his or her membership of any group, which destroys the secular fabric of the nation”.

²⁴ Draft of the Protection from Lynching Act, 2017, 7 July 2017 (<http://www.legal-tools.org/doc/f0b548/>) (‘Manav Suraksha Kanoon’, ‘MASUKA’).

5.3. Pre-Investigation/Investigation in Indian Criminal Procedural Law

This section will analyse the role of the police and the prosecutor in the mass crime investigative framework in India. Specific emphasis will be placed on the issue of ‘quality control’ to understand how police-prosecutor relations can be improved to strengthen the ‘pre-investigative’ phase. This part of the problem will highlight the below mentioned ‘problems’ in detail.

5.3.1. The Pre-Investigative/Investigative Framework in India

As mentioned earlier, there is no concept of pre-investigation in India. Indian criminal procedural law only makes a mention of investigation and there is no formal distinction between investigation and pre-investigation.²⁵ The relevant clause states that ‘investigation’ includes all the proceedings under the Code of Criminal Procedure for the collection of evidence conducted by a police officer or by any other person (other than a magistrate) who is authorized by a magistrate.²⁶ According to the Supreme Court of India, the term investigation comprises the following:²⁷

1. The need for the investigating officer to proceed to the spot/scene of the crime.
2. Ascertainment of the facts and circumstances of the case in question.
3. Discovery and arrest of the suspect.
4. Collection of evidence relating to the commission of the offence which may consist of:
5. Examination of various persons including the accused and recording of their statements in writing if deemed necessary.
6. Search and seizure of items/objects from the scene of the crime necessary at the time of trial.
7. Formation of an opinion as to whether on the materials collected there is a case to place the accused before a magistrate for trial and

²⁵ Code of Criminal Procedure, 1973, Section 2, Clause (h), see *supra* note 3.

²⁶ The relevant law in India is the Code of Criminal Procedure, 1973. All matters pertaining to procedural criminal law generally are contained in this enactment. See *ibid*.

²⁷ Supreme Court of India, *H.N. Rishbud and Inder Singh v. the State of Delhi (and Connected Appeals)*, Judgment, 14 December 1954, AIR 1955 SC 196 (<http://www.legal-tools.org/doc/cc9551/>).

if so taking the necessary steps for the same by filing a charge-sheet under Section 173 of the Code of Criminal Procedure.

The principal agency entrusted with the responsibility to investigate offences is the police. Wide powers and responsibilities are entrusted for this purpose some of which are as follows:

1. To require attendance of persons acquainted with the facts and circumstances of a case.²⁸
2. To examine witness and record their statements.²⁹

In this context, it is important to mention that Indian law makes a distinction between cognizable and non-cognizable cases. This distinction demarcates the power of the police in respect of criminal investigations. In all cognizable cases, police officers have the power, duty and responsibility to investigate; this is not true in the case of non-cognizable cases. An offence is cognizable if it is shown as such in the First Schedule of the Code of Criminal Procedure. For these offences, a police officer can arrest without warrant. In addition, for these categories of cases, the police can directly start investigation without the need for a direction by the magistrate. Cognizable cases are the more serious cases as opposed to the non-cognizable ones, which are minor in nature. Thus, for the purposes of this chapter which is concerned with mass crimes, only cognizable cases are relevant as all major crimes in India are regarded as cognizable offences.

5.3.2. Police in India

In India, the police force is the State instrumentality for the prevention, detection and investigation of crimes. Policing is a State subject, which means that every State government has its own police force which directly answerable to them. The State government decides the strength of the force. However, the most senior members of the force are members of the Indian Police Service who are recruited by a central agency known as the Union Public Service Commission to provide leadership to the respective State police forces. The head of the State police is the Director General of Police who invariably is the most senior Indian Police Service officer of the State Cadre. The Police Act, 1861, enacted by the British, is the law

²⁸ Code of Criminal Procedure, 1973, Section 160, see *supra* note 3.

²⁹ *Ibid.*, Section 161. It should be mentioned here that the discretion of the officer to record or not to record statements is discretionary. There is a thus a strong chance that such a power may be misused by the law enforcement for their own reasons.

that governs various aspects of policing, though there are some ancillary laws on the subject as well.

The logic of the Police Act, 1861 was to give maximum powers to the police officers to crush any potential rebellion against the imperial State. The Delhi Special Police Establishment Act, 1946, which provides for the constitution of a Special Force in Delhi for the investigation of specific offences in the Union Territories and States with their concurrence, is significant in this regard. The CBI, which is the creation of the Delhi Special Police Establishment Act, 1946, is the premier central investigating body in India. Most mass crimes have seen investigation by the CBI given its image as an impartial and reliable investigative agency. In addition, the judiciary has on many occasions directly ordered investigation by the CBI in highly sensitive cases or those involving serious human rights violations. However, in recent times, the CBI has been subjected to severe criticism because of interference by the central government, which exercises significant control over the body. The Code of Criminal Procedure confers powers on the police like the power to arrest, search, seize and so on. Broader powers are entrusted to those in charge of police stations, who are usually known as Station House Officers. Police officers above the rank of Station House Officer are automatically vested with powers to investigate cases. The Supreme Court in *Prakash Singh v. Union of India*³⁰ laid down a series of guidelines with the aim of reforming the police set up in the country as is widely viewed as the most significant aspect in police reforms in the country.

Problems facing pre-investigation in India can be summarized to the following points:

1. *Excessive discretion*: The police are given wide discretion to investigate crimes. Thus, they may investigate or may not depending on various circumstances. In most cases, this authority is abused. In addition, the obligation to investigate only the most serious cases (cognizable cases) results in the police trying to categorize even the more serious offences as non-cognizable. The lackadaisical approach of the lower level constabulary is mainly because of their need to report the progress of the case to their superior officials and internal departmental requirements of speedy progress.

³⁰ Supreme Court of India, *Prakash Singh and others v. Union of India and others*, Judgment, 22 September 2006, (2006) 8 SCC 1 (<http://www.legal-tools.org/doc/a66652/>).

2. *Politicization of the police:* The police in India is heavily politicized. Policing is a State subject (as opposed to a Union subject) which means that individual States regulate their law enforcements. The Indian Police Act, 1861 regulates the functioning of the police. However, the law is archaic and is not in tune with modern ideas. Heavy politicization of the police implies that politicians and their goons (who in most cases are directly or indirectly responsible for mass crimes) are seldom brought before the law and punished. Only the lower level functionaries are prosecuted if at all. This is clearly evidenced from the various commissions that enquired into the 1984 anti-Sikh riots. A large number of impunity cases in India go unprosecuted since there is political pressure on the police not to investigate cases. Making the police independent of the executive would be great measure and this would require clubbing the prosecution with the police under a meaningful arrangement. Interestingly, the Supreme Court is now directly asking the police to directly report on the investigative progress of grave cases. However, such instances are rare and few but the trend is a welcome one.
3. *No formal distinction between pre-investigation and investigation:* In India, there is no formal distinction made between pre-investigation and investigation in the Code of Criminal Procedure, 1973. Despite the same, pre-investigation is essential in every legal system to determine the important cases from the non-important one. Pre-investigation, thus understood in the Indian context, refers to the process of collecting/assessing information and determining if there is sufficient material for a full-fledged probe. The absence of a mass crimes law has strengthened the impunity framework in the country. The law enforcement is unable to investigate or charge sheet mass crimes in India because of the absence of a law. This stage (pre-investigation) is very crucial in the Indian context, given the near absolute powers of the police to decide whether to proceed with a case or not. No authority in India can technically interfere with the police at this stage. The prosecutor or the Court have no role at this stage. Though technically, the police may co-ordinate with the prosecutor at the pre-investigative stage, this seldom happens. If the police decide not to investigate a case, then they file a final report indicating the need to close the case. This is known as a closure report. The Magistrate examining the Closure Report has

two options: *Firstly*, accept the closure report and close the case as recommended by the police. *Secondly*, direct a fresh investigation to the police, if they are of the opinion that a closure report has been filed despite sufficient material to proceed with a trial. In certain rare instances, they may refuse to exercise either of the two options and directly admit the case for trial.³¹ However, if the police find sufficient material to proceed with the case, they will file a Charge sheet as required Section 173 of the Code of Criminal Procedure, 1973. Even here, the prosecutor has no role. While the police have every right to consult the prosecutor and seek his advice at every stage of the investigation, this happens only at the discretion of the police. The Investigative Officer works under the direct supervision of the district Superintendent of police who mainly controls the investigation.

4. *Police-prosecutor relations*: The Public Prosecutor or Assistant Public Prosecutor is the person responsible for conducting cases on behalf of the State. This applies at the trial and appellate levels as well. While in many countries in the world, the prosecution is given a key role at the pre-investigation and investigation stage, in India, the prosecutor practically appears only at the post- investigative or trial stage of a case. As mentioned earlier, there is hardly any co-operation between the police and the prosecution. This was primarily due to an amendment in the Code of Criminal Procedure, 1973 that separated the police from the prosecutor. It is important that the police and prosecution work together and deal with cases as police officers in many instances may not be well versed with the law. The prosecutor in reality has no independence even he actually comes into the picture at the trial stage of the case. Though he is supposed to represent the State as an officer of the court and conduct the case in a fair, transparent and unbiased manner, in reality he functions as a wing of the police (albeit in a subordinate position). Thus, while on paper the police and prosecution are separate, in practice they function as one once the trial begins. An evaluation of the Indian criminal trial process would show that the prosecutors in reality do not lock horns with the police as they are at the mercy of the State

³¹ The sensational Aarushi Talwar murder case was one such instance where the Magistrate refused to accept the Closure Report filed by the CBI and directed the initiation of a trial concluding the existence of sufficient evidence against the parents of the victim.

governments that appoint them. It is an open secret that their appointment is often questionable and secured by corrupt means. It is suggested that a better mechanism may be to give the prosecutor an independent role in evaluating the report of the police. Since, this is currently not the scheme in India; Indian lawmakers are unlikely to accept the change since they would lose control over the police. In addition, there is no point in giving the prosecutor independence to evaluate police records, if the prosecutor would be subjected to the same level of political interference like the police. All Supreme Court judgments including in *Sheo Nandand Paswan* on the question of the nature and role of the prosecutor have time and again clarified that the prosecution is an independent agency from the government.³² However, the reality is something different and the government heavily influences the prosecutors. In addition, the Indian police are unlikely to accept a prosecutor sitting in judgment over them. However, strict quality control requires that an independent prosecutor and independent police function together in the examination of cases. This would radically alter the pre-investigative stage of investigations and lead to qualitative improvements.

5. *Role of the CBI*: In fact, in the CBI, the investigative arm of the agency and the prosecuting arm of the agency work together. The CBI investigates most serious cases in India. However, in India, the CBI is often referred to as the ‘caged parrot’ as it is seldom allowed to function independently. It is under the administrative control of the Union government based in Delhi who often use it to settle political scores against rivals. A Quality control of the CBI would require making it independent of the Union government and perhaps directly under the control of the Supreme Court of India (if possible). Since, the executive is culpable in most massive human rights violations cases, expecting the CBI to be independent under present circumstances is difficult. The political abuse of the CBI is one of the biggest quality restraints facing Indian law enforcement today. However, despite these shortcomings, the CBI has a sound reputation among the Indian public and sensational cases are entrusted to the CBI as a final measure.

³² Supreme Court of India, *Sheo Nandan Paswan v. State of Bihar and others*, Judgment, 20 December 1986, AIR 1987 SC 877 (<http://www.legal-tools.org/doc/9035e4/>).

6. *Sanction for prosecution and good faith exception*: In India, Section 197 of the Code of Criminal Procedure, 1973 provides immunity to police and other government officials from prosecution. Sanction to prosecute these officials is required from the central government. This is the main reason why law-enforcement officials are hardly ever punished for acts of impunity committed by them. In addition, there is a good faith exception provided in the Indian Penal Code, 1860 that exempts any act performed by a Public servant in good faith from punishment. All crimes committed by the law enforcement which are protected by the good faith exception are exempt from punishment. Thus, quality control at any stage of the investigative framework in India cannot happen until Section 197, IPC is removed or severely curtailed, and the police-prosecutor teams have a greater joint role to play in pre-investigative matters. All this would require compulsory political non-interference in the pre-investigative phase.

5.4. Suggestions and Conclusions

The first imperative for the Indian State to deal with mass crimes is to effectively incorporate them into Indian law. This could be done through three routes: (i) adding internationally accepted mass crimes in the Indian Penal Code, 1860; (ii) amending the Geneva Conventions Act, 1960 to remove Section 17 of the Act, which requires prior sanction of the central government before a case can be registered under its provisions and taking out the ‘international armed conflict’ requirement from the ambit of the law; and (iii) enacting an independent mass crimes legislation that defines proscribes and punishes the crimes that India has agreed to prohibit under its treaty obligations and those prohibited under customary international law. Any change in the law or a new law should strive to incorporate communal violence as a specific crime within its ambit. Since international criminal law does not define ‘communal violence’, it can exist as a subset of crimes against humanity. Needless to mention, since India has assumed obligations under the Genocide Convention, 1948, the obligation under Article 5 of the Convention, that is, to enact a specific legislation on the subject, is an imperative that should be complied with.³³

³³ It is submitted that by the author that the obligations to prevent and punish the crime of genocide is an independent obligation under customary international law as specifically stated by the ICTY in *Krstić*.

Inquiry commissions in India have proved to be a failure. While there is no broad public debate in the country now, it is suggested that instead of having temporary inquiry commissions, it is better to have a permanent truth and reconciliation commission that would institutionalize the process of truth telling, dialogue and interaction between the various stakeholders. This institution essentially should function alongside the police but should have judicial members as such as members.

Police reforms in India urgently need to focus on abolishing Section 197 from the Code of Criminal Procedure, 1973. A strong and effective witness protection programme is the need of the hour to prevent threat and harm to witness. Zahira Shiek's case highlights the importance of witness protection, which is so very crucial in cases involving mass crimes. Police-prosecution co-ordinations should become a reality in India. It is time for Indian lawmakers to seriously ponder on separating pre-investigation from investigation in India. This change would be for the better in India.

Last but not the least, it is extremely important to ensure that the police are free from political pressure and bias. An Independent Police Accountability Board can be constituted in each State that ensures that human rights are not violated. Police officers found guilty for mass crimes should be punished under the proposed mass crime laws while providing safeguards for honest and diligent officers. India needs to go a long way in the fight against impunity. Recognizing the importance of pre-investigation and affording a great role for international criminal law, especially the ICC should be the first steps in this direction.

German Preliminary Examinations of International Crimes

Matthias Neuner*

This chapter discusses how the Office of the German Federal Prosecutor General ('FPG') conducts preliminary examinations¹ into international crimes and what quality control measures, if any, are applied. These issues are discussed in six sections: firstly, how Germany implemented the Statute of the International Criminal Court ('ICC Statute'); secondly, what the objectives of this implementation were; thirdly, which measures are available to a German Prosecutor in a preliminary examination; fourthly, the fate of certain preliminary examinations into international crimes; and fifthly, what quality control measures, if any, are taken during a preliminary examination. Finally, a conclusion is provided.

6.1. Germany's Implementation of the ICC Statute

Germany signed the ICC Statute on 10 December 1998² and deposited its instrument of ratification on 10 December 2000.³ The ICC Statute entered

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¹ The German term for preliminary examinations is *Vorermittlungen*. A literal translation would read 'pre-investigation'. However, as will be pointed out below in Section 6.3.1., German prosecutor has no coercive means available during this early stage. This justifies calling this phase 'examination' only instead of pre-investigation, because the latter term implies the use of coercive means which are *not* available to a German prosecutor before the formal opening of an investigation. To avoid confusion, this chapter uses the term 'preliminary examination'.

² Cf. the Law regarding the ICC Statute from 17 July 1998, 4 December 2000, *Bundesgesetzblatt*, 2000, part II, no. 35, p. 1393 ('German law on ICC Statute'). The official declaration of Germany accompanying the ratification was published on 4 April 2003 in the *Bundesgesetzblatt*, 2003, part II, no. 9, pp. 293, 297 and 298 ('German law on ratification').

³ This occurred days after Germany had translated the ICC Statute into German and published it in the official gazette on 7 December 2000 (cf. German law on ICC Statute, p. 1393 and German law on ratification, p. 293).

into force in Germany on 1 July 2002.⁴ Before this date, Germany had created the Code of Crimes against International Law ('CCAIL'), a law distinct from the Federal German Criminal Code ('FCC') which contains ordinary criminal offences. Initially, the CCAIL contained war crimes, crimes against humanity and genocide comparable to the offences codified in the ICC Statute.⁵ Germany exercises jurisdiction over these offences on the basis of active and passive personality, territoriality and also universal jurisdiction.⁶

Following the adoption of the crime of aggression in Kampala on 11 June 2010,⁷ Germany amended its CCAIL to include the crime of aggression as well.⁸ This amendment entered into force on 1 January 2017 and provides for German jurisdiction over aggression based on the principles of territoriality and active personality,⁹ but not universal jurisdiction.

6.1.1. Competent Court

The competent authorities to deal with offences codified in the CCAIL are according to Section 120(1)(8) of the Courts Constitution Act ('CCA')¹⁰ of the Higher Regional Courts. Ordinary decisions about requests to compel charges are decided by a bench of three judges.¹¹ The Higher Regional Court acts as the court of first instance for offences pursuant to the CCAIL. Depending on the complexity and difficulty of the cases, trials

⁴ German law on ratification, p. 293, Section I.

⁵ Cf. CCAIL, part II, chap. 1, Sections 6–8. The CCAIL was adopted on 26 June 2002 and entered into force on 30 June 2002 (cf. the Law introducing the CCAIL, published 29 June 2002, *Bundesgesetzblatt*, 2002, part I, no. 42, pp. 2254–60, Article 8).

⁶ Cf. CCAIL, Sections 1 and 2 in connection with FCC, Sections 3–5, Section 6, no. 9 and Section 7.

⁷ Review Conference of the Rome Statute, Amendments on the Crime of Aggression to the Rome Statute of the International Criminal Court, 11 June 2010, RC/Res.6 (<http://www.legal-tools.org/doc/0d027b/>); Adoption of Amendments on the Crime of Aggression, UN doc. C.N.651.2010.TREATIES-8 (Depositary Notification), 29 November 2010; cf. ICC Statute, Articles 5(1)(d) and 5(2).

⁸ Cf. Gesetz zur Änderung des Völkerstrafgesetzbuches (Law to change the CCAIL), adopted 22 December 2016, published 28 December 2016, *Bundesgesetzblatt*, part I, no. 65, p. 3150, Article 1. Article 1 introduces a new Section 13 into the CCAIL.

⁹ *Ibid.*, Article 3.

¹⁰ In German *Gerichtsverfassungsgesetz*.

¹¹ Cf. Federal Code of Criminal Procedure (hereinafter 'FCCP'), Section 172(2) in connection with CCA, Section 122(1).

may be conducted in front of a bench consisting of either three or five judges.¹²

6.1.2. Federal Prosecutor General

The competent authority in Germany to conduct preliminary examinations, investigations and prosecutions into offences codified in the CCAIL is the FPG's office based in Karlsruhe¹³ which is supported by the Federal German police's war crimes unit. The FPG mainly prosecutes offences relating to State security. The FPG has *no* authority to assess the suspicion of a crime under political standards.¹⁴ At least during the first six years after the CCAIL entered into force, there was no department within the FPG's office which exclusively dealt with offences under international law. Rather, other existing units within the FPG's office dealt with such offences. In December 2008, an investigative department¹⁵ dealing with international crimes was set up, comprised of one federal prosecutor, one senior prosecutor and two scientific researchers.¹⁶ Over the years this unit on international crimes grew and has, since March 2017, seven prosecutors, namely four permanent prosecutors and three scientific assistants. The latter rotate and usually stay in this unit for two years before moving to other departments within the FPG's office.

Regarding offences under international law, the FPG has been afforded a stronger position in comparison to his¹⁷ colleagues prosecuting ordinary crimes, in that an explicit *authorization* is provided to the FPG to *dispense* with an investigation if an offence under the CCAIL is believed to have been committed and if *no* concrete link to Germany exists.¹⁸ Fur-

¹² Cf. CCA, Section 122(2).

¹³ Cf. *ibid.*, Section 142a.

¹⁴ Preliminary note of the German government to questions posed by Parliamentarians, Bundestag, 5 May 2014, Bundestag Drucksache no. 18/1318, p. 2; Thomas Beck, "Das Völkerstrafgesetzbuch in der praktischen Anwendung – ein Kommentar zum Beitrag von Rainer Keller", in Florian Jeßberger and Julia Geneuss (eds.), *Zehn Jahre Völkerstrafgesetzbuch*, Nomos and Stämpfli, 2013, pp. 161 and 163 (hereinafter 'Beck – Völkerstrafgesetzbuch').

¹⁵ In German: *Ermittlungsreferat*, cf. response of the German government to questions posed by Parliamentarians, Bundestag, 19 December 2008, Bundestag Drucksache no. 16/11479, p. 6, response to question 17.

¹⁶ *Ibid.*

¹⁷ The masculine 'he', 'his' etc. hereinafter are used for the sake of convenience.

¹⁸ Sub-section 153(f)(1) FCCP empowers the FPG to dispense while sub-section 2 contains a suggestion to the FPG to exercise his discretion to suspend in certain cases. Through the

ther, the decisions of the FPG not to open an investigation or, once opened, to close an investigation are only subject to limited review by the Higher Regional Courts regarding two aspects: (a) did the FPG exercise his discretion at all?¹⁹ And if so, (b) did he exercise his discretion arbitrarily?²⁰ Further, even once the Higher Regional Courts have confirmed the charges, the FPG can, at any stage of the proceedings in cases involving offences under the CCAIL, dispense the proceedings *without* prior permission of the court. In this regard, Section 153f(3) of the Federal Code of Criminal Procedure ('FCCP') states: "[i]f, in the cases [subject to the CCAIL] public charges have already been preferred, the public prosecution office may, at any stage of the proceedings, withdraw the charges and terminate the proceedings".²¹

This provision increases the powers of the FPG in cases involving the CCAIL. By contrast, in almost²² all cases involving ordinary crimes, the prosecutor *cannot* simply withdraw the charges without the permission of the court,²³ and is barred from doing so after the trial has commenced.²⁴

6.2. Objectives of Implementation and Preliminary Examinations

First, the objectives of the implementation of the ICC Statute in Germany are defined, followed by a discussion of those of preliminary examination.

construction of this section, the legislature, relying on the principle of opportunity, structures the exercise of the FPG's discretion (cf. Björn Gercke, "9th section: Öffentliche Klage", in Björn Gercke, Karl-Peter Julius, Dieter Temming and Mark A. Zöller (eds.), *Strafprozessordnung*, 5th edition, C.F. Müller, 2012, Section 153(f), para. 2).

¹⁹ Higher Regional Court Stuttgart, *Center for Constitutional Rights v. Rumsfeld et al.*, decision, 13 September 2005, 5 Ws 109/05 (hereinafter 'Higher Regional Court Stuttgart – Rumsfeld decision'), published German in *Neue Zeitschrift für Strafrecht*, 2006, p. 117, Gründe Section III(2)(b) and in English in *International Legal Materials*, 2006, vol. 45, no. 1, pp. 122 and 125.

²⁰ *Ibid.*

²¹ Cf. also Higher Regional Court Stuttgart, *Amnesty International & Human Rights Watch v. Almatov et al.*, Decision, 27 March 2008, 5 Ws 1/07 (hereinafter 'Higher Regional Court Stuttgart – Almatov Decision'), sub-section II, para. 2(c).

²² Exceptions are provided for in FCCP Sections 153(c)(4), 153(d)(2), 153(e)(2) and 153(f)(3).

²³ Cf. *ibid.* Sections 153 and 153(a)(1); 153(a)(2), 153(b) and 154(2); and 154(b)(4).

²⁴ Cf. *ibid.* Section 294(1) in connection with Section 156.

6.2.1. Implementation

The legislative history behind CCAIL reveals that it was created (as part of the domestic implementation of the ICC Statute), among other objectives, to provide adequate investigations, so that Germany will not become a “safe haven” (*sicherer Rückzugsraum*) for war criminals.²⁵

At the same time, the legislature was also aware of the enormous resources required for the prosecution of war crimes, and of Germany’s own history involving the Nazi’s systematic commission of crimes and subsequent adjudication of individual perpetrators. It therefore decided that Germany should *not* present itself as a ‘world police officer’ who balances deficits in criminal prosecutions abroad or who demonstrates to other States how a better or other more efficient prosecution of international crimes works.²⁶ Germany is aware that its judicial resources are limited and that investigations into war crimes usually require cross-border investigations into complex situations. Hence, the German legislature emphasized the principle of subsidiarity and assists with providing judicial assistance to other States or international tribunals to enable them to conduct trials into crimes against international law.²⁷

6.2.2. Preliminary Examination

Whether regarding ordinary crimes or offences under the CCAIL, German law does *not* currently regulate and thus define what the objectives of a preliminary examination are.

6.2.2.1. Primary Inferences from Law

In the absence of explicit provisions on preliminary examinations, the FCCP governs at least the procedural step *following* a preliminary exami-

²⁵ Cf. the response of the German government to questions posed by Parliamentarians, Bundestag, 19 December 2008, Bundestag Drucksache no. 16/11479, p. 4, response to question 7, see *supra* note 15; Christian Ritscher, “Die Ermittlungstätigkeit des Generalbundesanwaltes zum Völkerstrafrecht: Herausforderungen und Chancen”, in Christoph Safferling and Stefan Kirsch (eds.), *Völkerstrafrechtspolitik*, Springer, 2003, pp. 223 and 225 (hereinafter ‘Ritscher – Ermittlungstätigkeit GBA’).

²⁶ *Ibid.*, p. 225.

²⁷ Federal Ministry of Justice Germany, Government Draft Code of Crimes against International Law (English version), 28 December 2001, p. 84 (hereinafter ‘government draft – motives CCAIL (English version)’); Bundestag, Entwurf eines Gesetzes zur Einführung des Völkerstrafgesetzbuches, 13 March 2002, BT Drs. 14/8524, p. 38 (hereinafter ‘Bundestag – motives CCAIL’).

nation. Regarding the formal opening of an investigation, Section 152(2) of the FCCP provides that: “the public prosecution office shall be obliged to take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications”. By inference, the objective of any preliminary examination is to explore whether sufficient factual indications exist.

Further guidance on preliminary examinations is provided by a directive which was not adopted by either the federal parliament (Bundestag) or any parliament of the 16 States of Germany. Rather, the Ministers of Justice and Interiors of those States agreed in 1992 on a common directive limited to preliminary examinations against organized crime:

If, following an assessment of the existing leads, factual indications remain unclear and additional lines of inquiry are available, the law enforcements authorities *may* pursue these. In such cases no legal duty to investigate exist. The objective is simply to clarify whether sufficient factual indications exist.²⁸

This common directive on organized crime indicates that the objective of a preliminary examination is to determine whether sufficient *factual indications* of a crime exist. This should be done by assessing given leads, meaning those which are known and/or which have been provided by the person/organization notifying the suspicion of a crime. However, by using the word ‘may’ and emphasizing that no legal duty to pursue additional lines of inquiry exists at the preliminary examination stage, the directive provides the law enforcement authorities with *discretion*. Its scope is unclear: does such discretion include *whether* to pursue additional lines of inquiry? Or rather, do all additional lines have to be generally pursued, but the Prosecutor has discretion regarding the intensity necessary to clarify whether sufficient factual indications of an organized crime exist?

²⁸ Gemeinsame Richtlinien der Justizminister/-senatoren und der Innenminister/-senatoren der Länder über die Zusammenarbeit bei der Verfolgung der Organisierten Kriminalität, 8 July 1992, JMBI/92, no. 9, p. 139, as amended through the *Gemeinsamer Runderlass*, 18 April 2000, JMBI/00, no. 5, p. 67, at Section 6.2. (hereinafter ‘Common Guideline’) (emphasis and translation by this author). (“Bleibt nach Prüfung der vorliegenden Anhaltspunkte unklar, ob ein Anfangsverdacht besteht, und sind Ansätze für weitere Nachforschungen vorhanden, so können die Strafverfolgungsbehörden diesen nachgehen. In solchen Fällen besteht keine gesetzliche Verfolgungspflicht. Ziel ist alleine die Klärung, ob ein Anfangsverdacht besteht.”)

Furthermore, this directive was adopted by ministers from German States, but not by the Federal Minister of Justice who appoints and has the power to instruct²⁹ the FPG, whose prosecutors investigate allegations involving crimes against international law. Thus, it remains unclear whether this directive on organized crime can be applied by analogy to preliminary examinations under international criminal law.

6.2.2.2. Secondary Inferences from Indirectly Applicable Law and Practice

Additional inferences on considerations guiding the FPG during the exercise of his discretion at the preliminary examination stage may be drawn from the options available to the FPG under the FCCP. When the FPG obtains knowledge of a suspicion of a crime under international law, he has the following options as a result of the preliminary examination: (1) he finds no factual indications and closes the preliminary examination, (2) he has already an open investigation against a concrete person and connects the new preliminary examination to it by extending the old investigation, (3) he formally opens a new investigation and subsequently either files an indictment³⁰ or closes the investigation,³¹ or (4) he maintains the information and evidence obtained during the preliminary examination by adding it to an ongoing structural investigation against unknown persons. Since 2002, the FPG has mainly pursued three options: the closing of preliminary examinations or of formally opened investigations or, since 2008, the usage of information provided in criminal complaints in structural investigations. These three options provide information on his mindset when exercising his discretion during preliminary examinations.

6.2.2.2.1. Section 153f(1), FCCP

This provision permits the FPG to dispense with an ongoing investigation if the crime was committed abroad and *no* concrete link to Germany exists because neither the victim nor the perpetrator(s) are German citizens and it is unlikely that the perpetrator will enter Germany in a foreseeable time span.³² Literally, Section 153f, FCCP only relates to the closing of a for-

²⁹ Cf. *infra* note 135.

³⁰ Cf. FCCP, Section 170(1).

³¹ Cf. *ibid.*, Sections 153(f)(1) and 153(f)(2).

³² Government draft – motives CCAIL (English version), p. 83; Bundestag – motives CCAIL, p. 89.

mally opened investigation. At least two scholars argue that the provision may apply by analogy to the closing of a preliminary examination (before an investigation has been opened).³³ During the preliminary examination, the FPG focuses on whether it can be established that ‘sufficient factual indications’ for the commission of a crime under international law exist; but if it is impossible to establish these indications without investing substantial effort and the preliminary examination has otherwise reached a ‘dead end’, then the FPG must decide how to proceed. To apply the law literally and first formally open an investigation in order to close it, is hardly practicable. In this situation he may also hypothetically consider whether, even if such factual indications of an offence under international law could ever be established, he may nevertheless have the right to close the investigation following a proper exercise of his discretion because the case displays *no* concrete link to Germany and is unlikely to do so in the foreseeable future.

Consequently when the Prosecutor reaches a ‘dead end’ during a preliminary examination, he may be tempted to divert away from exploring whether sufficient factual indications exist for the actual allegation, but to rather look for other indirectly related considerations,³⁴ such as whether the alleged perpetrator and victims of the potential crime have no link to Germany, or whether the institution or person launching the complaint only went to Germany to make use of the broad universal jurisdic-

³³ This application is needed, *a fortiori*, because why should the FPG lead a preliminary examination into the opening of a formal investigation only in order to immediately thereafter close this opened investigation pursuant to FCCP Section 153(f)? To avoid this, one may apply FCCP Section 153(f) by analogy to the closing of a preliminary examination (cf. Werner Beulke, in Ewald Löwe and Werner Rosenberg, *Die Strafprozeßordnung und das Gerichtsverfassungsgesetz*, supplement to 26th edition, De Gruyter, 2012, Section 153(f), para. 14 (hereinafter ‘Beulke – Strafprozeßordnung’); Denis Basak, “Der Fall Rumsfeld – ein Begräbnis dritter Klasse für das Völkerstrafgesetzbuch?”, in *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, 2007, vol. 90 no. 4, pp. 333 and 354 (hereinafter ‘Basak – Rumsfeld’).

³⁴ However, the FPG is not permitted to consider reasons relating to foreign politics of Germany in his decision to dispense with a (preliminary) investigation (cf. Dirk Teßmer, in *Münchener Kommentar zur Strafprozeßordnung*, C.H. Beck, 2016, vol. 2, Section 153(f), para. 20 (hereinafter ‘Teßmer – MK, Section 153f’)). Thomas Beck, former head of the unit on international crimes in the FPG office, states that political considerations do not play a role during the decisions of the FPG (Beck – Völkerstrafgesetzbuch, pp. 161 and 163).

tion provided there, that is, ‘forum shopping’.³⁵ Instead of focusing his attention on factual indications of the crime itself, the FPG would merely examine the reasons structuring the exercise of his discretion pursuant to Section 153f of the FCCP which, if satisfied, permit him to *close* a future investigation. However, when proceeding in this way, the focus of a preliminary examination shifts away from testing the truthfulness of the allegation itself, meaning whether a concrete allegation carries sufficient factual indications that a crime against international law has been committed.

6.2.2.2.2. Include Information into Existing Formal Investigations

Another consideration of the FPG during the preliminary examination stage is that he may use the evidence on which the allegations of a crime under international law was based as part of another ongoing formal investigation against concrete persons or a structural investigation.

First, if a formal investigation against a specific person already exists and a new allegation involving the same suspect is reported, then the FPG may simply *extend* the existing investigation to also include the newly reported crime, given sufficient factual indicia.

Second, recent developments at the FPG indicate that a lot of information and evidence received in relation to allegations is used for structural investigations. These are formally opened investigations against unknown persons.³⁶ The purpose of these investigations is not to assign individual criminal liability, but to collect information about *overarching organizational structures*³⁷ which would otherwise be missed if an inves-

³⁵ Cf. Michael Kurth, “Zum Verfolgungsermessen des Generalbundesanwaltes nach § 153f StPO”, in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2006, vol. 1, no. 2, pp. 81 and 83 (hereinafter ‘Kurth – §153f FCCP’).

³⁶ Felix Graulich, *Die Zusammenarbeit von Generalbundesanwalt und Bundeskriminalamt bei dem Vorgehen gegen den internationalen Terrorismus*, Duncker & Humblot, 2013, p. 317 (hereinafter ‘Graulich – Zusammenarbeit’); cf. Bundestag, Responses of the Federal Government, 7 November 2012, Bundestag Drucksache 17/11339, p. 3, response to question 7.

³⁷ Matthias Jahn, in Michael Heghmanns and Uwe Scheffler (eds.), *Handbuch zum Strafverfahren*, C.H. Beck, 2008, chap. I, para. 82 (hereinafter ‘Jahn – Handbuch Strafverfahren’); Graulich – Zusammenarbeit, pp. 316, 337 and 340; Jörg Ziercke, “Welche Eingriffsbefugnisse benötigt die Polizei?”, in *Datenschutz und Datensicherheit*, 1998, vol. 22, no. 6, pp. 319 and 321 (hereinafter ‘Ziercke – Eingriffsbefugnisse’); Wolfgang Sielaff, “Am selben Strang ziehen: Die Zusammenarbeit von Polizei und Staatsanwaltschaft bei der Bekämpfung der Organisierten Kriminalität”, in *Kriminalistik*, 1989, vol. 43, no. 3, pp. 141 and 142.

tigation is solely concentrated on the person itself. A structural investigation enables law enforcement agencies to explore the complexities of a ‘situation’ independent of the procedural destiny of a single case which aims at assigning individual criminal responsibility.³⁸ Thus, the inclusion of the evidentiary material into the structural investigation thus also provides an alternative to closing a preliminary examination or opening a formal investigation under Section 153f(2), FCCP.

6.2.2.3. Conclusion

Due to the lack of codification on the federal level, Germany should clarify the purpose(s) of preliminary examinations into crimes under international law. Inferences suggest that the objective of a preliminary examination is to clarify whether sufficient factual indications exist for the commission of an international crime. Distant indicia³⁹ combined with reasonable criminalistic experience⁴⁰ are sufficient. Germany’s Federal Constitutional Court held that the more important the legal value protected by the offence against international law, the smaller the probability is required to infer its violation.⁴¹ However, no reasonable basis exists if an untenable conclusion has been drawn by the FPG or the discretion has been exercised with objective arbitrariness.⁴²

At the same time, the legal uncertainty surrounding preliminary examinations in Germany combined with the FPG’s discretion provided by Section 153f of the FCCP and the existence of structural investigations indicate that there is a need for quality control of the exercise of discretion by the FPG and for codification of preliminary examinations.

³⁸ Cf. Bundestag, Responses of the Federal Government, 7 November 2012, Bundestag Drucksache 17/11339, p. 3, response to question 7, see *supra* note 36.

³⁹ Herbert Diemer, “Erhebungen des Generalbundesanwalts zur Klärung des Anfangsverdachts im Rahmen von ARP-Vorgängen”, in *Neue Zeitschrift für Strafrecht*, 2005, p. 666 (hereinafter ‘Diemer – ARP Vorgänge’).

⁴⁰ Cf. Common Guideline, Section 6.2.; Edda Weßlau, in Wilhelm Degener *et al.* (eds.), *Systematischer Kommentar zur Strafprozessordnung*, vol. III, 2012, Section 152, para. 12 (hereinafter ‘Weßlau – Systematischer Kommentar’).

⁴¹ Federal German Constitutional Court, judgement, 14 July 1999, 1 BvR 2226/94, 1 BvR 2420/95, 1 BvR 2437/95, BVerfGE 100, pp. 300, 392, at Section VI.

⁴² Diemer – ARP Vorgänge, p. 666.

6.3. Measures Available during Preliminary Examinations

6.3.1. Measures Infringing Human Rights

German law requires that any infringement of human rights by a State official such as the prosecutor requires a legal basis as justification.⁴³ This has consequences for preliminary examinations. Since these are generally not (yet) codified under German law and particularly not on the level of the FPG, the war crimes unit in Karlsruhe has no legal basis to apply measures that infringe human rights during preliminary examinations,⁴⁴ such as search and seizure, formal questioning, monitoring of telecommunications, arrest and so on. Such measures are available only *after* the formal opening of an investigation or at least when a well-founded suspicion exists which is comparable to or higher than required for the opening of an investigation.⁴⁵ To distinguish a preliminary examination which does not allow for such measures, the FPG logs it under the register letters ‘ARP’.⁴⁶ By contrast, following the formal opening of an investigation the same case is registered under different register letters ‘BJs’,⁴⁷ which indicates that now human rights infringing measures may be considered, if law permits.

6.3.2. Overview of Means Available during Preliminary Examination

Nevertheless, at least three distinct measures remain available during preliminary examinations, namely analysis of open source data, informal

⁴³ Cf. Hans Hilger, “Vor(feld)ermittlungen – Datenübermittlungen”, in Jürgen Wolter, Wolf-Rüdiger Schenke, Peter Rieß and Mark A. Zöller (eds.), *Datenübermittlungen und Vorermittlungen: Festgabe für Hans Hilger*, C.F. Müller, Heidelberg, 2003, pp. 11 and 13 (hereinafter ‘Hilger, Vor(feld)ermittlungen’); Daniel Krause, “Allgemeine Rechtsfragen von Vorprüfungen und AR-Verfahren”, in Christian Harmsen and Oliver Jan Jüngst (eds.), *Festschrift für Wolfgang von Meibom*, Carl Heymanns Verlag, 2010, pp. 351 and 359 with further references in fn. 32 (hereinafter ‘Krause – Vorprüfungen’); differentiating Jahn - *Handbuch Strafverfahren*, chap. I, paras. 77–79; Matthias Jahn, “Der Verdachtsbegriff im präventiv orientierten Strafprozeß”, in Institut für Kriminalwissenschaften und Rechtsphilosophie Frankfurt am Main, *Jenseits des rechtsstaatlichen Strafrechts*, Peter Lang, 2007, pp. 545 and 556.

⁴⁴ Diemer – ARP Vorgänge, p. 666; Graulich – Zusammenarbeit, p. 313; cf. Claus Roxin and Bernd Schünemann, *Strafverfahrensrecht*, C.H. Beck, 29th edition, Section 39, para. 17.

⁴⁵ Cf. FCCP, Sections 102, 103, 94, 136, 48, 52–55, 69, 100(a)–100(f) and 112.

⁴⁶ Graulich – Zusammenarbeit, p. 326; cf. Krause – Vorprüfungen, pp. 351 and 353; Diemer – ARP Vorgänge, p. 666, Section II.

⁴⁷ *Ibid.*, Section III.

questioning of persons, and to request existing data from other State authorities.

6.3.2.1. Open Source Analysis/Monitoring

Since open source data is available to everyone and its publication occurs usually voluntarily, the FPG can also use such information during the course of a preliminary examination if it sheds further light on the allegation under question. For example, since 2007, the FPG has analysed the current press and media coverage and created situation analysis to generate a picture of global conflicts.⁴⁸

Part of open source analysis may include the FPG collecting reports from the United Nations and its subcommittees, or from States and non-governmental organizations ('NGOs'), for example, reports about human rights violations. The decisions by the FPG in *Klein and Wilhelm* (Kunduz/Afghanistan) and on *Bünyamin E.* (drone strike in Pakistan), to be examined in Section 6.4. below, show that the FPG used open source material during the preliminary examinations. In the latter case, the FPG asked NGOs to provide advisory opinions on the question whether an armed conflict existed in a part of Pakistan.⁴⁹

6.3.2.2. Informal/Informative Questioning

To verify the veracity of specific allegations made in a criminal complaint about international crimes and/or potential perpetrators, the FPG may choose to have a police officer conduct informal or informative questioning. However, caution is necessary because conducting such informal questioning may easily occur within a 'grey zone'. At the beginning, since no formal investigation has been opened, the police officer engaging in informative questions has a broad, but otherwise not clearly identified task. The objective of informal questions is to clarify whether there are sufficient factual indicia for an allegation. Questioning may start informally without further advising of the person questioned about his right to remain silent.⁵⁰ However, depending on the responses received during the questioning, it may transpire that the person informally questioned is either a possible perpetrator or linked to the alleged perpetrator. Thus, the

⁴⁸ Beck – Völkerstrafgesetzbuch, pp. 161–62; Ritscher – Ermittlungstätigkeit GBA, p. 226.

⁴⁹ Cf. *infra* Section 6.4.2.1.

⁵⁰ Cf. Krause – Vorprüfungen, pp. 351, 357–358 and 360.

need arises to inform the person about the right not to incriminate himself or about a privilege he or she may invoke.⁵¹ If the police officer finally summarizes the results of such informal questioning, the legal question arises whether the information thus obtained can be used in subsequent criminal proceedings and whether the accused may be convicted on the basis of such information. Generally, evidence obtained without formal cautioning of the person concerned may be admissible only when the questioned persons, having been formally advised of his right to remain silent and informed about the allegation repeats the information initially obtained during informal questioning.⁵² If the person chooses not to repeat the information initially provided then a judgment convicting the accused should not be based on this information alone.

6.3.2.3. Request Available Data from Other State Authorities

As the FPG is limited during the preliminary examination to produce information and evidence which would *not* infringe human rights, he may rely on existing⁵³ information and data in other State administrations of Germany to check whether the alleged crime can be further substantiated, justified or dismissed. To do so, the FPG must rely on data exchange.

6.3.2.3.1. Data Transfer Laws

Several laws provide a legal basis for the transfer of data to the FPG during a preliminary examination. For example, Section 474(1) of the FCCP provides that “public prosecution offices [...] shall be able to inspect the files if this is necessary for the purposes of administration of justice”. Such inspection includes that the FPG inspects during the preliminary examination files of other prosecutor offices if this advances the case.⁵⁴

⁵¹ For example, the spouse or doctor-patient privilege.

⁵² German Federal Criminal Court, judgment, 17 September 1982, 2 StR 139/82, in *Neue Zeitschrift für Strafrecht*, 1983, p. 86.

⁵³ Hilger criticises this because data existing elsewhere is used for a *different* purpose though factual indications for the commission of a crime do *not yet* exist (Hilger - Vor(feld)ermittlungen, p. 14); cf. also Edda Weßlau, “Vor(feld)ermittlung, Datentransfer und Beweisrecht”, in Jürgen Wolter, Wolf-Rüdiger Schenke and Mark A. Zöller (ed.), *Datenübermittlungen und Vorfeldermittlungen: Festgabe für Hans Hilger*, C.F. Müller, Heidelberg, 2003, pp. 57–58.

⁵⁴ For example, in relating to the allegations launched against Jiang Zemin *et al.* the FPG requested the dossiers from his colleagues in Heidelberg which had interviewed some of the complainants as witnesses (cf. *infra* Section 6.4.1.1.). In the formal investigation

Similarly, Sections 10(2) and 11(4) of the Federal Police Agency Law⁵⁵ provide for transfer of personal data, information on red line notices, data about prison sentences and DNA information to the FPG. Section 19(1), nos. 2 and 4 as well as Section 20(1) of the Law on Federal Intelligence Agency Protecting the Constitution⁵⁶ provide for data transfer, as does Section 24(3) of the Federal Intelligence Service Law.⁵⁷ Also, Section 15(1)(4) of the Foreigner Central Register Law⁵⁸ and Section 8(3) of the Asylum Procedure Act⁵⁹ provide for data exchange with the FPG.⁶⁰

6.3.2.3.2. Questionnaire for Refugees from Syria

Particularly, Section 8(3) of the German Asylum Procedure Act facilitates sharing of information with the FPG. For example, when several hundred thousand refugees registered themselves as asylum seekers in Germany in 2015, it was understood that among them, there were many victims of humanitarian atrocities, but also some perpetrators. Hence, the German Federal Agency for Migration and Refugees ('FAMR') developed a questionnaire for refugees which could be filled out independently from the asylum procedure.⁶¹ Participation in this questionnaire was voluntary. Refugees were asked whether they had witnessed crimes in Syria and Iraq before leaving towards Germany. Only if a refugee provides relevant information FAMR transfers the information to the FPG.⁶²

against unknown persons in Pakistan, the FPG requested the dossier on Emrah E., the brother of the victim (cf. *infra* Section 6.4.2.1.).

⁵⁵ In German: Bundeskriminalamtsgesetz.

⁵⁶ In German: Verfassungsschutzgesetz.

⁵⁷ In German: Bundesnachrichtendienstgesetz.

⁵⁸ In German: Auslandszentralregistergesetz.

⁵⁹ In German: Asylverfahrensgesetz.

⁶⁰ Cf. Bundestag, Responses of the Federal Government, 7 November 2012, Bundestag Drucksache 17/11339, p. 5, response to question 17, see *supra* note 36, referring to Section 8(3) Asylum Procedure Act and 'close cooperation' between the Federal Agency for Migration and Refugees and law enforcement authorities who investigate individual cases.

⁶¹ Cf. Human Rights Watch, "Q&A: First Cracks to Impunity in Syria, Iraq", 20 October 2016, Section 10 (available on HRW web site).

⁶² Cf. Bundestag, Bundestagsdrucksache, 8 April 2016, Bundestag Drucksache 18/8052, pp. 23, 24, response to question 34.

6.3.2.3.3. Data Transfer and Structural Investigations

Such data is monitored, analysed and, if deemed relevant, entered into the pool of information relating to the structural investigations conducted in Germany. For example, by 31 December 2015, the FAMR had submitted 366 questionnaires relating to the so-called Islamic State in Syria ('ISIS') to the Central Agency to Fight War Crimes, a department of the Federal German Police working with the FPG.⁶³ Until that date, 1,735 questionnaires were sent about Syria to the FPG. By April 2017, 4,000 questionnaires had already been communicated to the FPG.⁶⁴

These figures indicate the importance of data transfer to these structural investigations. The following preliminary picture emerges: until 2009 the FPG's war crimes unit conducted one structural investigation involving allegations of crimes against humanity and war crimes.⁶⁵ In 2009, a second structural investigation involving again crimes against humanity and war crimes was opened by the FPG *ex officio*.⁶⁶ In 2011 alone, three additional structural investigations were opened followed by one structural investigation each in 2014 and 2015.⁶⁷ While it is unclear in which succession 11 structural investigations were opened,⁶⁸ what is certain is that Eastern Congo/Rwanda, the Arab Spring, ISIS and Syria (excluding ISIS-controlled territory) have become the objects of these structural investigations.⁶⁹

⁶³ Bundestag, Bundestagsdrucksache, 8 April 2016, Bundestag Drucksache 18/8052, p. 23, response to question 33, see *ibid*.

⁶⁴ *Ibid.*, p. 23, response to question 34.

⁶⁵ Bundestag, Bundestagsdrucksache, Response of a State Secretary in the German Federal Ministry of Justice to questions posed by a Parliamentarian from the Green Party, 17 July 2015, Bundestag Drucksache 18/5596, p. 38, response to question 50.

⁶⁶ *Ibid.*; Bundestag, Response of a State Secretary in the German Federal Ministry of Justice to questions posed by Parliamentarians from the Green Party, 2 September 2016, Bundestag Drucksache 18/9512, p. 11, response to question 14.

⁶⁷ *Ibid.*, pp. 11–12; Bundestag, Bundestagsdrucksache, Response of a State Secretary in the German Federal Ministry of Justice to questions posed by a Parliamentarian from the Green Party, 17 July 2015, Bundestag Drucksache 18/5596, pp. 39–40, response to question 50, see *supra* note 65.

⁶⁸ Cf. Bundestag, Bundestagsdrucksache, 8 April 2016, Bundestag Drucksache 18/8052, p. 23, response to question 33, see *supra* note 62.

⁶⁹ Cf. *ibid.*, pp. 23–24, response to questions 33 and 34.

6.4. Preliminary Examination in Practice

This section examines the fate of certain preliminary examinations which the FPG's office conducted and about which further information and data is publicly available. All preliminary examinations have been clustered into two scenarios: sub-section 1 introduces those cases which *ended* at the preliminary examination stage without opening of an investigation.⁷⁰ Sub-section 2 discusses other cases where the preliminary examination *led to* the formal opening of an investigation which was subsequently closed without laying charges.⁷¹ In Sub-section 3, some common arguments used by the FPG in his decisions not to proceed further with the preliminary examination or investigations are analysed.

6.4.1. Preliminary Examinations without Further Investigations

In each of the four cases introduced here, the FPG decided to stop the preliminary examination without formally opening an investigation. The first related to citizens of the People's Republic of China for alleged mistreatment of members of the Falun Gong. The second pertained to the Chechen Vice President for alleged war crimes in Chechnya. The third was concerned with allegations against the former Uzbek Minister of Interior regarding suspected torture in prisons in Uzbekistan and his and Mr. Inoyatov's possible involvement in a massacre carried out in Andijan with others. The last one related to allegations of mistreatment and torture conducted by American forces in the Abu Ghraib prison in Iraq

6.4.1.1. JIANG Zemin *et al.* (People's Republic of China)

On 21 November 2003, an advocate representing 40 persons from various States, including 31 German citizens and one association, the German Falun Dafa, launched a criminal complaint against the former President JIANG Zemin and 15 other governmental or otherwise senior politicians of the People's Republic of China.⁷² The acts were alleged to have oc-

⁷⁰ *Infra* Section 6.4.1., the cases relating to Jiang Zemin *et al.* (Peoples Republic of China), Ramzan Kadyrow (Chechen Republic within the Russian Federation), Zakirjan Almatov and Rustam Raulovich Inoyatov *et al.* (Republic of Uzbekistan), as well as Donald Rumsfeld *et al.* (US, allegations involving Abu Ghraib in the Republic of Iraq).

⁷¹ *Infra* Section 6.4.2., the cases against unknown (drone strike against German citizen Bünyamin E. in Pakistan) and Colonel Klein *et al.* (aerial attack near Kunduz, Afghanistan).

⁷² Cf. FPG, Decision not to open an investigation, 24 June 2005, 3ARP 654/03-2, p. 1 (hereinafter 'FPG - Falun Gong Decision').

curred in China, involving torture, inhumane treatment in work camps and killings which, the complainants alleged, amounted to genocide and crimes against humanity against members of the Falun Gong.⁷³ These allegations related to a time span before and after the CCAIL entered into force on 1 July 2002.

The FPG conducted a preliminary examination (3 ARP 654/03-2). The FPG requested from the Heidelberg Prosecutor's office the dossier of an investigation which contained, among others, witness statements of five of the persons who had launched the criminal complaint on 21 November 2003.⁷⁴ After 19 months, on 24 June 2005, the FPG closed the preliminary examination without formally opening an investigation.

As far as the complaint related to the former President JIANG Zemin, the FPG argued:

Immunity of the former President of the People's Republic of China, Jiang Zemin, already bars him from criminal prosecution... Neither former Section 220a [FCC], in force until 30 June 2002, nor its succeeding rules in the [CCAIL] contain rules on immunities, unlike [Article 27 of the ICC Statute]. Therefore Sections 18 – 20 [CCA] apply when determining the question whether immunity bars criminal prosecution by German authorities [...]. Section 20 (2) [CCA] restricts German jurisdiction if persons enjoy immunity under international law. A well-recognized rule in international law grants immunity from criminal prosecution by other states to present and former heads of government and heads of state when acting during their term in office (Doehring, *Völkerrecht*, 1999, § 12 marginal number 672).⁷⁵ The International Court of Justice explicitly confirmed this state practice in its judgment of 14 February 2002 in the case *Democratic Republic of Congo v Belgium* for present and former foreign ministers, reasoning that the function of such offices warrants this, which must not be curtailed by criminal prosecution by other states (judgment No. 51-61, [...] www.icj-

⁷³ Wolfgang Kaleck, "German International Criminal Law in Practice: From Leipzig to Karlsruhe", in Wolfgang Kaleck, Michael Ratner, Tobias Singelstein and Peter Weiss (eds.), *International Prosecution of Human Rights Crimes*, Springer, 2007, pp. 93, 107 (hereinafter 'Kaleck – German International Criminal Law').

⁷⁴ FPG - Falun Gong Decision, Section II(1), pp. 2–3.

⁷⁵ That is, Karl Döhring, *Völkerrecht: Ein Lehrbuch*, C.F. Müller, 1999, Section 12, marginal number 672.

cji.org; see Maierhofer, EuGRZ 2003, 553; Weiss, JZ 2002, 698).⁷⁶ The reasoning of the International Court of Justice also applies to heads of government and heads of state, as they fulfill similar functions. The ruling of the International Court of Justice also grants such immunity if these officials are prosecuted for international crimes (judgment No. 56-60)⁷⁷ and already bars initiation of any investigatory acts (judgment No. 54).⁷⁸ Therefore, Section 20 (2) [CCA] bars German prosecutorial agencies from prosecuting former head of state Jiang Zemin.⁷⁹

In so far as the complaint related to persons *other* than JIANG Zemin, the FPG distinguished whether the allegations related to the time periods before or after the entry into force of the CCAIL on 1 July 2002. Regarding the former, the FPG argued that the allegations made would neither satisfy the elements of genocide pursuant to Section 220a of the FCC in force until 30 June 2002 nor causing grievous bodily harm pursuant to Section 226 of the FCC.⁸⁰ Having reviewed the statements of five complainants taken by prosecutors from Heidelberg, the FPG concluded that further investigative leads could not be expected.⁸¹

Regarding alleged crimes committed after 1 July 2002, the FPG emphasized that the crime scenes were outside Germany, that investigations would therefore exclusively need to be conducted in China, and that none of the alleged perpetrators would be German nationals nor would they stay or are expected to stay in Germany in the foreseeable future.⁸²

⁷⁶ That is, International Court of Justice ('ICJ'), *Democratic Republic of Congo v. Kingdom of Belgium*, judgment, 14 February 2002, General List no. 121, paras. 51–61 (hereinafter 'ICJ – Yerodia judgment'); see Christian Maierhöfer, "Das Völkerstrafrecht vor den Haager Richtern: Besprechung des Urteils des IGH vom 14.2.2002, Demokratische Republik Kongo gegen Belgien", in *Europäische Grundrechte Zeitung*, 2003, p. 553; Wolfgang Weiss, "Völkerstrafrecht zwischen Weltprinzip und Immunität", in *JuristenZeitung*, 2002, vol. 57, no. 14, pp. 696, 698. The square brackets are supplied by Amnesty International.

⁷⁷ That is, ICJ – Yerodia judgment, paras. 56–60.

⁷⁸ That is, *ibid.*, para. 54.

⁷⁹ FPG, Decision not to open an investigation, 24 June 2005, 3ARP 654/03-2, pp. 1–2, in Amnesty International (trans.), *End impunity through universal jurisdiction (No safe haven series 3)*, 2008, p. 72. Footnotes supplied (not in the translation).

⁸⁰ FPG - Falun Gong Decision, Section II(1), pp. 2–3.

⁸¹ *Ibid.*, p. 3.

⁸² *Ibid.*, pp. 3–4.

Regarding the last point, the FPG⁸³ referred to the jurisprudence of the German Federal Criminal Court which requires a *legitimate link* to Germany in each individual case.⁸⁴ The stay of possible victims or of the complainant in Germany would not suffice.⁸⁵ Otherwise, a boundless and under international law questionable expansion of prosecutions by German authorities would extend to those cases, where there was hardly any prospect to investigate and adjudicate the act in a domestic German criminal procedure from the start.⁸⁶ The FPG argued that criminal prosecution absent a *legitimate link* to Germany would infringe the principle of non-intervention which follows from international law's imperative to observe the sovereignty of other States.⁸⁷

6.4.1.2. Ramzan Kadyrow (Chechen Republic within the Russian Federation)

Between 11 and 15 April 2005, Hannover's annual technology fair opened, with Russia as its partner country.⁸⁸ Before the event, informed circles learned that Putin intended to be accompanied during his visit to the fair by, among others, Ramzan Kadyrow, the then Vice President of Chechen Republic.⁸⁹ On 8 April 2005, the Secretary General of the Gesellschaft für bedrohte Völker e.V. (the Society for threatened people) filed at the FPG's office a criminal complaint against Ramzan Kadyrow, who was expected to soon enter Germany to travel to Hannover's fair.⁹⁰ The allegations related to war crimes pursuant to Section 8 of the CCAIL⁹¹ and included multiple abductions, illegal detentions and/or disappearances of persons in

⁸³ *Ibid.*, pp. 4–5.

⁸⁴ German Federal Criminal Court, judgment, 30 April 1999, 3 StR 215/98, BGHSt 45, 64, p. 66.

⁸⁵ German Federal Criminal Court, in *Neue Zeitschrift für Strafrecht*, 1999, p. 236; StV 1999, p. 240.

⁸⁶ *Ibid.* Cf. Claus Kreß, Völkerstrafrecht in Deutschland, in *Neue Zeitschrift für Strafrecht*, 2000, p. 617, at pp. 624–25.

⁸⁷ FPG - Falun Gong Decision, Section II(3), pp. 4–5.

⁸⁸ Cf. press release BOXID 33184, 6 April 2005.

⁸⁹ Uwe Halbach, *Der Kaukasus in neuem Licht: Die EU und Rußland in ihrer schwierigsten Nachbarschaftsregion*, Stiftung Wissenschaft und Politik Studie, November 2005, p. 33.

⁹⁰ Gesellschaft für bedrohte Völker, criminal complaint, 8 April 2005 (hereinafter 'Criminal complaint against Kadyrow').

⁹¹ *Ibid.*

Chechnya in from June 2004 to December 2004.⁹² The complainant demanded the opening of an investigation against Kadyrow.⁹³

After the Federal Government of Germany insisted to Moscow that Ramzan Kadyrow not travel to Hannover,⁹⁴ the speaker of the German government clarified that he would *not* be part of the official Russian delegation.⁹⁵ Eventually, on 11 April 2005, President Putin visited the fair together with then chancellor Schröder.⁹⁶

On 28 April 2005, the FPG decided not to open a formal investigation against Ramzan Kadyrow.⁹⁷ The AU-EU Expert Report and one scholar claim that the FPG based the decision not to open an investigation on immunity considerations.⁹⁸

6.4.1.3. Almatov, Inoyatov *et al.* (Uzbekistan)

On 13 May 2005, allegations that a massacre occurred in Andijan, Uzbekistan were made. On 23 May 2005, the Council of the European Union “strongly condemn[ed] the reported excessive, disproportionate and indiscriminate use of force by the Uzbek security forces, and call[ed] upon the Uzbek authorities to act with restraint in order to avoid further loss of life”.⁹⁹ The Council further issued statements on Uzbekistan on 13 June 2005 and 18 July 2005 condemning the disproportionate and excessive use of force by the security forces of Uzbekistan against civilians during the unrest in Andijan.¹⁰⁰ On 3 October 2005, the Council “decided to im-

⁹² Cf. *ibid.*

⁹³ *Ibid.*

⁹⁴ Cf. Friedbert Meurer, “Mehr Druck in der Tschetschenien Frage”, in *Die Zeit*, 11 April 2005.

⁹⁵ Cf. *ibid.* and “Strafanzeige gegen tschetschenischen Vize-Regierungschef”, in *Der Standard*, 11 April 2005.

⁹⁶ “Putin, Schroeder tour Russian displays at at Hanover exhibition”, in *Sputniknews*, 11 April 2005.

⁹⁷ The decision is neither published, nor does the website of the FPG contain any press release to Kadyrow (cf. web site of the FPG; Kaleck – German International Criminal Law, p. 107; and Council of the European Union, *The AU-EU Expert Report on the Principle of Universal Jurisdiction*, 16 April 2009, 8672/1/09 REV 1, para. 24, fn. 121).

⁹⁸ *Ibid.*

⁹⁹ Council of the European Union, “UZBEKISTAN - Council conclusions”, in *Press Release: 2660th Council meeting, 23–24 May 2005, C/05/112*, p. 11, para. 2.

¹⁰⁰ Cf. Council of the European Union, Common Position 2005/792/CFSP of 14 November 2005 concerning restrictive measures against Uzbekistan, *Official Journal of the European Union*, 16 November 2005, L 299, pp. 72–79, paras. 2 and 3.

plement restrictions on admission to the European Union aimed at those individuals directly responsible for the indiscriminate and disproportionate use of force in Andijan”.¹⁰¹ This decision did not specifically name which specific persons from Uzbekistan were subject to restrictions to travel to and within the European Union.

On 14 October 2005, the German Embassy in Moscow issued a visa for Zakirjan Almatov, the then Minister of Interior of Uzbekistan for the purpose that he receive medical treatment in Germany.¹⁰² The visa for Almatov was issued from 6 November 2005 until 12 January 2006.¹⁰³

Sometime in November 2005, Zakirjan Almatov, the former Minister of Interior of Uzbekistan, visited a hospital in Hannover where he received medical treatment. On 14 November 2005, the Council of the European Union issued a common position concerning restrictive measures against Uzbekistan which contained the following passage:

(6) The Council has also decided to implement restrictions on admission to the European Union aimed at those individuals who are directly responsible for the indiscriminate and disproportionate use of force in Andijan and for the obstruction of an independent inquiry. [...]

Article 3

1. Member States shall take the necessary measures to prevent the entry into, or transit through, their territories of those individuals, listed in Annex II, directly responsible for the indiscriminate and disproportionate use of force in Andijan and the obstruction of an independent inquiry. [...]¹⁰⁴

The first person listed in Annex II was Zakirjan Almatov in his capacity as Minister of Interior of Uzbekistan. The last person listed was Rustam Raulovich Inoyatov, who was Chief of the National Security Service of Uzbekistan.

¹⁰¹ Council of the European Union, General Affairs and External Relations, “UZBEKISTAN - Council conclusions”, in *Press Release: 2679th Council meeting*, 3 October 2005, C/05/242, p. 9, para. 5.

¹⁰² Response of the German government to questions posed by the Liberal Party, Bundestag, 8 June 2006, Bundestag Drucksache 16/1781, p. 2, response to question 1. Cf. also Response of the German government to questions posed by Parliamentarians, Bundestag, 19 December 2008, Bundestag Drucksache 16/11479, p. 1.

¹⁰³ *Ibid.*

¹⁰⁴ Council of the European Union, Common Position 2005/792/CFSP of 14 November 2005 concerning restrictive measures against Uzbekistan, see *supra* note 100.

Almatov left Germany sometime in mid-November 2005.¹⁰⁵

On 5 December 2005, Amnesty International sent to the FPG a fax containing a criminal complaint against Almatov regarding alleged crimes against humanity and requested the arrest of Almatov. On 12 December 2005, a German advocate acting on behalf of Human Rights Watch and eight Uzbek citizens sent to the FPG another fax containing allegations against Almatov, Inoyatov and ten Uzbek citizens regarding allegations of crimes against humanity. A day later, Amnesty International furnished further documents outlining the human rights situation to the FPG. The allegations related to, first, the killings of hundreds of demonstrators in Andijan in mid-May 2005 and separately, allegations of systematic torture in detention centres of Uzbekistan for which Almatov was allegedly responsible.

The FPG conducted a preliminary examination (3 ARP 116/05-2) and closed the preliminary examination after three and a half months on 23 March 2006.¹⁰⁶ He concluded that the crime scenes are located outside Germany, that the crimes neither involve German perpetrators nor German victims and that the requested investigation has no significant prospect of elucidation because requests for assistance to the government of Uzbekistan would be hopeless.¹⁰⁷ Further, the FPG argued that the relevant circumstances were extensively documented by NGOs and the United Nations.¹⁰⁸

On 23 January 2007, the advocate who had filed the second criminal complaint against Almatov, Inoyatov and others seized the Higher Regional Court in Stuttgart with proceedings to compel public charges pursuant to Section 172(2) of the CCA. He argued that the FPG had exercised his discretion provided for in Section 153f of the FCCP in a wrongful and arbitrary way and that this decision would be subject to judicial review.¹⁰⁹ On 6 March 2007, the FPG requested to dismiss this request arguing that the exercise of discretion under Section 153f of the FCCP would not be contestable by way of proceedings to compel public charges.

¹⁰⁵ FPG, *Amnesty International and Human Rights Watch v. Almatov et al.*, decision, 23 March 2006, 3 ARP 116/05-2, Section A, before sub-section 1 (hereinafter 'FPG – Uzbekistan decision').

¹⁰⁶ *Ibid.*, Sections B(1) and B(2).

¹⁰⁷ *Ibid.*, Sections B(2)(a) and B(2)(b).

¹⁰⁸ *Ibid.*, last para. before Section B(3).

¹⁰⁹ Cf. Higher Regional Court Stuttgart – Almatov Decision, Section I, para. 6.

es.¹¹⁰ Further, the FPG claimed to have noticed the existence of discretion and exercised it pursuant to Section 153f of the FCCP correctly. An entry into Germany of the concerned persons from the Uzbek leadership would not be expected, particularly because of the press coverage the criminal complaint had received in late 2005.¹¹¹ The FPG argued against the applicants' proposition that German authorities had in late 2005 organizationally neglected to notify the FPG of Almatov's entry for medical reasons into the country. The FPG clarified that the principle of legality or that of mandatory prosecutions pursuant to Section 152(2) of the FCCP would only be applicable to the prosecutor's offices, but not to consular or diplomatic representations of Germany which had issued the visa for Almatov.¹¹²

On 27 March 2008, the Higher Regional Court in Stuttgart did not permit opening proceedings to compel public charges against a decision of the FPG pursuant to Section 153f of the FCCP.¹¹³ This inadmissibility followed a conscious decision of the legislature.¹¹⁴ The Court pointed out that *at the time* of the FPG's decision, none of the persons named in the criminal complaint had been in Germany. Section 153f(1) of the FCCP would explicitly mention a present stay or a stay which is currently to be expected.¹¹⁵ A past stay would not suffice.¹¹⁶ Whether reference points for the expectation of a stay exist is part of the assessment leeway of the FPG.¹¹⁷ In any case, reference points for such an expected stay must be real and concrete.¹¹⁸ Finally, the Court clarified that the discretion of the FPG would not be fully judicially reviewable because according to legislative intent, the FPG should remain the sole dominant actor, even beyond the formal opening of court proceedings.¹¹⁹ *A fortiori* the FPG would assume this position in the arena of preliminary examinations.¹²⁰ The Court

¹¹⁰ FPG, submission, 6 March 2007, 3 ARP 116/05-2, Section B, sub-section 3(c) in particular.

¹¹¹ *Ibid.*, Section B(2).

¹¹² *Ibid.*

¹¹³ Higher Regional Court Stuttgart – Almatov Decision, Section II, para. 2.

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*, particularly in sub-section II, para. 2(b)(bb).

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*, particularly in sub-section II, para. 2(b)(cc).

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*, sub-section II, para. 2(c).

¹²⁰ *Ibid.*

therefore concluded that the discretionary decision of the FPG would be only subject to a limited judicial review. Such review would be limited to establishing whether the FPG noticed his discretion and whether he exercised it in an arbitrary way.¹²¹ The court concluded that FPG had noticed his discretion and had not exercised it arbitrarily and, thus, upheld the FPG decision not to formally open an investigation.¹²²

The European Union extended the travel restrictions for persons alleged to be involved into the Andijan events, including Almatov and Inoyatov, until 13 October 2008.¹²³ On that day, the travel restrictions for certain persons from Uzbekistan expired without the Council deciding to renew them.¹²⁴ On 27 October 2008, the advocate who had filed the first complaint regarding Almatov, Inoyatov and others informed the FPG that Inoyatov would stay in Germany.¹²⁵ Indeed, on 30 October 2008, the German press reported that Rustam Inojatovic was in Germany following an invitation of the German Chancellery.¹²⁶ The FPG dismissed the complaint against Inojatov.¹²⁷

6.4.1.4. Donald Henry Rumsfeld *et al.* (Abu Ghraib Prison in Iraq)

On 29 November 2004, the Center for Constitutional Rights in the United States ('US') and four Iraqi citizens launched a criminal complaint against Donald Henry Rumsfeld, the then Secretary of Defence of the United States of America ('US') and against other senior persons in the civilian and military hierarchy of the US. The criminal complaint focused on the

¹²¹ *Ibid.*

¹²² *Ibid.*

¹²³ Cf. Council of the European Union, Common Position 2007/734/CFSP of 13 November 2007 concerning restrictive measures against Uzbekistan; Official Journal of the European Union, 14 November 2007, L 295, pp. 7–34, Article 3, no. 1 and annex II.

¹²⁴ Cf. Council of the European Union, General Affairs and External Relations, "UZBEKISTAN - Council conclusions", in *Press Release: 2897th Council meeting*, 13 October 2008, C/08/288, p. 10, para. 4; Council of the European Union, Common Position 2008/843/CFSP of 10 November 2008 amending and extending Common Position 2007/734/CFSP concerning restrictive measures against Uzbekistan, 10 November 2008, Article 2.

¹²⁵ Response of the German government to questions posed by Parliamentarians, Bundestag, Bundestag Drucksache 16/11479, 19 December 2008, p. 2, response to question 4.

¹²⁶ Cf. Günter Lachmann, "Usbekischer Stasi-Chef heimlich in Deutschland", in *Die Welt*, 30 October 2008.

¹²⁷ Wolfgang Kaleck, "From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998 – 2008", in *Michigan Journal of International Law*, 2009, vol. 30, no. 3, p. 927, at p. 952.

period between 15 September 2003 and 8 January 2004 and related to 44 acts committed in the Abu Ghraib prison in Iraq, which was at the time under the occupation authority of the US. Further, four Iraqi complainants raised allegations of mistreatment at other locations in Iraq. Overall, the criminal complaint referring to command responsibility of civilian and military superiors advanced allegations of war crimes according to Sections 8, 13 and 14 of the CCAIL, qualifying bodily harm pursuant to Sections 223 and 224 of the FCC and acts of torture under the UN Convention against Torture.¹²⁸

The FPG conducted a preliminary examination (3 ARP 207/04-2). In January 2005, while the preliminary examination was still pending, the US administration announced that Rumsfeld would not attend the annual Munich Security Conference for security reasons.¹²⁹ On 10 February 2005, the FPG closed the preliminary examination after two and a half months, without having formally opened an investigation.¹³⁰ The FPG argued he had neither to prove whether the allegations advanced by the complainant satisfied the requirement of factual indications necessary for the opening of an investigation, nor whether immunity considerations would be a stumbling block.¹³¹ Rather, in weighing up the various considerations as required by Section 153f of the FCCP, it was determined that, under the principle of subsidiarity, German law enforcement authorities should not be activated. The objective of the CCAIL is to close impunity and prosecution gaps. Closing such gaps would occur in the context of the principle of non-intervention into the internal affairs of States.¹³² The FPG argued that the US, as another ‘country’ pursuant to Section 152f(2)(4) of the FCCP, would be generally conducting investigations into the allegations raised:

¹²⁸ United Nations, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984 (adopted), 26 June 1987 (entry into force) (<http://www.legal-tools.org/doc/326294/>).

¹²⁹ For proceedings against Donald Rumsfeld, see “Part C: Cases”, in Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, 2009, p. 889.

¹³⁰ FPG, *Center for Constitutional Rights et al. v. Donald Rumsfeld et al.*, Decision, 10 February 2005, 3-ARP 207/04-2 (hereinafter ‘FPG – First decision *Rumsfeld et al.*’), in German in *JuristenZeitung*, 2005, vol. 60, no. 6, pp. 311 ff. and in English in *International Legal Materials*, 2006, vol. 45, no. 1, p. 119.

¹³¹ *Ibid.*, Section B.

¹³² *Ibid.*

In what order and with what means the state of primary jurisdiction carries out an investigation of the overall series of events must be left to this state according to the principle of subsidiarity. (...) In the case at hand there are no indications that the authorities and courts of the US are refraining, or would refrain, from penal measures as regards the violations described in the complaint.¹³³

Two days after the FPG had issued this decision, Donald Rumsfeld delivered a speech at the security conference in Munich.¹³⁴

The government of Germany clarified that the German Federal Ministry of Justice had neither issued any instruction¹³⁵ to the FPG on how to deal with this case, “nor was any other influence exerted on him by the Federal government to persuade him not to launch investigations into the occurrences in Abu Ghraib”.¹³⁶

On 14 July 2005, the Center for Constitutional Rights contested the FPG’s decision of 10 February 2005 to close the preliminary examination against Rumsfeld *et al.* by requesting the Higher Regional Court to compel public charges. On 13 September 2005, the Higher Regional Court in Stuttgart decided not to permit proceedings to compel public charges.¹³⁷

¹³³ FPG – First decision *Rumsfeld et al.*, p. 121 (English), see *supra* note 130.

¹³⁴ Máximo Langer, “The diplomacy of universal jurisdiction: the political branches and the transnational prosecution of international crimes”, in *American Journal of International Law*, 2011, vol. 105, no. 1, pp. 1 and 14; Elaine Sciolini, “‘New’ Rumsfeld Is Seeking Stronger Ties With Europe”, in *New York Times*, 13 February 2005.

¹³⁵ Supervision by the Federal Ministry of Justice regarding the FPG permits the Ministry to issue general as well as specific instructions on issues of law and fact. Limits of instructions are that they can only be issued if the law provides discretion to the FPG and if such instructions are not guided by illegal or arbitrary considerations (cf. Lutz Meyer-Goßner and Bertram Schmidt, *Strafprozeßordnung*, 60th edition, 2017, Section 146, para. 5). An instruction of the FPG against the law incurs criminality of the instructor (cf. FCC, Sections 258a, 344, 345). In general, the Ministry of Justice issues instructions to the FPG extremely restrictive (cf. Preliminary Remark of the German government, Response of the German government to questions posed by Parliamentarians, Bundestag, Bundestag Drucksache 18/1318, 5 May 2014, p. 3).

¹³⁶ Federal Government of Germany, Response on 22 August 2006 to the letter of the UN Human Rights Council’s Special Rapporteur on the independence of judges and lawyers on 13 July 2006, cf. Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy: Addendum: Situations in specific situations and countries, A/HRC/4/25/Add.1, 5 April 2007, para. 156 (hereinafter ‘Addendum of Special Rapporteur’).

¹³⁷ Higher Regional Court Stuttgart – Rumsfeld decision, p. 117 (German), p. 122 (English), see *supra* note 19.

Regarding the criminal complaints against four persons who worked in army barracks of the United States located in Germany, the court ruled that they would be subject to the unrestricted and unimpeded access of the United States Forces. Though stationed in Germany, they would be subject to US command and US jurisdiction as their counterparts in the US. Therefore, there would be no need for a complementary jurisdiction of Germany under the principle of universal jurisdiction.¹³⁸ As the impunity gap which the principle of universal jurisdiction seeks to avoid would not exist, there would be no need for a supplementary jurisdiction in Germany.¹³⁹

On 14 November 2006, the Center for Constitutional Rights – this time supported by 32 non-governmental organizations, 11 Iraqi citizens and one Saudi Arabian citizen – filed to the FPG *another* criminal complaint against Donald Rumsfeld and at least 13 named US citizens regarding allegations of war crimes and torture committed in 2003 and 2004 in the detentions facilities Abu Ghraib and, since 2002, in the Guantánamo Bay Naval Station in Cuba.¹⁴⁰ The additional criminal complaint was launched because results of investigations in the US would mean that merely members of the *lower* ranks within the US military had so far been held criminally accountable, but not those senior US citizens implicated in this complaint, which related to war crimes according to Sections 8, 13 and 14 of the CCAIL, other offences under the FCC¹⁴¹ as well as acts of torture and bodily harm under the UN Convention against Torture.¹⁴² The complainant argued that, regarding the events in Abu Ghraib and Guantánamo Bay, no criminal prosecutions against the senior leaders subject to this complaint would take place which would indicate the unwillingness of the US authorities to bring the perpetrators to justice.¹⁴³

The FPG conducted a preliminary examination (3 ARP 156/06-2). On 5 April 2007, the UN Human Rights Council's Special Rapporteur on the independence of judges and lawyers noted with concern that the alleged perpetrators in Abu Ghraib "have still not been prosecuted in the US,

¹³⁸ *Ibid.*, p. 118, para. 14.

¹³⁹ *Ibid.*

¹⁴⁰ Criminal Complaint, 14 November 2006, 1505/2006 WKA (<http://www.legal-tools.org/doc/75572b/>) (hereinafter 'Second criminal complaint against Rumsfeld *et al.*').

¹⁴¹ Namely qualifying bodily harm pursuant to FCC, Sections 223 and 224.

¹⁴² Second criminal complaint against Rumsfeld *et al.*, Sections 2.3.–2.6.

¹⁴³ *Ibid.*, Section 2.6., in particular pp. 56 and 44.

and that on the contrary new legislation has been adopted in that country which practically impedes the prosecution of public officials suspected of being responsible for those acts. In light of this development [the Special Rapporteur] notes that a new complaint has been submitted to the German prosecutor [...]. In this context the Special Rapporteur hopes that this complaint will be considered with the required independence, in compliance with applicable international norms and standards”.¹⁴⁴

On 26 April 2007, the FPG closed the five-month long second preliminary examination, again without formally opening an investigation.¹⁴⁵ The FPG argued that the crime scenes (Abu Ghraib, other Iraqi detention centres and Guantánamo) were *not* located in Germany¹⁴⁶ and the persons against whom a criminal complaint had been filed would neither be in Germany nor would their stay be expected in the foreseeable future.¹⁴⁷ Also, no elucidation of the complaint made could be expected by the German authorities because, to the extent that investigations in Iraq and Cuba would be necessary, German authorities would have no executive powers over these locations anyway.¹⁴⁸ Also, the filing of requests for assistance would appear pointless considering the security and legal situation in Iraq.¹⁴⁹ The FPG pointed out that no loss of evidence would occur, particularly regarding the offer of the complainant to make Janis Karpinski, former director of the prison in Abu Ghraib, available for an interview.¹⁵⁰ By formally interviewing Karpinski the FPG would not expect a statements of a wider scope than the one she had provided already to the advocate assisting the complainant. And having the FPG interview her and possibly other witnesses made available by the complainant would not lead to the success of a potential investigation from Germany because of the restricted access to the crime scenes and the limited effect requests for assistance are expected to have. Rather, this would result in

¹⁴⁴ Addendum of Special Rapporteur, para. 160.

¹⁴⁵ FPG, Cover letter containing memorandum, 5 April 2007, 3 ARP 156/06-2, p. 5, Section B(I) (hereinafter ‘FPG – Second Decision *Rumsfeld et al.*’).

¹⁴⁶ *Ibid.*, Section B(I)(1)(a).

¹⁴⁷ *Ibid.*, Section B(I)(1)(b).

¹⁴⁸ *Ibid.*, Section B(I)(2)(b).

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*, p. 11, Section B(II)(2)(b).

mere symbolic investigations¹⁵¹ which would remain one sided without prospect of further clarification of the allegations. The FPG referred to the legislative intent to avoid binding the limited financial and human resources to the detriment of otherwise successful prosecutions of other cases involving international crimes.¹⁵²

On 30 October 2007, the Center for Constitutional Rights contested the decision of the FPG in *Rumsfeld et al.* by again requesting the Higher Regional Court in Stuttgart to compel public charges. On 21 April 2009, the Court dismissed the request,¹⁵³ holding that proceedings to compel charges are consciously not permitted by the legislature if the FPG proceeds, as it did there, pursuant to Section 153f of the FCCP.¹⁵⁴ Further, the FPG had exercised his discretion not to open a formal investigation within the limits of Section 153f of the FCCP.¹⁵⁵ While the Court could validate that the FPG had noticed his discretion and had not exercised it arbitrarily, it held that the judges would *not* be competent to review the FPG's exercise of the discretion pursuant to Sections 153f and 172(2)(3) of the FCCP in further detail.¹⁵⁶ The Court accepted the FPG's submission which relied on information provided by the US Headquarters in Europe according to which none of the persons against whom the allegations were directed were currently present in Germany and that their presence would not be expected in the foreseeable future.¹⁵⁷ The Court held that due to a missing concrete link to Germany, it would not matter whether or not the alleged crimes would be pursued by a third State. It held that the FPG would not undervalue the considerations relating to the principle of universality and to the goal of a seamless worldwide prosecution. In relation to the FPG's findings that (i) it would be difficult to secure cooperation of a State if its senior nationals would be investigated by German authorities and that (ii) the prospect to successfully investigate and prosecute the alleged crimes in Germany was low as the crime scenes in Iraq are located outside Ger-

¹⁵¹ Cf. also Rolf Hannich, "Justice in the Name of All", in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2007, vol. 2, no. 13, pp. 507 ff., at p. 513.

¹⁵² *Ibid.*

¹⁵³ Higher Regional Court Stuttgart, *Center for Constitutional Rights v. Rumsfeld et al.*, Decision, 21 April 2009, 5 Ws 21/09, pp. 3 and 6, Section III(1).

¹⁵⁴ *Ibid.*, p. 6, Section 3(1)(a).

¹⁵⁵ *Ibid.*, Section 3(1)(b).

¹⁵⁶ *Ibid.*, p. 9, Section 3(1)(c).

¹⁵⁷ *Ibid.*, pp. 7–9, Section 3(1)(b)(bb).

many, the Court found them to be legitimate considerations which would not render arbitrary the decision to suspend the preliminary examination.¹⁵⁸

6.4.2. Preliminary Examinations Leading to Formal Investigations (And Their Subsequent Closing)

At least two preliminary examinations conducted in Germany led to the formal opening of investigations, which were eventually closed without the filing of charges. These cases related to the killing of a German citizen by a drone strike in the so-called ‘tribal areas’ in Pakistan and the bombardment of a petrol truck on request by a German army commander of the International Security Assistance Force near Kunduz in Afghanistan.

6.4.2.1. Against Unknown Persons (Drone Strike in Pakistan)

The media reported an alleged drone operation on 4 October 2010 in Mir Ali, Northern Waziristan in the tribal areas of Pakistan which led to the killing of Bünyamin E., a German citizen.¹⁵⁹ To clarify this allegation, the FPG opened a preliminary examination on 11 October 2010. He also requested other State authorities¹⁶⁰ for further information. Reports received indicated that Bünyamin E., a German citizen from Wuppertal, was dead as a result of a military operation. The FPG requested advisory opinions from two think tanks about whether an armed conflict existed in Pakistan in the relevant period. In late May 2011, the Heidelberg Institute for International Conflict Research (Heidelberger Institut für Konfliktforschung) and the German Institute for International and Security Affairs (Stiftung Wissenschaft und Politik) provided advisory opinions. Further, in May and June 2011, the German Foreign Office and Federal Intelligence Service provided their advisory opinions and/or furnished additional information on Pakistan. The FPG analysed open-source information including but not limited to the annual publication of the Stockholm International Peace Research Institute, the Heidelberg Institute’s conflict barometer as

¹⁵⁸ *Ibid.*, p. 9, Section 3(1)(c).

¹⁵⁹ See <https://www.ecchr.eu/en/international-crimes-and-accountability/drones/pakistan.html>, last accessed on 6 March 2018.

¹⁶⁰ Namely the Federal German Police, the Federal Intelligence Service (‘*Bundesnachrichtendienst*’).

well as the Armed Conflict Database of the International Institute for Strategic Studies in London.¹⁶¹

Based on the information collected, the FPG formally opened an investigation against unknown persons on 10 July 2012. The objective was to inquire into whether the death of Bünyamin E. could be considered a war crime under the CCAIL.¹⁶² On 10 August 2012, the FPG requested access to files on the incident in Mir Ali held by the German Bundestag. Its secret protection office submitted the documents on 18 September 2012 to the FPG.¹⁶³ To further understand the purpose of the travel of Bünyamin E. to Pakistan, the FPG requested the criminal file relating to his older brother Emrah E. who was on 14 January 2013 accused of membership of foreign terrorist groups pursuant to Section 129b of the FCC.¹⁶⁴ Further, the FPG analysed two additional domestic criminal proceedings for purposes of the investigation into the death of Bünyamin E. and interviewed his brother Emrah and his wife.¹⁶⁵ Following an assessment of the available evidence, the FPG concluded that Bünyamin E. could at the time of his death *not* be considered as a civilian person who would enjoy the protection of international humanitarian law. Rather, his departure to Pakistan was for the purpose of participating in a jihad.¹⁶⁶ The usage of a drone leading to the death of Bünyamin E. was therefore not punishable under the CCAIL.¹⁶⁷ Further, the FPG assessed the criminality of the usage of drones under German criminal law, but denied this because

¹⁶¹ For the documentation listed in the entire paragraph, see FPG, Decision, 20 June 2013, 3BJs 7/12-4, Section A entitled “Erkenntnisquellen”, pp. 1–2 (hereinafter ‘FPG Pakistan Decision’) (<http://www.legal-tools.org/doc/600993/>).

¹⁶² Cf. FPG, press release entitled “Keine Anklage wegen eines Drohnenangriffs in Mir Ali / Pakistan am 4. Oktober 2010”, 1 July 2013, no. 21/2013 (hereinafter ‘FPG – press release Pakistan’) (available on its web site).

¹⁶³ FPG Pakistan Decision, Section A entitled “Erkenntnisquellen”, p. 2.

¹⁶⁴ *Ibid.* The trial against Emrah E. was conducted in front of the Higher Regional Court in Frankfurt (cf. FPG - press release Pakistan). About half a year after the FPG closed the preliminary examination against unknown (drone strike in Pakistan), the Higher Regional Court Frankfurt convicted in a separate proceeding Emrah E. for membership in two foreign terrorist organisations and sentenced him to seven years (first instance judgment, 23 January 2014, 5-2 StE 2/13 - 8- 1/13).

¹⁶⁵ FPG Pakistan Decision, Section A entitled “Erkenntnisquellen”, p. 2.

¹⁶⁶ *Ibid.*, Section D(II)(3)(b)(bb), p. 24. Particularly, the FPG referred to a video produced after the death where Bünyamin E. was portrayed as “German brother” and “martyr” who would have since a “few months [participated] in jihad”. *Ibid.*

¹⁶⁷ *Ibid.*, Section D(II), particularly sub-sections (3)–(5), pp. 22–27.

Bünyamin E. could be considered a legitimate military target¹⁶⁸ making his death admissible under international humanitarian law.¹⁶⁹ In conclusion, the FPG suspended the criminal investigation into the death of Bünyamin E. pursuant to Section 170(2) of the FCCP.

6.4.2.2. Colonel Klein *et al.* (Aerial Bombardment near Kunduz/Afghanistan)

Around 2 a.m. on 4 September 2009, a US war plane dropped a 500-pound bomb on two petrol trucks which the Taliban had misappropriated from the Federal German Army (hereinafter ‘FGA’). Air support had been requested and approved by Colonel Klein who was assisted by Master Sergeant Wilhelm, both officers in the FGA. As a result of the explosion between 70 to 120 people died, including both Taliban fighters and civilians.

Initially, the prosecutor’s office in Dresden was seized with the preliminary examination¹⁷⁰ regarding Klein, but deferred the dossier on 5 November 2009 to the FPG in Karlsruhe. On 27 November 2009, the FPG requested from the Operations Command of the FGA all relevant data and information. The Operations Command submitted their investigation report dated 9 September 2009 with 44 attachments to the FPG. The material included (i) a written statement made by Colonel Klein to his superior on 5 September 2009, (ii) a report from the International Security Assistance Force’s fact-finding team on the incident dated 6 September 2009, (iii) a report from an Afghanistan investigation committee of President Karzai, (iv) notes of conversations between this domestic investigation committee and the Provincial Reconstruction Team Kunduz, (v) a list of possible civilian victims of the air strike by the UN Assistance Mission to

¹⁶⁸ Kai Ambos, “Einstellungsverfügung GBA vom 20.6.2013 zum Drohneneinsatz in Mir Ali Pakistan am 4.10.2010 und Tötung des deutschen Staatsangehörigen B.E. - Anmerkungen zur “offenen Version” vom 23.7.2014”, in *Neue Zeitschrift für Strafrecht*, 2013, p. 634, at p. 615, Section 3: “If one follows the argumentation of the FPG, then the *mere membership* in a (terrorist) armed group suffices to make a civilian protected by IHL into a legitimate military target. [...] However, criminal liability does not permit (a state’s) killing of the person concerned, but only criminal prosecutions” (unofficial translation by the author). Cf. also the additional critic in Section 5.

¹⁶⁹ FPG Pakistan Decision, Section D(III)(3)(b)(bb), p. 35 and Section D(III)(4), p. 36 in connection with Section D(II)(3)(b)(bb), p. 24.

¹⁷⁰ Prosecutor Office Dresden, Prüfvorgang betreffend Oberst Klein wegen der Genehmigung zum Einsatz von Luftfahrzeugen am 4. September 2009 nahe Kunduz/Afghanistan, 5 November 2009, dossier no. 392 AR 100001/09.

Afghanistan and (vi) a NGO report from 5 November 2009. On 8 December 2009, the FPG requested copies of the investigation committee report of the Defence Committee of the German Bundestag. The Defence Committee sent 164 dossiers to the FPG. They also sent material from the investigation committee of the Defence Committee which contained records of questioning of Klein and Wilhelm.¹⁷¹

On 21 December 2009 and 23 February 2010, the FPG sent detailed questionnaires to the Operational Command of the German armed forces.

On 12 March 2010, the FPG formally opened an investigation into the acts of Klein and Wilhelm in relation to the suspicion of a crime under the CCAIL and German criminal law. During the investigation both suspects and other witnesses¹⁷² were formally questioned. On 16 April 2010, some 35 days after the formal opening, the FPG closed the investigation pursuant to Section 170(2) of the FCCP.¹⁷³ In his decision, the FPG discussed the possible criminal liability of Colonel Klein pursuant to Section 11(1)(3) of the CCAIL which states:

War crimes consisting in the use of prohibited means of warfare

(1) Whoever in connection with an international armed conflict or with an armed conflict not of an international character [...] 3. carries out an attack by military means and definitely anticipates that the attack will cause death or injury to civilians or damage to civilian objects on a scale out of proportion to the concrete and direct overall military advantage anticipated [...] shall be punished with imprisonment of not less than three years. [...]

The FPG argued that the objective elements of the offence were satisfied.¹⁷⁴ However, he denied that the subjective element, namely that the suspect definitely anticipated that the attack would cause death to civilians on a scale out of proportion to the concrete and direct overall military

¹⁷¹ Regarding all sources listed in the paragraph, cf. FPG, Decision to suspend pursuant to Section 170(2) of the FCCP criminal proceedings against colonel Klein and master sergeant Wilhelm pursuant to offences under the CCAIL and other offences, 16 April 2010, 3 Bjs 6/10-4, Section A, pp. 3–4 (hereinafter ‘FPG - Kunduz decision’) (<http://www.legal-tools.org/doc/24d8bd/>).

¹⁷² For example, between 22 to 25 March 2010, a captain and sergeant major, both from the FGA.

¹⁷³ FPG - Kunduz decision, p. 1.

¹⁷⁴ *Ibid.*, Section D(II)(3)(a), pp. 45–46.

advantage anticipated, was met in the circumstances.¹⁷⁵ The FPG also denied responsibility of Colonel Klein pursuant to Sections 8(1)(1) and 11(1)(1) of the CCAIL.¹⁷⁶

Further, the FPG discussed and dismissed the criminal liability of Colonel Klein for ordinary criminal offences, including murder pursuant to Section 211 of the FCC, because the aerial bombardment of the stolen petrol truck was permitted under international humanitarian/criminal law.¹⁷⁷

On 12 April 2010, Abdul H., who lost two sons as a result of the incident on 4 September 2009 in Kunduz, launched proceedings to compel charges against the decision of the FPG. On 16 February 2011, the Higher Regional Court in Düsseldorf dismissed his request because the applicant failed to deliver a coherent and closed description of the facts. Instead, several submissions made by the requester were insufficiently substantiated and thus did not satisfy the requirements of Section 172(3) of the FCCP.¹⁷⁸ His further claim that his right to be heard would have been violated was also dismissed by the Court.¹⁷⁹

In furtherance of the last claim, Abdul H. filed a complaint against the decision to the German Federal Constitutional Court. On 19 May 2015, the Federal Constitutional Court dismissed his complaint as inadmissible. The judges held that the German Constitution does not create a right to have third persons prosecuted. However, in special circumstances the right to have third persons effectively prosecuted exists where the right to life is at stake, or in structurally asymmetric relationships where the State carries a duty of care, or when an allegation is made that State officials have committed crimes.¹⁸⁰ The obligation for effective prosecution relates to all law enforcing organs.¹⁸¹ The Constitutional Court ruled that:

¹⁷⁵ *Ibid.*, Section D(II)(3)(b), pp. 46–50.

¹⁷⁶ *Ibid.*, Section D(II)(4), pp. 50–51.

¹⁷⁷ *Ibid.*, Section D(III)(3)(b), pp. 59 – 67 and Section D(II)(1)(a), pp. 51–52.

¹⁷⁸ Higher Regional Court Düsseldorf, *Omar Khel v. FPG*, Decision on request to compel charges, 16 February 2011, III-5 StS 6/10.

¹⁷⁹ Higher Regional Court Düsseldorf, *Omar Khel v. FPG*, Decision on fair hearing, 31 March 2011, III-5 StS 6/10.

¹⁸⁰ German Federal Constitutional Court, *Abdul H. v Germany*, Decision, 19 May 2015, 2 BvR 987/11, p. 8, paras. 20–22, Sections III(1)(b)(aa), III(1)(b)(bb) and III(1)(b)(cc) (hereinafter ‘Constitutional Court – Kunduz decision’).

¹⁸¹ *Ibid.*, p. 8, para. 22, Section III(1)(b)(dd).

This does not mean that the obligation concerned can only be discharged by filing criminal charges. Often it is sufficient if the Prosecution and under its instructions the police, make use of the available human and relevant means and their competence in form of a proportional usage of resources in order to clarify the case and to save the evidence [...]. To satisfy the obligation to effectively prosecute requires a detailed and complete documentation of the course of investigation as well as an understandable reasoning of the decision to suspend. This is subject to judicial review (sections 172 ff. FCCP).¹⁸²

The Constitutional Court held that the decisions of the FPG and of the Higher Regional Court in Düsseldorf satisfied these requirements and thus dismissed the complaint as inadmissible.

6.4.3. Common Arguments Advanced in Decisions on Preliminary Examinations

The decisions discussed above reveal that at least in cases involving German citizens, whether as potential victims¹⁸³ and/or perpetrators¹⁸⁴ of a possible violation of international humanitarian law, the FPG did not only conduct a preliminary examination, but also formally opened criminal investigations. This step enables the FPG to formally take witness statements and, in the case of Kunduz, suspect interviews, both of which are not permitted at the preliminary examination phase on account of human rights as explained above.¹⁸⁵

¹⁸² *Ibid.*, p. 9, para. 24, Section III(1)(b)(ee) (author's translation). ("Dies bedeutet nicht, dass der in Rede stehenden Verpflichtung stets nur durch Erhebung einer Anklage genügt werden kann. Vielfach wird es ausreichend sein, wenn die Staatsanwaltschaft und - nach ihrer Weisung - die Polizei die ihnen zur Verfügung stehenden Mittel personeller und sächlicher Art sowie ihre Befugnisse nach Maßgabe eines angemessenen Ressourceneinsatzes auch tatsächlich nutzen, um den Sachverhalt aufzuklären und Beweismittel zu sichern [...]. Die Erfüllung der Verpflichtung zur effektiven Strafverfolgung setzt eine detaillierte und vollständige Dokumentation des Ermittlungsverlaufs ebenso voraus wie eine nachvollziehbare Begründung der Einstellungsentscheidungen. Sie unterliegt der gerichtlichen Kontrolle (§§ 172 ff. StPO).")

¹⁸³ Bünyamin E. in against unknown (drone strike in Pakistan).

¹⁸⁴ Colonel Klein and master sergeant Wilhelm in the case involving the aerial bombardment near Kunduz in Afghanistan.

¹⁸⁵ Cf. *supra* Section 6.3.1.

This sub-section discusses four common arguments the FPG advanced in decisions on preliminary examinations, namely immunity of persons against whom a criminal complaint had been made, no specific link of the alleged perpetrators to Germany, symbolic investigations or preventive judicial assistance and subsidiarity of the German investigation in relation to investigations by other States.

6.4.3.1. No Specific Link of the Alleged Perpetrator to Germany

All decisions of the FPG discussed here contain elaborations on the existence (or absence) of a link between the alleged perpetrator and Germany. The reason the FPG considers this element is that Section 153f of the FCCP makes explicit reference to it:

The public prosecution office may dispense with prosecuting a criminal offence for which there is criminal liability pursuant to [...] the CCAIL [...] if the accused is not resident in Germany and *is not expected* to so reside.¹⁸⁶

First, the legislature has clarified that for a link to Germany to exist, it is sufficient that the alleged offender “is deemed to be present in the country if he or she is in Germany, even temporarily. Presence as part of a transit is sufficient”.¹⁸⁷ It is not necessary that the entry into Germany be voluntary.¹⁸⁸

Secondly, a prior stay of the person against whom the criminal complaint has been made is not sufficient. What is required is that the person be present at the time the FPG conducts the preliminary examination or makes his decision (to open an investigation or to close the preliminary examination). The contrary view, that a prior stay in Germany could create such a link,¹⁸⁹ overlooks that the reason for requiring a specific link

¹⁸⁶ Emphasis supplied.

¹⁸⁷ Government draft – motives CCAIL (English version), p. 83; Bundestag – motives CCAIL, p. 38.

¹⁸⁸ For example, it suffices that entry into Germany occurs as a result of an emergency landing (Gercke, 2012, Section 153(f), para. 4, see *supra* note 18).

¹⁸⁹ Salvatore Zappalà, “The German Prosecutor’s Decision not to Prosecute a former Uzbek Minister: Missed Opportunity or Prosecutorial Wisdom?”, in *Journal for International Criminal Justice*, 2006, vol. 4, no. 3, pp. 606–607: “Almatov was present in Germany in autumn 2005, meeting the requirement of presence in the state exercising jurisdiction” (hereinafter ‘Zappalà – FPG’s Decision Uzbekistan’).

to Germany is to have the person concerned arrested.¹⁹⁰ In this regard, the FPG's first decision involving the allegations against Almatov was correct because by the time the FPG became aware of the allegations, the then Uzbek Minister of Interior had already left the country.¹⁹¹ Hence an arrest by German authorities was no longer possible.

Thirdly, the use of the phrase "is not expected" in the section raises the question of who procedurally carries the burden of substantiating this link, or the absence thereof. Basak argues that it is the FPG who bears the burden of demonstrating that the alleged offender is not expected to enter into Germany or that his or her return thereto would be far-fetched.¹⁹² After all, it will be the FPG who intends to rely on the existence or absence of such a link in his decisions to close a preliminary examination or an investigation pursuant or analogous to Section 153f of the FCCP. However, at least on one occasion the FPG argued that preliminary examinations about current or future travel plans of suspects living abroad would not be potentially successful.¹⁹³ This reasoning left it open who carries the burden of proving the absence of a link to Germany. To assess the existence of a specific link of an alleged offender to Germany requires facts. In their absence all that remains is a mere prognosis decision based on assertions. And any prognosis can only be based on what is known at a given moment; whether information then available provides a factual basis to expect an entry of the person concerned into Germany.¹⁹⁴ In this regard, the FPG may consider whether the person concerned has family or

¹⁹⁰ "The accused must only remain in Germany long enough for him or her to be arrested" (cf. government draft – motives CCAIL (English version), p. 83; Bundestag – motives CCAIL, p. 38).

¹⁹¹ Kreß suggests that the communication between the Federal government and the authorities relating to foreigners and refugees on the one hand side and the FPG on the other hand side should be improved. He suggests an obligation for the authorities involved to check the aspect of international crimes and, if suspicious exists to inform the FPG, should be similar to the Netherlands, be created. See Claus Kreß, "Nationale Umsetzung des Völkerstrafgesetzbuches", in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2007, vol. 2, no. 13, p. 523 (hereinafter 'Kreß – Nationale Umsetzung').

¹⁹² Basak – Rumsfeld, p. 356; cf. Beulke – Strafprozeßordnung, Section 153(f), para. 16.

¹⁹³ FPG – Second Decision *Rumsfeld et al.*, Section B(I)(1)(b)(bb), p. 9.

¹⁹⁴ Cf. Teßmer – MK, Section 153f, para. 8.

relatives in Germany and/or business contacts providing the necessity for (re-)entering into the country.¹⁹⁵

The decision to close the preliminary examination regarding Inoyatov, the Uzbek Chief of the National Security Service, shows the potential margin of error in a prognosis decision. In 2006, when the FPG closed the preliminary examination, it was neither reasonably foreseeable when the European Union would lift the travel ban against Inoyatov nor if he would still continue to occupy his official post which would provide him a reason to travel to Germany in the future to liaise with his intelligence services counterparts there. Based on the 2006 assessment against Inoyatov, it was understandable that the FPG closed the preliminary examination as it was not alleged that he had entered German territory. However, the consequence was that in late 2008, when the travel ban was lifted, there was no pending criminal proceedings against Inoyatov so he could enter Germany unimpeded. The decision to invite Inoyatov was beyond the competence (and possibly done without prior knowledge) of the FPG, similar to the temporary stay of the then Uzbek Minister of Interior Almatov, in whose favour the German embassy in Moscow issued a visa autumn 2005. So Almatov and Inoyatov were in Germany *without* the FPG asking them questions regarding the allegations raised in the criminal complaint. Kreß suggests improving the flow of information between the State administration and the FPG in order to ensure that the latter learns in advance about a suspects anticipated stay in Germany (and not *after* the fact, meaning after he has left the country).¹⁹⁶ The consequences of the FPG identifying a missing link to Germany are described by Thomas Beck, the former head of the unit on international crimes in the FPG:

What we [in the FPG's office] are not doing: open an investigation in purely foreign cases without specific link to Germany. And this not only because we do not have the capacity for it. We are of the firm conviction that we would overstrain ourselves and this would be detrimental to the holistic system of international criminal law (see Belgium, see

¹⁹⁵ Beulke – Strafprozeßordnung, Section 153(f), para. 16; Tobias Singelstein and Peer Stolle, “Völkerstrafrecht und Legalitätsprinzip”, in *Zeitschrift für Internationale Strafrechtsdogmatik*, 2006, vol. 1, no. 3, pp. 118 and 121.

¹⁹⁶ Kreß - Nationale Umsetzung, p. 523. In this regard, Beck points out that at best a formal initiation of an investigation together with a suspect interview could be expected. The outcome of a suspect interview would be, in his view, “foreseeable” (cf. Beck - Völkerstrafgesetzbuch, p. 162).

Spain). Investigations which are a mere facade, without any prospect of evidentiary results, do not correspond to the way in which Germany conducts criminal prosecutions.¹⁹⁷

Similarly, the FPG elaborated in the second decision not to open proceedings against Rumsfeld *et al.* that the purpose of the specific link requirement in Section 153f is to avoid fruitless investigation activity by Germany because the suspect is abroad.¹⁹⁸ However, this notion has the potential to set aside the guidance of the legislature who expressly stated that “the investigation and prosecution duty is not limited to crimes which have a German connection; even if there is *no* connection to Germany, the results of investigation initiated in Germany could be valuable for proceedings before a foreign or international criminal court”.¹⁹⁹

6.4.3.2. Preventive Judicial Assistance

When the German legislature decided in favour of the possibility of preventive judicial assistance by German authorities regarding allegations of international crimes, it also explicitly clarified that even if another State has preferential jurisdiction, German prosecutors may still act:

If, on the other hand, a foreign state or an international criminal court is already investigating the matter, but there is a link in terms of offence, suspect or victim to Germany, the German authorities should avail of the investigation opportunities resulting from the German connection, for reasons of worldwide solidarity alone, even *without* specific requests for legal aid, in order to support the trial abroad as well as possible and to be prepared for the case for possible take over by Germany at a later time.²⁰⁰

¹⁹⁷ Beck – Völkerstrafgesetzbuch, p. 162 (author’s translation). (“Was wir nicht tun: Die Aufnahme von Ermittlungen bei reinen Auslandstaten ohne Anknüpfungspunkt nach Deutschland. Und das keineswegs nur weil gar nicht die Kapazitäten dazu haben. Wir sind der festen Überzeugung, dass wir uns damit überheben würden und das wäre schädlich für das Gesamtsystem des Völkerstrafrechts (siehe Belgien, siehe Spanien). Ermittlungsverfahren, die nur Fassade sind, ohne jegliche Aussicht auf Beweisergebnisse entsprechen nicht der Art und Weise wie in Deutschland Strafverfolgung betrieben wird”).

¹⁹⁸ FPG – Second Decision *Rumsfeld et al.*, Section B(I)(1)(b)(bb), p. 9. Beck – Völkerstrafgesetzbuch, p. 162.

¹⁹⁹ Government draft – motives CCAIL (English version), p. 82; Bundestag – motives CCAIL, p. 37; Weßlau – Systematischer Kommentar, Section 153(f), para. 1.

²⁰⁰ Government draft – motives CCAIL (English version), p. 84; Bundestag – motives CCAIL, p. 38. Agreeing: Teßmer – MK, Section 153f, para. 20.

It is sufficient that the perpetrator, a victim or the act have a link to Germany.²⁰¹

In this regard, the FPG's notion is narrower than the legislature's guidance. The FPG points out that a 'fruitless investigation' is to be avoided. While these concerns are real, they still do not live up to the legislative intent. Rather, the FPG repeatedly announced that it suffices that the UN or NGOs have documented or otherwise taken statements of victims and that therefore there would be no need for the FPG to take official statements.²⁰² This view is neither consistent with the spirit of the legislature which had emphasized solidarity considerations, nor with the realities of criminal litigation, whether before national or international judges. While certain documentations from the UN may carry significant weight in court proceedings, they may often not reach the courtroom due to confidentiality reasons. If the UN or regional organizations lift confidentiality then their reports may be redacted making the content of their public reports generic. Fact-finding reports from the UN or regional organizations, like NGO reports, often contain useful information. This may be used as *lead* information in an investigation, but generally not as evidence of individual guilt to issue an arrest warrant²⁰³ and/or to obtain a conviction in courtroom proceedings. This is because NGO staff are often not properly trained in (forensic) evidence handling procedures, and are not legally bound to abide by any criminal procedural code which affords the interviewed persons the right to remain silent. Therefore, informative accounts recorded by NGOs and observers from regional or international organizations in their reports carry, in the absence of a formal advising of witnesses and suspects of their right to remain silent, limited weight in courtrooms.²⁰⁴

²⁰¹ Government draft – motives CCAIL (English version), p. 84; Bundestag – motives CCAIL, p. 38.

²⁰² Cf. FPG – Second Decision *Rumsfeld et al.*, Section B(II)(2)(b), p. 11; FPG – Uzbekistan decision, last paragraph before Section B(3).

²⁰³ Beck – Völkerstrafgesetzbuch, p. 162; cf. Martin Böse, "Das Völkerstrafgesetzbuch und der Gedanke der "antizipierten Rechtshilfe"", in Florian Jeßberger and Julia Geneuss (eds.), *Zehn Jahre Völkerstrafgesetzbuch*, Nomos and Stämpfli, 2013, pp. 167, 175 (hereinafter 'Böse – antizipierte Rechtshilfe').

²⁰⁴ Cf. Krefß – Nationale Umsetzung, p. 521; Rainer Keller, "Das Völkerstrafgesetzbuch in der praktischen Anwendung: Eine kritische Bestandsaufnahme", in Florian Jeßberger and Julia Geneuss (eds.), *Zehn Jahre Völkerstrafgesetzbuch*, Nomos and Stämpfli, 2013, pp. 141, 144 (hereinafter 'Keller – CCAIL'); Wolfgang Kaleck, "Strafverfolgung nach dem Völker-

Still, the FPG mentions in his decision to close preliminary examination or an investigation his refusal to take formal statements of witnesses offered by complainants arguing that everything is already ‘well documented’. This attitude was criticized,²⁰⁵ particularly since victims of international crimes are potentially more vulnerable and formally taking their statement may be crucial before they die.

The former head of the war crimes department of the FPG suggests that preventive judicial assistance may be considered if it occurs for a future criminal prosecution by German authorities.²⁰⁶ Again, this notion is narrower than the guidance provided by the legislature. The explicit intent of the legislature was that Germany may also provide preventive judicial assistance for proceedings before a *foreign* criminal court, if the primary jurisdiction is, for political reasons, unwilling to exercise its jurisdiction over the crime, or if important witnesses are present in Germany.²⁰⁷ This begs the question: what are the minimum requirements to commence with preventive judicial assistance? Would the fact that another State or an international court has already commenced criminal proceedings into a (specific) case for which evidence is available in Germany suffice?²⁰⁸ Or is it also required that the evidence, if obtained, can be legally transmitted to the other jurisdiction concerned, meaning that its transmission is not blocked by Section 73 of the Act on International Cooperation in Criminal Matters?²⁰⁹ Or should preventive judicial assistance at least be carried out without any other jurisdiction being seized of the case if a “unique investigative opportunity”²¹⁰ arises in Germany?

strafgesetzbuch: Ein kurzer Blick in die Zukunft – ein kurzer Kommentar zum Beitrag von Martin Böse”, in Florian Jeßberger and Julia Geneuss (eds.), *Zehn Jahre Völkerstrafgesetzbuch*, Nomos and Stämpfli, 2013, pp. 177, 181.

²⁰⁵ Kreß – Nationale Umsetzung, pp. 515 and 519; Keller – CCAIL, p. 144.

²⁰⁶ Cf. Beck – Völkerstrafgesetzbuch, p. 162.

²⁰⁷ Government draft – motives CCAIL (English version), pp. 83–84; Bundestag – motives CCAIL, p. 38.

²⁰⁸ Cf. Böse – antizipierte Rechtshilfe, p. 173.

²⁰⁹ Section 73 Limitations on Assistance (Ordre Public) states: “Legal assistance and transmission of data without request shall not be granted if this would conflict with basic principles of the German legal system”.

²¹⁰ Cf. with ICC Statute, arts. 56 and 18(6).

6.4.3.3. Subsidiarity

The FPG based several decisions not to open investigations on subsidiarity considerations. Particularly, the criminal complaints against Rumsfeld *et al.* did not result in formal opening of criminal proceedings because the US would be primarily responsible and had already opened an investigation.

The motives behind Section 153f of the FCCP, in relation to Germany's universal jurisdiction, provide that: "the jurisdiction of third party states (which exists under international law) must be understood as a subsidiary jurisdiction which should prevent impunity, but not otherwise inappropriately interfere with the primarily responsible jurisdiction. The state in which the crime was committed and the home state of the perpetrator or victim deserve priority due to their particular interest in the prosecution and due to the general proximity to evidence".²¹¹

The investigative activities of the US authorities in the Abu Ghraib case were relevant as the alleged perpetrators of the criminal complaints were US citizens. One cannot find fault with the reference of the FPG observations that it depends on the US law enforcement authorities conduct their investigation.²¹²

However, it is more doubtful whether the US authorities were indeed pursuing persons belonging to senior and highest level of civilian and military leadership responsible for the allegations in Abu Ghraib and other detention facilities in Iraq. Rather, they merely subjected persons at the lowest level of the military hierarchy to criminal proceedings.²¹³ The US authorities investigated *some* acts of the lowest subordinates, but certainly not those acts of superiors which the criminal complaint brought to the attention of the FPG.²¹⁴

²¹¹ Government draft – motives CCAIL (English version), p. 82; Bundestag – motives CCAIL, p. 37.

²¹² FPG – First decision *Rumsfeld et al.*, p. 121 (English), see *supra* note 130.

²¹³ Katherine Gallagher, "Universal Jurisdiction in Practice: Efforts to Hold Donald Rumsfeld and Other High-Level United States Officials Accountable for Torture", in *Journal for International Criminal Justice*, 2009, vol. 7, no. 5, pp. 1087 ff.; Bettina Weißer, "Das Prinzip der Weltrechtspflege in Theorie und Praxis", in *Goldtammer's Archiv für Strafrecht*, 2012, vol. 159, no. 7, pp. 416 and 425.

²¹⁴ Cf. Gallagher, 2009, pp. 1087, 1098–99, Section D, see *supra* note 213; Kurth – §153f FCCP, p. 85.

Teßmer argues that the FPG should only close a case if he *positively* found another authority who is pursuing the investigation:

[the FPG's] suspension is only then suitable, if the act 1. is persecuted elsewhere and 2. this 'elsewhere' may have primacy. Whether this is so, is to be assessed according to the priority of competences, for which the specific link to Germany is decisive. The stronger this link is, the more likely the act has to be persecuted in Germany. If that is the case then a suspension is possible only if the FPG finds somebody with the same or with a higher competence, who wants to conduct the procedure constitutionally and who has declared this will with binding effect. Only if it is guaranteed that an investigation is conducted elsewhere, then the procedure in Germany may be terminated.²¹⁵

In the case of *Rumsfeld et al.*, the FPG closed the preliminary examination without having received any assurance from the US that they would investigate the highest echelons of military and civilian leadership. However, to require such an assurance is unrealistic: what means would the FPG have to obtain such an assurance? The only way to react to such allegations and omitted assurances from the primary responsible State is to formally secure relevant evidence which is available in Germany and preserve it for future proceedings, whether in Germany, the US, or elsewhere.

What is also questionable is the consideration which the FPG advanced in two decisions to refrain from investigation due to the principle of non-intervention into the internal affairs of States.²¹⁶ The fact that the FPG advances this consideration contradicts the expressly declared decision of the legislature who explicitly stated that a trial based on the prin-

²¹⁵ "Eine Einstellung [kommt] nur dann in Betracht, wenn die Tat 1. 'woanders' verfolgt wird und 2. dieses 'woanders' den Vorrang haben darf. Ob dies so ist, bemisst sich nach der 'gestuften Zuständigkeitspriorität', wofür entscheidend der Inlandsbezug der Tat ist. Je stärker dieser ausfällt, desto eher muss die Tat in Deutschland verfolgt werden. Ist das der Fall, kann eine Einstellung nur noch in Betracht kommen, wenn der Generalbundesanwalt 'jemanden' mit gleicher oder höherer Zuständigkeitspriorität gefunden hat gefunden hat, der das Verfahren tatsächlich und rechtsstaatlich führen will und dieses 'Wollen' verbindlich erklärt hat. Erst wenn sichergestellt ist, dass das Verfahren woanders stattfindet, kann das Verfahren in Deutschland eingestellt werden" (Teßmer – MK, Section 153f, para. 20 (author's translation)).

²¹⁶ Cf. FPG – First decision *Rumsfeld et al.*, Section B, p. 119 (English), see *supra* note 130; FPG - Falun Gong Decision, Section II(3), pp. 4–5.

principle of universality regarding war crimes, crimes against humanity and genocide “committed abroad, even by foreign citizens, is *not* at variance with the principle of non-intervention”.²¹⁷

Further, the European Court of Human Rights acknowledged in *Jorgić v. Germany* an interpretation of a German court which “found that the public international law principle of universal jurisdiction, which was codified in Article 6 no. 1 of the [German] Criminal Code, established their jurisdiction while complying with the public international law duty of non-intervention”.²¹⁸ The Court concluded that “the German courts’ interpretation of the applicable provisions and rules of public international law, in the light of which the provisions of the Criminal Code had to be construed, was not arbitrary. They therefore had reasonable grounds for establishing their jurisdiction to try the applicant on charges of genocide”.²¹⁹

In conclusion, the narrow notion advanced by the FPG on the principle of non-intervention is neither consistent with the motives of the German legislature, nor required as the European Court of Human Rights ruled that the German judiciaries approach to international crimes is compliant with the principle of non-intervention.

6.4.3.4. Immunity

The FPG twice highlighted immunity considerations in relation to a former president²²⁰ and a current deputy president.²²¹ In the first decision not to open an investigation against Rumsfeld, the FPG said in *obiter* that he did not have to consider whether, as current Secretary of Defence,²²² immunity considerations would form a stumbling block, because other con-

²¹⁷ Government draft – motives CCAIL (English version), p. 29 (emphasis added); Bundestag – motives CCAIL, p. 14 (emphasis added).

²¹⁸ European Court of Human Rights, *Jorgić v. Germany*, Judgment, 12 July 2007, application no. 74613/01, para. 67.

²¹⁹ *Ibid.*, para. 70.

²²⁰ Former Chinese President Jiang Zemin.

²²¹ At the time of the FPG’s decision Ramzan Kadyrow was deputy President of Chechen Republic.

²²² Donald Henry Rumsfeld was at the time of FPG’s decision on the first criminal complaint Secretary of Defence of the US, but no longer so at the time the FPG issued his decision on the second complaint.

siderations²²³ would already suffice to close the preliminary examination. At the time of the second decision, when Rumsfeld was no longer the Secretary of Defence of the US, the FPG omitted any reference to immunity considerations.²²⁴ Similarly, the FPG declined to engage in considerations of immunity in 2006 when deciding not to open an investigation into allegations surrounding Uzbek citizens.²²⁵ By that time Almatov had resigned and, thus, was no longer the Minister of Interior.

The FPG's approach regarding presidents²²⁶ of other States is in line with the decision of the International Court of Justice in the *Yerodia* case which grants a head of State, a head of government and the foreign minister immunity *ratione personae* for private and official acts, even in cases of crimes against humanity and war crimes.²²⁷ Further, the FPG's approach is also consistent with the Cologne Higher Regional Court's decision which acknowledged immunity from criminal prosecution in Germany in favour of Saddam Hussein, the then sitting President of Iraq.²²⁸

The FPG's approach regarding immunity is questionable in at least two aspects. It was unnecessary to mention immunity of a Minister of Defence in the FPG's first decision in relation to Donald Rumsfeld because national courts tend to recognize immunity of the so-called troika,²²⁹ consisting of the heads of States and government as well as the minister of foreign affairs. A minister of defence²³⁰ or a minister of interior are not part of that troika. Granting immunity *ratione personae* is unnec-

²²³ For example, subsidiarity of the German investigation, the fact that the crimes were committed abroad and not by or against German citizens and the lacking prospect that German authorities could clarify the allegations as part of their investigation.

²²⁴ Positively noted by Kreß – Nationale Umsetzung, pp. 515 and 520.

²²⁵ Cf. Zappalà – FPG's Decision Uzbekistan, pp. 602, 613–16, Section 5.

²²⁶ Namely, regarding Jiang Zemin and Ramzan Kadyrow.

²²⁷ ICJ – *Yerodia* judgment, paras. 53–60.

²²⁸ Cologne Higher Regional Court, *Saddam Hussein*, Decision, 16 May 2000, 2 Zs 1330/90, para. 9.

²²⁹ International Law Commission ('ILC'), Fifth report on immunity of State officials from foreign criminal jurisdiction, 14 June 2016, A/CN.4/701, para. 237 (<http://www.legal-tools.org/doc/ec3997/>) (hereinafter 'ILC – Fifth Report Immunities').

²³⁰ Steffen Wirth, "Immunity for Core Crimes? The ICJ's judgment in the Congo vs. Belgium case", in *European Journal of International Law*, 2002, vol. 13, no. 4, pp. 877 and 879; Basak – Rumsfeld, p. 351; Schoreit favors a broader scope claiming CCA, Sections 18–20 would exempt Heads of States and governments, Ministers and their entourage from jurisdiction of German courts (in Rolf Hannich *et al.* (eds.), *Karlsruher Kommentar zur Strafprozeßordnung*, C.H. Beck, Munich, 2013, 7th edition, Section 153(f), para. 3).

essary as ministers of defence or interior do not exercise the primary function of representing their States. Thus, to discuss considerations of immunity *ratione personae* for a minister of interior or secretary of defence is unnecessary. Therefore, regarding Rumsfeld, the FPG could have simply omitted any reference to immunity, or at least clarified his position that in his view a sitting minister of defence has (or does not have) immunity.²³¹ However, by choosing to mention immunity in connection with the phrase “stumbling block”²³² without offering further views, the FPG has created an ambiguity.

Further, the FPG’s approach regarding *former* sitting presidents’ immunity from prosecution regarding grave international crimes is also questionable.²³³ In 2013, the International Law Commission provisionally adopted Article 4(1) which states that “Heads of State, Heads of Government and Ministers for Foreign Affairs enjoy immunity *ratione personae* only during their term of office”.²³⁴

Finally, the FPG’s notion of immunity regarding international crimes should acknowledge that Section 20(2) of the CCA exempts persons from German jurisdiction only “pursuant to the general rules of international law”. Currently, international law regarding immunity for international crimes is developing, particularly after the *Pinochet* decision of the House of Lords.²³⁵ It is debatable whether former heads of States

²³¹ Cf. Kurth – §153f FCCP, p. 86, text accompanying fn. 60; Zappalà – FPG’s Decision Uzbekistan, p. 613.

²³² FPG – First decision *Rumsfeld et al.*, see *supra* note 130, Section B.

²³³ Critical: Kreß – Nationale Umsetzung, p. 519; fn. 36 referring to Claus Kreß, “Der Internationale Gerichtshof im Spannungsfeld zwischen Völkerstrafrecht und Immunitätsschutz”, in *Goldammer’s Archiv für Strafrecht*, 2003, vol. 150, no. 1, pp. 25–43; Zappalà – FPG’s Decision Uzbekistan, p. 615; Helmut Kreicker states that sitting heads of state and government and ministers of foreign affairs enjoy complete immunity in Germany from criminal accountability, with no exception for crimes against international law. However, once they cease this function, they enjoy no special international legal exemption from criminal accountability – even for acts committed in their official capacity during their time in office. Without restriction the international legal community can hold them accountable (Helmut Kreicker, in Albin Eser and Helmut Kreicker (eds.), *Nationale Strafverfolgung völkerrechtlicher Verbrechen*, vol. I, Max-Planck-Institut, Freiburg, 2003, pp. 350 ff.).

²³⁴ ILC – Fifth Report Immunities, annex I, p. 96. Cf. Andreas Fischer-Lescano, “Weltrecht als Prinzip”, in *Kritische Justiz*, 2005, vol. 38, no. 1, pp. 72 and 81.

²³⁵ House of Lords, *Regina v. Bartle and the Commissioner of Police for the Metropolis and Others (Appellants), ex part Pinochet (Respondent)*; *Regina v. Evans and Another and the Commissioner of Police for the Metropolis and Others (Appellants), ex parte Pinochet (Respondent)*, Judgment, 24 March 1999, 2 All E.R.97.

are granted immunity *ratione materiae*, meaning only for official acts.²³⁶ The International Law Commission discussed during its sixty-ninth session in 2017 the following proposed Article 7 regarding an exclusion of immunity *ratione materiae* for State officials:

Crimes in respect of which immunity does not apply

1. Immunity shall not apply in relation to the following crimes: (i) Genocide, crimes against humanity, war crimes, torture and enforced disappearances [...];²³⁷

The Commission provisionally adopted this proposal with 21 votes in favour, eight votes against and one abstention and referred it to its drafting committee.²³⁸ In any event, for the German application of immunity regarding crimes against international law it would be useful if the issue is clarified either by the FPG, or a competent German court.

6.5. Quality Control of Preliminary Examinations

One means of quality control is to provide transparent decisions. In the case of *Abdul H v. Germany*, the German Federal Constitutional Court required the FPG to provide a detailed and complete documentation of the course of his investigation as well as understandable reasoning for the decision to suspend under Section 153f of the FCCP.²³⁹ All accessible²⁴⁰ FPG decisions reviewed and discussed in this contribution are several pages long, provide details about the consideration advanced by the FPG when exercising discretion and otherwise satisfy the requirements set by the constitutional court.

In addition, the FPG maintains a website on which he publishes press releases summarizing the current progress of cases dealt with by the office, which include cases on international criminal law.²⁴¹ However, few

²³⁶ Basak – Rumsfeld, p. 351.

²³⁷ ILC – Fifth Report Immunities, Annex III, p. 99.

²³⁸ Report of the International Law Commission Sixty-ninth session (1 May-2 June and 3 July-4 August 2017), UN Doc. A/72/10, 4 August 2017, Chap. VII, paras. 72–77, 84–86, 94–101 (<http://www.legal-tools.org/doc/7d6be0/>); cf. ILC – Fifth Report Immunities, para. 239 mentioning that some ILC members found this proposal ‘unconvincing’ while others saw it as ‘balanced and unambiguous’.

²³⁹ Cf. *supra* Section 6.4.2.2.

²⁴⁰ The FPG’s decision of the FPG on Kadyrow (Chechen Republic within the Russian Federation) was not accessible to this author.

²⁴¹ Available at its web site.

press releases covered decisions on closing preliminary examinations or investigations relating to cases involving the CCAIL, including some of those discussed. Rather, the website mainly contained press releases relating to cases attracting media attention.²⁴²

Although the FPG endeavours to release so-called ‘open versions’ (preserving the confidentiality of certain sensitive information) of final decisions relating to crimes against international law, apart from one exception,²⁴³ the open versions of these decisions are not posted on the website of the FPG, but are available only because they were posted by the criminal complainants, academic institutions or NGOs after they gained access to this information. These persons or institutions published these decisions on websites maintained by them or otherwise on openly accessible websites maintained by third persons. As a result, the decisions of the FPG are scattered on various websites on the Internet and the documents posted, though they usually carry indicia of authenticity such as the header of the FPG and stamps of the receiving person or institution, otherwise lack official authentication.

Hence, to date, the decisions of the FPG are *not* made available to the public in a centralized manner, for example, on the FPG’s website. Certainly, concerns of confidentiality and sensitivity of information during the preliminary examination-stage may militate against such public sharing of information, but the ICC demonstrates that it is possible to maintain a website where each situation subject to a preliminary examination has a special area and where relevant documents can, if necessary with redactions, be published.²⁴⁴

In exceptional circumstances, the FPG published some ‘light tower’ decisions on the CCAIL in academic journals in German and English.²⁴⁵ FPG staff occasionally published in academic journals and books information about the work of the war crimes department. As a result, many scholars have discussed the decisions of the FPG, reviewed his arguments

²⁴² While the website contains certain press releases relating to *Rumsfeld et al.* and *Klein and Wilhelm (Kunduz/Afghanistan)* other cases are not mentioned at all: for example, the preliminary examination of Aslan Kadyrow.

²⁴³ Cf. *supra* note 171.

²⁴⁴ Cf., for example, ICC, “Guinea” (available on the Court’s web site).

²⁴⁵ For example, the cases relating to *Rumsfeld et al.* and *Colonel Klein et al.* (aerial bombardment near Kunduz/Afghanistan).

thereby providing further guidance on the validity of certain lines of thoughts advanced by the FPG.

Currently, the FPG has neither published a policy paper on how preliminary examinations are conducted, nor annual reports outlining which situations are monitored and allowing interested organizations to inform themselves about the annual progress, if any, of the preliminary examinations conducted by the FPG. This would allow interested organizations to furnish additional material to the FPG for further consideration and analysis.

Due to the strong legal position of the FPG and his broad discretion, a judicial review by German courts of his discretionary decisions is unlikely to succeed. Thus, the dominant position of the FPG lacks adequate *external* checks and balances. Academics have proposed two options: either increase the scope of judicial review of the discretionary decisions of the FPG,²⁴⁶ or create a requirement of judicial approval²⁴⁷ if the FPG intends to stop a preliminary examination or an investigation.²⁴⁸ The first option requires that someone triggers the judicial review by initiating the procedure to compel charges. This depends on a victim or criminal complainant who is willing to pursue the FPG in proceedings under Section 172 of the FCCP. The disadvantage of this procedure is that the victim may not have adequate legal advice regarding the procedure to compel charges. This scenario is avoided by option two, which would involve an automatic approval of the FPG by the judiciary, usually following a process of consultation and review.

The decision of the German legislature to create the principle of universality and to balance this with the broad discretion of the FPG has led to the situation where the question of impunity, a matter of substantive criminal law, has been transferred into the realm of the procedural. Hence the principal decision whether Germany exercises its competence over

²⁴⁶ Cf. Kai Ambos, in *Münchener Kommentar zum Strafgesetzbuch*, vol. 8: Nebenstrafrecht III, Völkerstrafgesetzbuch, Section 1, paras. 32, 33; Singelstein and Stolle, 2006, p. 122, see *supra* note 195; Kreicker, 2003, p. 438, see *supra* note 233.

²⁴⁷ Cf. the analogous situation in FCCP, Sections 153(a) and 153(b) and ICC Statute, Article 53(3) lit/b.

²⁴⁸ Kreß – Nationale Umsetzung, p. 523; Nils Geißler and Frank Selbmann, “Fünf Jahre VStGB - Eine kritische Bilanz”, in *Humanitäres Völkerrecht*, 2007, vol. 20, no. 3, pp. 160 and 165. Cf. Kai Ambos, “International core crimes, universal jurisdiction, and § 153f of the FCCP”, in *Criminal Law Forum*, 2007, vol. 18, no. 1, pp. 43 and 58, Section IV.

international crimes rests on the shoulders of the FPG. In this regard, Weßlau observed an “executive control of the prosecution activities in the sensitive area of international conflicts”.²⁴⁹

Since German law currently provides only limited opportunities for judicial review, issues of quality control of preliminary examinations in Germany have to be mainly addressed by the FPG in form of *self-imposed* quality control measures.

6.6. Conclusion

German law does not explicitly govern preliminary examinations. In practice, the FPG conducts preliminary examinations, though for some situations so-called structural investigations have been formally opened. Regarding international crimes, the legislature provides the FPG with a structured discretion to suspend an investigation and even a trial until the judgment is issued. By inference, the FPG also has discretion to suspend a preliminary examination. The discretion to suspend an investigation and, by analogy, a preliminary examination is *not* subject to a procedure to compel charges due to a conscious omission by the German legislature. Thus, judicial review of the FPG’s exercise of discretion is limited to two points: whether the FPG has noticed his discretion at all and whether he exercised his discretion in an arbitrary way.

The FPG exercises his discretion within the boundaries provided by the German legislature. Mere symbolic investigations are to be avoided and investigations into crime scenes abroad require the co-operation of domestic authorities which will be difficult to secure when requests for assistance target the citizens of the country from whom such assistance is sought (unless a regime change has changed political considerations).

In his decisions, the FPG advances at least two considerations which reflect conservative notions that neither reflect the guidance of the German legislature nor developments in international law. Decisions of the FPG should avoid considering that conducting preliminary examinations or investigation into international crimes would be at odds with the principle of ‘non-intervention’ into the internal affairs of States. The FPG should review its reluctance to engage in preventive judicial assistance.

The FPG’s position regarding immunity is at present only partially clear. It is clear that the FPG respects the immunity of present and former

²⁴⁹ Weßlau – Systematischer Kommentar, Section 153(f), para. 3.

presidents. Regarding former presidents, the FPG's approach disregards developments in international law that *no longer* grant such immunity. Further, in his first decision on Rumsfeld *et al.*, the FPG did not need to mention immunity of a sitting secretary of defence.

The practice shows that the litmus test for the FPG is whether a specific link to Germany exists.²⁵⁰ All suspended preliminary examinations discussed here displayed no specific link to Germany in two aspects: the crime scenes were abroad and neither the perpetrator nor the victims were German citizens.

This practice of suspensions is largely in line with the law and has therefore become systematic. Due to the broad discretion afforded to the FPG, there are few reasons why the FPG should adjust this approach. However, enhanced quality control would make the exercise of this practice more transparent. Such enhanced quality control will promote discussion and awareness and lead to gradual improvements in preliminary examinations. This may eventually give rise to impetus for reform. Scholars suggest extending the scope of judicial review or introducing the requirement for judicial approval of decisions to suspend an investigation and, by analogy, a preliminary examination. This would add an independent element to the decision-making process and balance the position of the FPG by involving a judge. Doing so would require will of the legislature. The reform of the FCCP is a pending project of the Federal Ministry of Justice. This reform would provide the opportunity to define and codify preliminary examinations.

²⁵⁰ Cf. *supra* notes 200 and 201.

The Legalistic Function of Preliminary Examinations: Quality Control as a Two-Way Street

Matilde E. Gawronski*

7.1. Introduction

The preliminary examination of a situation by the Office of the Prosecutor (‘OTP’) of the International Criminal Court (‘ICC’) is first and foremost a *legalistic* process. It is established by the Rome Statute.¹ It is framed by policy papers.² It is known to the general public through reports published on a yearly basis since 2011,³ and through situation specific reports as well as statements issued, for example, at the opening or closing of a preliminary examination.⁴ Its overall objective is to determine, on the basis

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¹ Within the ICC Statute, the term ‘preliminary examination’ appears in Article 15(6) in reference to the Prosecutor’s duty under Article 15(2). The process of a preliminary examination is however governed by Article 53(1). See Rome Statute of the International Criminal Court, 17 July 1998, Article 15(2) and (6) (‘ICC Statute’) (<http://www.legal-tools.org/doc/7b9af9/>).

² Office of the Prosecutor, ICC (hereinafter ‘OTP’), *Policy Paper on Preliminary Examinations*, 1 November 2013 (<http://www.legal-tools.org/doc/acb906/>).

³ OTP, *Report on Preliminary Examination Activities 2013*, November 2013 (<http://www.legal-tools.org/doc/dbf75e/>); *idem*, *Report on Preliminary Examination Activities 2012*, November 2012 (<http://www.legal-tools.org/doc/0b1cfc/>); and *idem*, *Report on Preliminary Examination Activities 2011*, 13 December 2011 (<http://www.legal-tools.org/doc/4aad1d/>).

⁴ See, for example, among other statements regarding the opening and on-going nature of preliminary examinations: OTP, “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, concerning referral from the Gabonese Republic”, 29 September 2016 (<http://www.legal-tools.org/doc/e0b4f6/>); *idem*, “ICC Prosecutor confirms situation in Guinea under examination”, 14 October 2009, ICC-OTP-20091014-PR464 (<http://www.legal-tools.org/doc/ceb4de/>); *idem*, “ICC Prosecutor: alleged war crimes in the territory of

of the available information, whether “there is a reasonable basis [for the OTP] to proceed with an investigation” into a specific situation.⁵ Preliminary examinations effectively determine “when and where the Court should intervene”,⁶ playing this way an institutional ‘green light’ role. This assessment is done “in accordance within the statutory criteria”,⁷ in particularly those determined by Article 53(1)(a)–(c) of the Rome Statute. All these factors make preliminary examinations essentially legalistic – essentially about rules, benchmarks, and parameters, against which information is assessed and decisions on where to turn and which direction to take are made.⁸

In what ways, then, can the quality control of such legalistic process be enhanced? This chapter will argue that quality control of the preliminary examination process should be viewed as a *two-way street*. The quality of preliminary examinations could be enhanced by both internal and external input. While ‘internal’ quality control will come from within the OTP, and in particular from the Situation Analysis Section (‘SAS’) entrusted with the task of analysing information through a set framework, quality enhancement could also derive from relevant external stakeholders, such as States, NGOs, victims groups, the media, and academia, who often are the providers and gatekeepers of relevant information. With reference to selected aspects of the four phases of a preliminary examination – the submission and analysis of relevant Article 15 communications, and the assessment of subject-matter jurisdiction, complementarity and the interests of justice criteria – this chapter will explore some of the possible and different ways in which the quality of preliminary examination could be internally controlled and externally enhanced.

To do so, the chapter will first analyse the quintessentially legalistic quality of the preliminary examination process and will explore why it is

the Republic of Korea under preliminary examination”, 6 December 2010 (<http://www.legal-tools.org/doc/d7a9fb/>). See also, *idem*, *Situation in Mali: Article 53(1) Report*, 16 January 2013 (<http://www.legal-tools.org/doc/abb70f/>).

⁵ *Policy Paper on Preliminary Examinations*, 2013, para. 34, p. 8, see *supra* note 2.

⁶ *Ibid.*, para. 24, p. 7.

⁷ *Ibid.*

⁸ Noting that after a preliminary examination is completed and an investigation is opened, decisions regarding the selection and prioritization of cases for investigation and prosecution of course take into consideration criteria beyond those considered during the preliminary examination process. See OTP, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016 (<http://www.legal-tools.org/doc/182205/>).

important to focus on this aspect rather than on the extra-legal possible objectives often ascribed to it. It will then briefly present the four phases of a preliminary examination. It will then explore what could be meant by ‘quality’ in the context of preliminary examinations and will define the concepts of internal quality control and external quality enhancement. On this basis, it will explore, for each phase, possible opportunities and limitations for both. Altogether, it will aim to form a roadmap for quality control and enhancement focused on the legalistic qualities of the preliminary examination process.

7.2. Preliminary Examinations as a Legalistic Process

The process of preliminary examination can be considered as quintessentially legalistic insofar as it pertains to the interpretation and application of legal rules, as well as the enhancement of specific legal processes. Many stakeholders – including the OTP – however, consider preliminary examinations to be much more than this. In their view, preliminary examinations have multiple functions which are extra-legal, including aiding investigations,⁹ creating networks of co-operating partners,¹⁰ fostering positive complementarity¹¹ as well as prevention and deterrence.¹² While these functions may in different ways be related to the *practice* or at least the *potential* of the preliminary examination process, they are not the core *function* ascribed to it by the Statute. Their accomplishment is much more of an *offshoot* of the legalistic process of preliminary examination than an explicit and direct *objective* of the process itself. This chapter argues, therefore, that ‘going back to the essence’ of preliminary examinations may be an apt starting point for exploring how to enhance their quality. The essence, in this case, takes a legalistic form.

7.2.1. The Legalistic Nature of Preliminary Examinations

The legalistic nature of preliminary examinations manifests itself in at least three ways: (1) by statutory origin, (2) through their position within the broader prosecutorial mission of the OTP, itself also of a legalistic nature, and (3) as an internal work process – how preliminary examina-

⁹ OTP, Strategic Plan 2016 - 2018, 16 November 2015, para. 55(1), p. 20 (<http://www.legal-tools.org/doc/2dbc2d/>).

¹⁰ *Ibid.*

¹¹ *Ibid.*, para. 55(2), p. 20.

¹² *Ibid.*, para. 55(3), p. 21.

tions are structured, what they analyse, and how. This sub-section briefly explores each one of them and how they intertwine, focusing on the third aspect in particular – the internal legalistic analytical function of preliminary examinations.

The establishment of a preliminary examination process is one of the innovations silently embedded in the Rome Statute to guide the ICC and the OTP. As a result, the OTP is *statutorily* responsible for collecting all relevant information and determining in a fully informed manner whether there is a reasonable basis to proceed with an investigation into a situation under its scrutiny.¹³ Article 53(1) of the Rome Statute, in particular, demands that an OTP investigation into a specific situation can only be triggered upon satisfaction of a number of legal criteria, strictly applied to available information,¹⁴ namely (a) jurisdiction (temporal, subject-matter and territorial or personal), (b) admissibility (itself implying an assessment of gravity and complementarity), and finally (c) interests of justice.¹⁵ The Rome Statute thus imposes on the OTP a preliminary analysis to assess whether the required parameters are met in a given situation, failing which an investigation cannot be initiated.¹⁶

In establishing the OTP's responsibility towards this analytical task, the Statute effectively brings preliminary examinations into existence, imbuing them at the very outset with a legalistic soul. More specifically, however, the Statute also brings the practice of preliminary examinations to existence in two other ways.

On the one hand, it defines it as a *sine qua non* process which necessarily precedes an eventual investigation and which qualitatively differs from it.¹⁷ During the preliminary examination phase, in fact, the Office does not have investigative powers. The findings of a preliminary examination will not be binding on any future investigation that may derive from it and they may also change or evolve if, in the course of an investigation, the case hypotheses, evidentiary trails and new information deter-

¹³ *Policy Paper on Preliminary Examinations*, 2013, para. 1, p. 2, see *supra* note 2.

¹⁴ ICC Statute, Article 53(1), see *supra* note 1; Strategic Plan 2016 - 2018, 2015, see *supra* note 9.

¹⁵ ICC Statute, Article 53(1), see *supra* note 1.

¹⁶ To the contrary, it is a duty of the OTP to initiate an investigation if all of them are met. See *Policy Paper on Preliminary Examinations*, 2013, para. 2, p. 2, see *supra* note 2.

¹⁷ For example, in terms of the threshold that it needs to satisfy and in terms of the type of information that it normally avails itself of and produces.

mine so.¹⁸ At the same time, however, a preliminary examination will define the contours of the situation that might eventually be investigated, in particular in terms of geographical and temporal scope.¹⁹ This aspect pertains to how the preliminary examination process as a whole fits as the first sub-phase of the larger legalistic process of prosecution. On the other hand, the Statute brought the preliminary examination process into existence as a matter of technical definition, structuring it as a multiphase analytical task based on the parameters set by Article 53(1). This gives preliminary examinations the quality of a discrete segmented analytical work process with a specific scope, phases, and objective.

All three aspects contribute to defining preliminary examinations as an essentially legalistic process. When Article 53(1) requires that the OTP assess whether its jurisdiction, admissibility and interests of justice standards are met, it both determines and confirms the dual legalistic nature of preliminary examinations. At a *macro*-level, it determines the role of preliminary examinations within the life cycle of a situation under the scrutiny of the OTP, giving it a triggering power, without which investigations could not occur. At a *micro*-level, it presents the Office with an essentially legalistic question, offering it legalistic tools to answer it and a legalistic mission to work towards. In other words, all that preliminary examinations are theoretically designed to be and to do operates in the realm of the strict application of a legal framework for the purpose of determining whether a legal process can take place and, if so, within which contours. This is why preliminary examinations are an ‘intrinsically’ legalistic process, that is, a process internally defined by legal rules and parameters, which simultaneously determine and guide what should be analysed, how

¹⁸ *Policy Paper on Preliminary Examinations*, 2013, para. 84, pp. 19-20, see *supra* note 2.

¹⁹ Preliminary examinations effectively determine the temporal and geographical scope within which an eventual investigation might take place. They also provide a blueprint of potential cases that may be investigated. However, unlike the geographical and temporal scope, the identification of potential cases is purely preliminary and without prejudice to any potential cases that may be identified in the process of subsequent investigations. The assessment of potential cases is also “not binding for future admissibility determinations or the subsequent conduct of investigations”. *Policy Paper on Preliminary Examinations*, 2013, para. 44, p. 11, see *supra* note 2. On the issue of what defines a situation, in comparison to a case, see Rod Rastan, “What is a Case for the Purpose of the Rome Statute?”, in *Criminal Law Forum*, 2008, vol. 19, no. 3-4, pp. 435-48; Rod Rastan, “Situation and Case: Defining the Parameters”, in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice, Volume 1*, Cambridge University Press, 2011.

it should be analysed, and to what end. This, it is suggested, is also the core aspect of the process within which quality control and enhancement should occur.

In sum, while many powers and qualities could be ascribed to preliminary examinations, the core *function* and therefore core *power* of the process is that of producing a *legal* assessment based on available information to determine whether the margins are met to start an investigation. The margins are defined within a matrix that includes assessments of jurisdiction, admissibility – including gravity and complementarity – and the interests of justice. The benchmark is set at the “reasonable basis to believe” standard, a threshold which confirms the purely preliminary nature of the assessment. While the assessment – as encapsulated at the end of the process by the so-called ‘Article 53(1) report’ – may ultimately be authoritative on specific matters, it is however none other than an institutionally functional assessment aimed at producing a legalistic answer to a legal question.

This, of course, does not imply that all aspects of a preliminary examination inquiry will be solely of a strict legalistic nature. However, altogether, this suggests that for an understanding of preliminary examinations to be built and therefore for their quality to be enhanced, one should, firstly, notionally distinguish the technical work process of a preliminary examination from everything that surrounds it. This includes the decision made upon its completion, which is the result of a balancing act between the Prosecutor’s ‘legal duty’²⁰ as well as her prerogative to exercise her ‘discretion’.²¹ Secondly, we should focus on it as a discrete process with

²⁰ That is, if the Prosecutor “is satisfied that all the criteria established by the Statute for this purpose are fulfilled”. *Policy Paper on Preliminary Examinations*, 2013, para. 2, p. 2, see *supra* note 2.

²¹ The discretion of the ICC’s Prosecutor to open or not an investigation has been widely debated. See, for example, Matthew R. Brubacher, “Prosecutorial Discretion within the International Criminal Court”, in *Journal of International Criminal Justice*, 2004, vol. 2, no. 1, pp. 71-95; Hassan B Jallow, “Prosecutorial Discretion and International Criminal Justice”, in *Journal of International Criminal Justice*, 2005, vol. 3, no. 1, pp. 145-61; William Schabas, “Prosecutorial Discretion v. Judicial Activism at the International Criminal Court”, in *Journal of International Criminal Justice*, 2008, vol. 6, no. 4, pp. 731-61; Michael J. Struett, “The Politics of Discursive Legitimacy: Understanding the Dynamics and Implications of Prosecutorial Discretion at the International Criminal Court”, in Steven C. Roach (ed.), *Governance, Order, and the International Criminal Court*, Oxford University Press, 2009; Darryl Robinson, “Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court”, in *European Journal of International Law*,

the *de facto* technical function of producing a legal assessment of ‘facts’ (defined as pre-investigative facts) on the basis of a ‘reasonable basis standard’, for the purpose of enabling the OTP to determine whether or not the next step within the broader legal process of competence to the OTP should take place. The technical four-phase preliminary examination work process is briefly described below.

7.3. The Preliminary Examination Work Process in Brief

The preliminary examination work process²² – how the preliminary examination analysis is tackled by the OTP from an operational perspective – is structured around four phases, each one based around criteria established by the Rome Statute and developed by subsequent OTP policy.²³ After a situation is referred to the Court (through a State referral²⁴ or declaration,²⁵ or a Security Council referral²⁶) or initiated *proprio motu*,²⁷ the OTP runs an assessment on the basis of the criteria set out in Article 53(1)(a)–(c): jurisdiction, admissibility and interests of justice. Together, these criteria provide the conceptual and analytical structure of each preliminary examination. The same framework is applied to each situation

2003, vol. 14, no. 3, pp. 481-505; Mireille Delmas-Marty, “Interactions between National and International Criminal Law in the Preliminary Phase of Trial at the ICC”, in *Journal of International Criminal Justice*, 2006, vol. 4, no. 1, pp. 2-11; Richard J. Goldstone and Nicole Fritz, “‘In the Interests of Justice’ and Independent Referral: The ICC Prosecutor’s Unprecedented Powers”, in *Leiden Journal of International Law*, 1999, vol. 13, no. 3, pp. 655-67; Allison Marston Danner, “Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court”, in *American Journal of International Law*, 2003, vol. 97, no. 3, pp. 510-52; James A. Goldston, “More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court”, in *Journal of International Criminal Justice*, 2010, vol. 8, no. 2, pp. 383-406.

²² Even though one derives from the other, it is important to distinguish the preliminary examination ‘work process’, followed by the OTP SAS and defined as a matter of policy and day-to-day practice, from the statutory process, which determines that the OTP analyse the criteria imposed by Article 53(1) of the ICC Statute. By this token, for example, Phase 1 is simply a work phase and is not legally defined by Article 53(1). Similarly, the phase known as Phase 2 corresponds to the analysis of the first set of criteria concerning jurisdiction, established by Article 53(1)(a).

²³ ICC Statute, Article 53(1), see *supra* note 1; *Policy Paper on Preliminary Examinations*, 2013, para. 77, p. 18, see *supra* note 2.

²⁴ ICC Statute, Articles 13(a) and 14, see *supra* note 1.

²⁵ *Ibid.*, Article 12(3).

²⁶ *Ibid.*, Article 13(b).

²⁷ *Ibid.*, Articles 13(c) and 15(1).

regardless of how it comes under the scrutiny of the court.²⁸ The standard of proof within which this analysis has to determine its findings is that of ‘reasonable basis’, interpreted by the ICC Chamber in the Kenya situation as meaning “a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court ‘has been or is being committed’”.²⁹ Each phase is described below, noting however that despite their segmented outlook, as a matter of practice, they are followed by the OTP in a holistic manner.³⁰

7.3.1. Phase 1

Phase 1 pertains only to the potential opening of a preliminary examination *proprio motu*.³¹ As such, Phase 1 concerns “the initial assessment of all information on alleged crimes received under Article 15”,³² which allows the Prosecutor to “initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court”.³³ Such information, when received, is defined in OTP parlance as an ‘Article 15 communication’. The purpose of Phase 1 is to analyse the “seriousness” of the received information, to “filter out information on crimes that are outside the jurisdiction of the Court”, and to “identify” information regarding crimes “that appear to fall within the jurisdiction of the Court”.³⁴ Within the screening process, the OTP categorizes the information received in four groups: (1) communications concerning “matters which are manifestly outside the jurisdiction of the Court”; (2) communications concerning “situation already under preliminary examination”; (3) communications concerning “situation(s) already under investigation or form-

²⁸ *Policy Paper on Preliminary Examinations*, 2013, para. 12, p. 3, see *supra* note 2.

²⁹ ICC, Situation in the Republic of Kenya, Pre-Trial Chamber, 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. 35 (“Kenya Article 15 Decision”) (<http://www.legal-tools.org/doc/338a6f/>). For an extensive analysis on the issue of the standard of proof applied during the preliminary examination process see Matthew Cross, “The Standard of Proof in Preliminary Examinations”, *infra* vol. 2, chap. 22.

³⁰ *Policy Paper on Preliminary Examinations*, 2013, para. 77, p. 18, see *supra* note 2.

³¹ This phase is regulated by Article 15 of the ICC Statute. Situations referred by States, State Parties or non-State Parties (under Article 12(3)), or by the Security Council begin effectively from Phase 2. See ICC Statute, Articles 12(3) and 15, see *supra* note 1.

³² *Policy Paper on Preliminary Examinations*, 2013, para. 78, p. 18, see *supra* note 2.

³³ ICC Statute, Article 15(1), see *supra* note 1.

³⁴ *Policy Paper on Preliminary Examinations*, 2013, para. 78, p. 18, see *supra* note 2.

ing the basis of a prosecution”; and (4) communications warranting further analysis, known as ‘WFAs’, concerning “matters which are neither manifestly outside the jurisdiction of the Court nor related to situations already under preliminary examination or investigation or forming the basis of a prosecution”.³⁵ This fourth category can, under the Prosecutor’s *proprio motu* powers and in certain circumstances, trigger the opening of a preliminary examination. To this end, they are analysed in combination with other communications and relevant open source material, in order to assess on its face “whether the alleged crimes appear to fall within the jurisdiction of the Court”.³⁶ The findings of this assessment are collated in a report known in OTP parlance as ‘Phase 1 report’, which informs the Prosecutor’s decision as to whether the allegations warrant the formal opening of a preliminary examination and thus moving the situation to Phase 2 of the process, that is, to ‘preliminary examination proper’.

7.3.2. Phase 2: Jurisdiction

Phase 2 marks the formal commencement of a preliminary examination.³⁷ This phase corresponds to Article 53(1)(a) and concerns the assessment of jurisdictional parameters.³⁸ Its objective is twofold: first, to ascertain “whether the preconditions to the exercise of jurisdiction under article 12 are satisfied”, that is territorial or personal and temporal jurisdiction; and second, to assess whether the alleged conduct amounts to Rome Statute crimes,³⁹ that is subject-matter jurisdiction.

The assessment of temporal jurisdiction is regulated by Article 11, which states that “the Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute”.⁴⁰ Temporal jurisdiction is differently assessed depending on the modality in which the situation came under the scrutiny of the Court: (1) on the basis of the date of entry into force of the Statute for States that were Parties on 1 July 2002; (2) the date of entry into force for a State acceding the Statute at a later

³⁵ *Ibid.*, para. 78, pp. 18-19; OTP, Regulations of the Office of the Prosecutor, 23 April 2009, ICC-BD/05-01-09, Regulation 27 (<http://www.legal-tools.org/doc/a97226/>).

³⁶ *Policy Paper on Preliminary Examinations*, 2013, para. 79, p. 19, see *supra* note 2.

³⁷ *Ibid.*, para. 80, p. 19.

³⁸ ICC Statute, Article 53(1)(a), see *supra* note 1.

³⁹ *Policy Paper on Preliminary Examinations*, 2013, para. 80, p. 19, see *supra* note 2.

⁴⁰ ICC Statute, Article 11 and in particular 11(1), see *supra* note 1.

stage;⁴¹ (3) the date specified in a Security Council referral;⁴² or (4) the date declared by a State in a declaration lodged pursuant to Article 12(3), giving the ICC jurisdiction on its territory from a specific date onwards.⁴³

Territorial or personal jurisdictions, along with temporal jurisdiction, are part of the pre-conditions that must be met for the ICC to exercise its jurisdiction in a situation.⁴⁴ Their satisfaction “entails that the crime occurs on the territory, or [was committed] by a national of a State Party or a non-State Party that has lodged a declaration accepting the jurisdiction of the Court, or otherwise arises from a situation referred by the Security Council acting under Chapter VII of the Charter of the United Nations”.⁴⁵ Specifically, Article 12(2)(a) defines the territorial jurisdiction of the Court as limited to crimes committed on the territory of a State Party or on a vessel or aircraft flying the flag of a State Party.⁴⁶ Article 12(2)(b) defines the personal jurisdiction of the Court as limited to “the State of which the person accused of the crime is a national”.⁴⁷ This means that the Court will only have jurisdiction limited to the territory of a State where the crimes have been committed (broadly understood as including vessels and aircraft) or on individuals who allegedly committed international crimes and who are nationals of a State Party or a referring State, regardless of where the crime was committed.⁴⁸ The provisions of territorial and personal jurisdiction do not have to be satisfied concomitantly for the Court to have jurisdiction on a situation, as one of them suffices, in addition to the establishment of temporal and subject-matter jurisdiction.

‘Subject-matter’ or ‘material’ jurisdiction is arguably the most crucial and arduous type of jurisdiction that needs to be ascertained during Phase 2.⁴⁹ It concerns the question of whether there is a reasonable basis

⁴¹ *Ibid.*, Article 11(2).

⁴² *Policy Paper on Preliminary Examinations*, 2013, para. 37, p. 9, see *supra* note 2.

⁴³ *Ibid.*, para. 37, p. 9.

⁴⁴ *Ibid.*, para. 6, pp. 2-3.

⁴⁵ *Ibid.*

⁴⁶ ICC Statute, Article 12 (2)(a), see *supra* note 1.

⁴⁷ *Ibid.*, Article 12 (2)(b).

⁴⁸ See, for example, OTP, “Situation in Iraq/UK” and “Situation in Afghanistan”, in *Report on Preliminary Examination Activities 2016*, 14 November 2016 (<http://www.legal-tools.org/doc/f30a53/>).

⁴⁹ Noting that subject-matter analysis and information collection continues also during Phase 3, in particular for situation of ongoing crimes. See *Policy Paper on Preliminary Examinations*, 2013, para. 82, p. 19, see *supra* note 2.

to believe that crimes within the jurisdiction of the Court may have been committed. More specifically, the subject-matter jurisdiction of the ICC is defined by Article 5 of the Rome Statute and the correlated Articles 6, 7, 8 and 8*bis*. Together, these articles establish that the ICC's jurisdiction will be limited to war crimes, crimes against humanity, genocide and, with its activation in December 2017, the crime of aggression.⁵⁰ By statutory terms, the ICC will therefore not be able to deal with every situation of large-scale violence, such as situations involving human rights violations that do not reach the threshold of international crimes, or situations in which there is information that international crimes may have been committed but upon which the ICC has no mandated jurisdiction to intervene, as, for example, in the situation of Syria. This notwithstanding, the OTP's focus will be on "crimes committed on a large scale, as part of a plan or pursuant to a policy".⁵¹

The OTP will thus have to carry out "a thorough factual and legal assessment of the crimes allegedly committed in the situation at hand"⁵² with the goal of ascertaining whether they effectively constitute one of the crimes listed under Article 5 and, if so, then identifying "the potential cases falling within the jurisdiction of the Court".⁵³ The subject-matter analysis of Phase 2 utilizes a variety of sources including: Article 15 communications, information derived "from referrals by a State Party or the Security Council, declarations lodged pursuant to article 12(3)", "open source information", and "testimony received at the seat of the Court".⁵⁴ The final outcome of Phase 2 will be the submission to the Prosecutor of a so-called "Article 5 report",⁵⁵ upon which she will decide whether the preliminary examination in point meets the relevant standards, in order to proceed to Phase 3.

⁵⁰ ICC Statute, Articles 5, 6, 7, 8 and 8*bis*, see *supra* note 1.

⁵¹ *Policy Paper on Preliminary Examinations*, 2013, para. 81, p. 19, see *supra* note 2.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*; Article 15(2) of the ICC Statute also allows the Prosecutor to seek additional information from States, organs of the United Nations, IGOs and NGOs, and other reliable sources as well as to receive written or oral testimony at the Seat of the Court. See ICC Statute, Article 15(2), see *supra* note 1.

⁵⁵ *Policy Paper on Preliminary Examinations*, 2013, para. 81, p. 19, see *supra* note 2.

7.3.3. Phase 3: Admissibility⁵⁶

Phase 3 concerns the assessment of the admissibility criteria, which includes the concomitant assessment of two factors as imposed by Article 53(1)(b) and further defined by Article 17: gravity and complementarity. Although this assessment occurs during Phase 3 of a preliminary examination, it corresponds to the whole function of a preliminary examination: are the cases potentially deriving from the situation under scrutiny admissible on all fronts to be considered for investigation under the rules and mandate of the ICC?

The gravity assessment concerns the specific prerogative of the ICC to prosecute perpetrators of international crimes, and, among these, those most responsible for the gravest crimes committed within a broader situation of mass violence. Oftentimes the OTP's attention may be drawn to situations of violence which, although tragic, do not qualify as international crimes or do not reach the necessary gravity threshold for the OTP.⁵⁷ The gravity assessment functions therefore as a filter. It includes the assessment of parameters⁵⁸ such as the scale,⁵⁹ nature,⁶⁰ manner of commission of the crimes,⁶¹ and their impact.⁶² The assessment of these

⁵⁶ See *ibid.*, pp. 10–11.

⁵⁷ See, for example, the closure of Korea preliminary examination.

⁵⁸ *Policy Paper on Preliminary Examinations*, 2013, para. 9, p. 3 and para. 61, p. 15, see *supra* note 2. These factors are also stipulated in Regulation 29(2) of the Regulations of the OTP, 2009, see *supra* note 35.

⁵⁹ “The scale of the crimes may be assessed in light of, *inter alia*, the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, or their geographical or temporal spread (high intensity of the crimes over a brief period or low intensity of crimes over an extended period)”. *Policy Paper on Preliminary Examinations*, 2013, para. 62, p. 15, see *supra* note 2.

⁶⁰ “The nature of the crimes refers to the specific elements of each offence such as killings, rapes and other crimes involving sexual or gender violence and crimes committed against children, persecution, or the imposition of conditions of life on a group calculated to bring about its destruction”. *Ibid.*, para. 63, p. 15.

⁶¹ “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”. *Ibid.*, para. 64, pp. 15-16.

factors is carried out through qualitative and quantitative analysis.⁶³ Gravity is further assessed by the OTP “bearing in mind the potential cases that would likely arise from an investigation of the situation”.⁶⁴ An understanding of gravity is built primarily from any information available to the OTP regarding the allegedly committed crimes under scrutiny.

The complementarity⁶⁵ assessment concerns instead the ‘last resort’ mandate of the ICC and the primacy of national authorities in investigation and prosecution.⁶⁶ It is defined by Article 17(1)(a)–(c) and 17(2)–(3), and “involves an examination of the existence of relevant national proceedings in relation to the potential cases being considered for investigation by the Office”.⁶⁷ Questions at the centre of this assessment follow two intertwined lines of inquiry: (1) are any investigations or prosecutions of cases of possible interest to the ICC taking place or have they taken place under any relevant domestic jurisdiction? And if so, (2) is the relevant State (un)willing or (un)able to genuinely carry out such investigations or prosecutions?⁶⁸

Article 17 guides the assessment of each of the two aspects, focusing (1) on the existence of proceedings and whether they effectively cover the same person and the same conduct identified by the OTP for its potential cases, even if differently characterized from a legal perspective; and (2) on their genuineness, which is determined by the willingness and ability of a State to carry them out. More specifically, Article 17(2) defines that factors that the OTP should consider in order to determine ‘unwillingness’ include whether any possible ongoing proceedings may be undertaken to shield the person from criminal responsibility (Article 17(2)(a)), with a delay which appears inconsistent with the intent of bringing the person to justice (Article 17(2)(b)), and not independently and impartially

⁶² “The impact of crimes may be assessed in light of, inter alia, the sufferings endured by the victims and their increased vulnerability; the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities”. *Ibid.*, para. 65, p. 16.

⁶³ *Ibid.*, para. 61, p. 15.

⁶⁴ *Ibid.*, para. 9, p. 3.

⁶⁵ *Ibid.* See also *ibid.*, paras. 46-58, pp. 11-15.

⁶⁶ ICC Statute, Preamble, paras. 6 and 10, and Article 1, see *supra* note 1.

⁶⁷ *Policy Paper on Preliminary Examinations*, 2013, para. 8, p. 3, see *supra* note 2.

⁶⁸ Where relevant domestic investigations or prosecutions exist, the Office will assess their genuineness. See *ibid.*, para. 8, p. 3.

(Article 17(2)(c)).⁶⁹ Similarly Article 17(3) defines that in order to determine ‘inability’, the OTP may look at factors such as whether the domestic justice system with jurisdiction on the potential cases may be ‘available’, that is, not affected by “total or partial collapse” as a consequence of which the State in point would not be able to obtain the accused or the necessary evidence and testimony to carry out proceedings.⁷⁰ The complementarity assessment must answer these questions “bearing in mind the Office’s policy of focusing any future investigative efforts on those most responsible for the most serious crimes under the Court’s jurisdiction”⁷¹ as well as the *ne bis in idem*⁷² principle.

The information used by the OTP for its admissibility assessment, includes both open source information as well as, when available, information coming from the relevant jurisdiction and other knowledgeable stakeholders.⁷³ The findings of the admissibility assessment are collated in a so-called ‘Article 17 report’, submitted to the Prosecutor for her consideration.⁷⁴

7.3.4. Phase 4: Interests of Justice

The fourth and final phase of the preliminary examination process is the assessment of the ‘interests of justice’ criterion.⁷⁵ In accordance with the provisions of Article 53(1)(c), this is a countervailing consideration that may give a reason not to proceed, rather than an active assessment.⁷⁶ This means that the Prosecutor will not have to actively and positively assess that opening an investigation would be in the interests of justice. Rather the OTP will have to “assess whether, taking into account the gravity of

⁶⁹ ICC Statute, Article 17, see *supra* note 1. See also *Policy Paper on Preliminary Examinations*, 2013, paras. 50-55, pp. 13-14, see *supra* note 2.

⁷⁰ ICC Statute, Article 17(3), see *supra* note 1. See also *Policy Paper on Preliminary Examinations*, 2013, paras. 55-57, p. 14, see *supra* note 2.

⁷¹ *Policy Paper on Preliminary Examinations*, para. 8, p. 3.

⁷² ICC Statute, Articles 17(1)(c) and 20, see *supra* note 1. Note that so far no case has come before the ICC in which the *ne bis in idem* principle has been contended in trial.

⁷³ Note that information for the admissibility assessment is gathered from Phase 2 onwards. See *Policy Paper on Preliminary Examinations*, 2013, para. 8, p. 3, see *supra* note 2.

⁷⁴ *Ibid.*, para. 82, p. 19.

⁷⁵ ICC Statute, Article 53(1)(c), see *supra* note 1.

⁷⁶ See Section 3 “The balancing test”, in *Policy Paper on Preliminary Examinations*, 2013, para. xx, pp. 16-17, see *supra* note 2.; OTP, *Policy Paper on the Interests of Justice*, September 2007, pp. 2-3 (<http://www.legal-tools.org/doc/bb02e5/>).

the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice”.⁷⁷ Upon the completion of a preliminary examination assessment during Phase 4, the OTP “will proceed unless there are specific circumstances which provide substantial reasons to believe that the interests of justice are not served by an investigation at that time”.⁷⁸

Whereas neither the Statute nor the OTP has ever defined what ‘interests of justice’ are, over time, the Office clarified what factors may be relevant to its assessment. One above all is the ‘interests of victims’, as “expressed by the victims themselves as well as by trusted representatives and other relevant actors such as community, religious, political or tribal leaders, States, and intergovernmental and non-governmental organisations”.⁷⁹ Factors such as the interests of peace and security,⁸⁰ or the interests of other post-conflict justice mechanisms,⁸¹ while potentially contextually relevant, are however not formally considered during this phase, as they are seen as not pertaining to the judicial mandate and decision-making abilities of the OTP.⁸² Ultimately, the Office operates under “a strong presumption that investigations and prosecutions will be in the interests of justice and therefore a decision not to proceed on the grounds of the interests of justice would be highly exceptional”.⁸³ So far, no commencement of an investigation has ever been halted on ‘interests of justice’ grounds.⁸⁴

⁷⁷ *Policy Paper on Preliminary Examinations*, 2013, para. 10, p. 3, see *supra* note 2.

⁷⁸ *Ibid.*, para. 67, p. 16; See further on this: *Policy Paper on the Interests of Justice*, 2007, see *supra* note 76.

⁷⁹ *Policy Paper on Preliminary Examinations*, 2013, para. 68, p. 16, see *supra* note 2.

⁸⁰ See Section 6(b) “Peace Processes”, in *Policy Paper on Preliminary Examinations*, 2013, paras. 68-69, pp. 16-17, see *supra* note 2; *Policy Paper on the Interests of Justice*, 2007, pp. 8-9, see *supra* note 76.

⁸¹ *Ibid.*, Section 6(a) “Other Justice Mechanisms”, pp. 7-8.

⁸² *Policy Paper on Preliminary Examinations*, 2013, paras. 68-69, pp. 16-17, see *supra* note 2.

⁸³ *Ibid.*, para. 71, p. 17.

⁸⁴ Should the Prosecutor decide not to proceed with an investigation solely on the basis of the ‘interests of justice’ criterion, she shall promptly inform the Pre-Trial Chamber accordingly, as explained in Regulations of the Office of the Prosecutor, 2009, Regulation 31, see *supra* note 35.

7.3.5. Article 53(1) Report

The conclusion of Phase 4 and therefore of the preliminary examination work process is determined by the production of a so-called ‘Article 53(1) report’.⁸⁵ Such report collects all the findings of the preliminary examination process in respect to a specific situation. Specifically, it will also “indicate an initial legal characterisation of the alleged crimes within the jurisdiction of the Court”, as well as, in a preliminary manner and without prejudice to further findings in the course of the subsequent investigative stage,⁸⁶ “a statement of facts indicating, at a minimum, the places of the alleged commission of the crimes; the time or time period of the alleged commission of the crimes, and the persons involved (if identified), or a description of the persons or groups of persons involved”.⁸⁷ Such a report will provide the “basis for the Prosecutor to determine whether to initiate an investigation” or not.⁸⁸ When applicable, it will also form the basis of the OTP’s Article 15 request for authorization from the ICC’s Pre-Trial Chamber to open an investigation.⁸⁹ As stated above, the Statute imposes a “legal duty”⁹⁰ on the Prosecutor to open an investigation if the parameters of Article 53(1) are all met, but her discretionary powers may also play a role in this decision.⁹¹ Overall, the compilation of an Article 53(1)

⁸⁵ *Ibid.*, Regulation 29. For an example of an Article 53(1) report see Office of the Prosecutor, *Situation in Mali: Article 53(1) Report*, 16 January 2013 (<http://www.legal-tools.org/doc/abb70f/>).

⁸⁶ Note that “this identification of facts is preliminary in nature, bearing in mind the specific purpose of the procedure at this stage. It is not binding for the purpose of future investigations, and may change at a later stage, depending on the development of the evidentiary trail and future case hypotheses”. *Policy Paper on Preliminary Examinations*, 2013, para. 84, pp. 19-20, see *supra* note 2.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*, para. 83, p. 19.

⁸⁹ The most recent example of an Article 15 request for authorization to open an investigation was filed by the OTP on 20 November 2017 in the situation of Afghanistan, see Office of the Prosecutor, *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-Red (<http://www.legal-tools.org/doc/db23eb/>).

⁹⁰ *Ibid.*, para. 2, p. 2.

⁹¹ Within the preliminary examination analytical process, a more discretionary approach can be applied to some of the analytical criteria available. The ICC Statute in fact sets out the legal provisions that guide the process, imposing a specific set of objective parameters through which the available information is analysed. While some of these criteria will allow for a *purely objective* analysis, for example, territorial and temporal jurisdiction, others will allow for a *more discretionary* assessment, as, for example, the gravity and inter-

Report is the culmination of the preliminary examination's legalistic and analytical work process.

7.4. The Concepts of 'Quality' and 'Quality Control' in the Context of Preliminary Examinations

Having established what the preliminary examination process as a legalistic work process looks like, this section turns to addressing what 'quality' and 'quality control' could mean in this context. It first explores what 'quality' may mean from the internal point of view of the OTP, concluding that at a basic level quality means the thorough and careful assessment of all available information against the parameters set by the Rome Statute, making quality essentially a question about the legalistic nature of the preliminary examination process. It then suggests that 'quality control', strictly speaking, will be a prerogative of the OTP,⁹² while 'quality enhancement' could also be the result of external input.

7.4.1. Quality and Preliminary Examinations: A View from the OTP

The OTP Strategic Plan for 2016-18 establishes, among others, the goal of improving the quality and efficiency of its core activities, including preliminary examinations.⁹³ While it does not offer a detailed blueprint of how quality improvement should be achieved, it does suggest areas in which quality enhancement is sought.

ests of justice criteria. Likewise, upon the completion of a preliminary examination, prosecutorial discretion can be exercised, for example, regarding *when* and *how* to open an investigation, but not on *whether* to open an investigation, if all the criteria for it are met.

⁹² Note that there exist views, including within this anthology, that quality control over the Prosecutor's discretion to proceed or not with an investigation should be *outsourced*. Such views call, for example, for judicial oversight to be exercised by the ICC's Pre-Trial Chamber beyond the stipulations of Article 53(3)(b), and/or by an external oversight mechanism. Others also argue that concerned States should have the opportunity to control the quality of the preliminary examination process by making submissions to the Court about it as this process takes place. It is this chapter's view, however, that the implementation of any such proposals would be contrary to the general statutory principles under which preliminary examinations are conducted: independence (Article 42), impartiality (Article 21(3)) and objectivity (Article 54(1)). See *Policy Paper on Preliminary Examinations*, 2013, paras. 25-33, pp. 7-8, see *supra* note 2.

⁹³ See Strategic Goals 1 and 3, in Strategic Plan 2016 - 2018, 2015, para. 4, p. 6, see *supra* note 9. Preliminary Examinations fall under the overarching goal of "achieving high performance in relation to the Office's mandate". Goals 1 and 2 in the OTP's Strategic Plan 2012-15 expressed a similar intention. See OTP, Strategic Plan 2012-2015, 11 October 2013 (<http://www.legal-tools.org/doc/954beb/>).

These areas include (1) intra-institutional operational objectives, such as the promotion of further integration of preliminary examination work and pre-investigative activities;⁹⁴ (2) Rome Statute systemic objectives, such as the encouragement of “genuine national investigations and prosecutions by the States concerned”;⁹⁵ (3) public relations objectives, such as the promotion of transparency and “a better understanding of the process”;⁹⁶ (4) policy objectives, such as the exertion of the potential deterrent and preventive function of preliminary examinations;⁹⁷ and finally, (5) analytical objectives, such as the continuous undertaking of preliminary examinations through the “strict application of the legal requirements of the Rome Statute”,⁹⁸ the exploration of all relevant sources of information”,⁹⁹ and their completion “in as timely a manner as this thorough legal assessment allows”¹⁰⁰ but “without undue delays”.¹⁰¹

On a first reading of this list of objectives explicitly stated by the OTP as relevant to the quality of the preliminary examination process, it may appear that quality enhancement for the OTP may have more to do with extra-legal functions of preliminary examinations. In a strategic and policy sense, the OTP recognizes preliminary examinations as a process with a potential power which is broader than that for which it was strictly designed as a legalistic process in the context of the Rome Statute. The question then is: if all these functions are ascribed to preliminary examinations, including by the OTP itself, how can these objectives – and therefore high quality in achieving them – be pursued, given the legalistic nature of the process? And what could constitute ‘quality’ in this sense? The key to this answer may be found in the last point stressed by the OTP’s

⁹⁴ *Ibid.*, para. 55(1), p. 20.

⁹⁵ *Ibid.*, para. 55(2), p. 20. See also *Policy Paper on Preliminary Examinations*, 2013, paras. 100-103, pp. 23-24, see *supra* note 2 (defining “Ending Impunity through Positive Complementarity” as one of the policy objectives of the preliminary examination process).

⁹⁶ Strategic Plan 2016 - 2018, 2015, para. 55(3), p. 20, see *supra* note 9. See also *Policy Paper on Preliminary Examinations*, 2013, paras. 94-99, pp. 22-23, see *supra* note 2 (transparency as another policy objective).

⁹⁷ Strategic Plan 2016 - 2018, 2015, para. 55(4), p. 21, see *supra* note 9. See also *Policy Paper on Preliminary Examinations*, 2013, at paras. 104-106, pp. 24-25, see *supra* note 2 (prevention as another policy objective).

⁹⁸ Strategic Plan 2016 - 2018, 2015, para. 55, p. 20, see *supra* note 9.

⁹⁹ *Ibid.*, para. 55(5), p. 21.

¹⁰⁰ *Ibid.*, para. 55, p. 20.

¹⁰¹ The declared aim by the OTP is a 1:1 closure ratio. In *ibid.*, para. 55(5), p. 21.

Strategic Plan, that is, that the successful completion of a preliminary examination ultimately rests on its analytical function, which entails the strict application of the parameters set by the Statute, and on the analysis of all information available.

This is why this chapter suggests that, albeit mindful of these extra-legal quality-enhancing objectives of preliminary examinations, any analysis on quality control and enhancement of the preliminary examination process should start from the quality of its core analytical aspects. To that end, this chapter suggests delving deeper into the preliminary examination process, away from its extra-legal policy objectives, and exploring how quality can be controlled and enhanced at the sub-analytical level of each of its four phases. Assuming that large-scale policy objectives would also be enhanced if the strict preliminary examination process is itself enhanced first, this chapter ultimately wants to assess the implications of the proposition put forward by the OTP that the high quality of preliminary examinations rests on the strict application of the law of the Rome Statute to all known available facts.

Quality, in essence, seems to be first and foremost a matter of knowledge building and filtering. This is of course rendered all the more difficult by the fact that the analytical parameters are strict and the available information is often flawed and limited, due to the nature of the dynamics under scrutiny. This limitation notwithstanding, there are multiple avenues available for the quality control and improvement of the legalistic preliminary examination process and of its output in terms of quality. One, quality control *stricto sensu* will rest with the OTP, the mandated and independent producer of the analysis and designated driver of the preliminary examination process.¹⁰² The other, quality enhancement, could rest with the ‘external’ community around the OTP, that is, the potential information producers and providers, ‘co-operators’ and ‘benchmarkers’. While external stakeholders will not be able to exercise effective control on the quality of the process as this is taking place, being outside of it and

¹⁰² The OTP’s independence is a key factor in determining that while quality control may be directly exercised by the Office, it could however simply be enhanced from the outside. Any form of ‘control’ of the process, *stricto sensu*, could in fact only come from the Office. Anything to the contrary would be in contravention of the OTP’s independence. Regulation 13 of the OTP states this clearly: “In all operational activities of the Office, at headquarters and in the field, the Prosecutor shall ensure that the Office and its members maintain their full independence and do not seek or act on instructions from any external source”: Regulations of the Office of the Prosecutor, 2009, see *supra* note 35.

with no designated competence towards it, they may however be able to positively affect it, thus enhancing its quality, from an external standpoint.¹⁰³ In this regard, it is suggested that there is a strong potential for the quality of the legalistic process of preliminary examinations to benefit both from the OTP's direct internal quality control and, beyond it, from the direct and indirect external quality enhancement of other relevant stakeholders.

7.4.2. Internal Quality Control and External Quality Enhancement

The potential for internal quality control and external quality enhancement derives directly from the existence of both 'constants' that largely remain unchanged across situations and 'variables' which differ from situation to situation. This dichotomy defines the potential dual scope for quality control by the OTP and the potential for quality enhancement by external stakeholders.

The two constants are (1) the legal framework of the Rome Statute, in particular the one imposed by Article 53(1), and (2) the stakeholder in charge of conducting the analysis, the OTP. First, while the interpretation of some of the parameters may be clarified by the evolving jurisprudence, the analytical parameters that the Rome Statute imposes are constants. Likewise, while the formation of the OTP's team conducting preliminary examination analysis and the internal processes attached to preliminary examinations could change,¹⁰⁴ all preliminary examinations will be conducted according to the same analytical matrix and by the same Office. Internal quality control will therefore depend solely on how the OTP will conduct its analysis, with all that it entails, on the basis of the Rome Statute prescribed criteria. Quality control in this case will also be direct, because ultimately the analytical output of preliminary examinations will rest with the OTP and in particular with its SAS, supported by other OTP

¹⁰³ I note here that it has been argued elsewhere that under Article 15 and 53(3) of the Rome Statute the ICC's Pre-Trial Chamber may also exercise some form of quality control in the preliminary examination process. In my view however, the Pre-Trial Chamber's prerogative under these articles does not specifically concern or affect the quality of the preliminary examination process per se, but rather that of the Prosecutor's decision in its light. Though a subtle difference, it is also a crucial one, as this chapter particularly focuses on how quality could be controlled and enhanced as the preliminary examination process is taking place, not once it has been completed.

¹⁰⁴ For example, in recent years, the SAS has increased its workforce from six to twelve analysts, under the oversight of the sections' head.

sections and units, through careful processes of internal peer review, for example, which take place at all crucial stages. The work of the OTP, accordingly, will have the most direct impact on the outcome and output of preliminary examinations, in terms of analysis and decision-making.

At the same time, in conducting preliminary examinations, the OTP is not self-sufficient. Therefore, the ‘quality’ of its work will also depend on external and changing variables that are crucial to it. The most crucial and unpredictable variable will be found in the ‘producers’ or the ‘keepers’ of the necessary and relevant information for conducting preliminary examinations, which is primarily external to the OTP and whose gatekeepers are the myriad stakeholders that know it, produce it and hold it.

Each situation is effectively known to the OTP *ex novo* – the Office enters each situation geographically and notionally from afar. As the Statute does not empower the OTP with investigative powers during the preliminary examination phase. The Office, instead, has to rely on external stakeholders who are embedded in the situations under scrutiny to obtain the relevant information. Those stakeholders may produce the processes that a preliminary examination is interested in (for example, domestic investigations or prosecutions of crimes) or produce first-hand information as close observers (as, for example, is often done by civil society organizations on the ground). So, when the OTP must analyse the crimes allegedly committed in a situation (Phase 2), their gravity and the existence of any national proceedings (Phase 3), and even the interests of justice criteria (Phase 4), its ability to do so will depend on what relevant information is available and the availability of information will depend on such external stakeholders.¹⁰⁵

Therefore, to the extent that this information will be held in the hands of the referring, conflicting or victimized parties (States, armed groups or factions) and observers on the ground (IGOs, civil society, witnesses and victims), all such stakeholders have the ability to exercise direct quality enhancement if they decide to provide this information to the OTP under Article 15 of the Statute. Such information does not have to be limited to the specific alleged conduct in question, but may also cover

¹⁰⁵ Of course, the absence of information need not be necessarily a factor preventing the OTP from carrying out a preliminary examination and reaching conclusions within the ‘reasonable basis’ standard. For example, the lack of information regarding domestic proceedings may, to the contrary, in itself be relevant information to carry out an admissibility assessment.

other relevant issues, such as specific pertinent contextual dynamics or legal interpretations of the specific issues raised in a given preliminary examination. Likewise, as mentioned, the OTP makes use of open source information, systematically collected, evaluated and analysed. By guaranteeing the high quality of said information and by making it openly available, anyone producing it may indirectly exercise external quality enhancement in the preliminary examination process. Both types of external quality enhancement can happen during all four phases of the preliminary examination process.

All in all, the successful conduct of preliminary examinations will rest on the interplay between internal quality control and external quality enhancement – between the constants and the variables in the preliminary examination equation. This nexus between the analytical grid and available information is crucial, because ultimately the Prosecutor will have to decide whether or not to open an investigation – including by seeking the Pre-Trial Chamber’s authorization for a *proprio motu* investigation – on the basis of the information *available to her* and not on all existing information, if this is not accessible. In light of this conclusion, the final section of the chapter puts forward a proposal on how internal quality control and external quality enhancement, and therefore their interplay, can occur on a phase by phase basis.

7.5. Quality Control and Enhancement in the Preliminary Examination Process

If quality control and enhancement can both be exercised to the benefit of the quality of the analytical preliminary examination process, this section explores a number of possible ways in which quality is already or could be further controlled and enhanced through internal and external input, on a phase by phase basis, with a focus in particular on the processual relation between the framework of Article 53(1) and the available information relevant to each phase. It will do so by focusing in particular on four aspects of the preliminary examination process: (1) the receipt and analysis of Article 15 communications during Phase 1, (2) the subject-matter jurisdiction ‘crime’ analysis during Phase 2, (3) the complementarity assessment during Phase 3, and (4) the interests of justice assessment during Phase 4.

7.5.1. Quality Control in Phase 1

Phase 1, as discussed above, concerns the analysis of all received Article 15 communications and, in particular WFAs. From an internal perspective¹⁰⁶ at this stage of the process quality resides in three aspects: (1) the receipt of communications containing relevant and high-quality information; (2) the identification of WFA communications; and (3) their prompt processing, in particular for those WFA communications that refer to situations of present and on-going criminality.

The OTP's internal mechanism is generally efficient in terms of distinguishing between the different types of communications. However, among the hundreds of communications received every year, the vast majority fall outside the remit of the ICC.¹⁰⁷ To improve the submission process, the ICC could therefore consider developing a set of guidelines to explain, in plain terms and multiple languages, the remit of the Court, the scope of its jurisdiction and the process of preliminary examinations. As part of the same project, it could also develop an Article 15 submission information page that could be accessed online by any potential submitting individual or body, explaining the role of Article 15 communications and the specific scope of Phase 1. These guidelines could, for example, be made accessible on the ICC website, which could include an Article 15 submission interface, through which potential information providers could be asked a number of questions prior to their submission for an initial quality self-check.¹⁰⁸ This should be done without however barring the

¹⁰⁶ For an extensive analysis of the internal quality control process carried out by the OTP during Phase 1, see Amitis Khojasteh, "The Pre-Preliminary Examination Stage: Theory and Practice of the OTP's Phase 1 Activities", in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 1*, Torkel Opsahl Academic EPublisher, Brussels, 2018, chap. 8.

¹⁰⁷ According to the OTP 2016 yearly report "During the [2016] reporting period, the Office [OTP] received 477 communications relating to Article 15 of the Rome Statute of which 356 were manifestly outside the Court's jurisdiction; 28 warranted further analysis; 72 were linked to a situation already under analysis; and 21 were linked to an investigation or prosecution. The Office has received a total of 12,022 Article 15 communications since July 2002": *Report on Preliminary Examination Activities 2016*, para. 18, p. 6, see *supra* note 48.

¹⁰⁸ The OTP has already developed an online 'gateway' through which members of the public can anonymously submit information to the Office in the situation of the Central African Republic, currently under investigation. This model, in my view, could be further expanded to enable the submission of Article 15 communications. See ICC, "Central African Republic II" (available on the Court's web site).

submission of material, but simply to enable anyone intending to make a submission to understand where their submission would stand *vis-à-vis* a potential preliminary examination process. For example, when inputting the situation for which a submission is being made, the information provider could be informed on whether the situation is already under preliminary examination or investigation and whether the relevant State is a party to the Rome Statute or not, thus clarifying whether the ICC would have jurisdiction over it or not. This could enhance transparency as well as help clarifying what expectations anyone submitting communications might feasibly have. Altogether, this proposal could be part of a broader informational campaign in particular targeting organizations and individuals with less direct access to – and therefore knowledge of – the Court. All this information may in fact be obvious to the practitioners of international criminal law, but it is often not so for the general public and for those submitting information to the Office. A further effort to clarify the scope of the Article 15 submission process, would possibly enable the office to receive better quality information. Such campaign, however, would have to be designed in such a way that the provision of clarifications to the public of the kind highlighted above, would not at the same time deter the open submission of information, that may, for example, at a later stage, fall under the jurisdiction of the Court.

Quality is also controlled by the OTP once relevant communications are received. As communications are received these are submitted for analysis to the relevant OTP section, known as the Information and Evidence Unit on a rolling basis. WFAs are then submitted to the SAS for in-depth screening. While it may take a long time to assess whether a situation would warrant the formal opening of a preliminary examination, the swifter the Phase 1 process is, the sooner the OTP may be able to open a new preliminary examination and thus potentially start exercising its deterrent function. Likewise, the sooner a Phase 1 analysis is completed – perhaps concluding that at this point in time a situation does not warrant the opening of a preliminary examination – the sooner this may indicate to the submitting parties that either more information may be needed or that recourse could be found through other legitimate bodies. This may be particularly valuable knowledge, as many human rights violations may not fall under the core crimes of the Rome Statute, but may nonetheless warrant the intervention of other relevant organizations.

From an external quality enhancement perspective, the Phase 1 mechanism – as well as the referral one – should be taken seriously by those stakeholders that have information that could contribute to the triggering of a preliminary examination. Any information that is potentially relevant either to ongoing situations or investigations or to potential new ones should be submitted to the Court. The higher the quality of this information – in terms of relevance, completeness, and clarity – the more this information could become a helpful source for the preliminary examination process.

7.5.2. Quality Control in the Subject-Matter Jurisdiction Assessment of Phase 2

Phase 2 includes the assessment of subject-matter jurisdiction, or, what is internally known as ‘crime analysis’. The OTP, as discussed above, produces this assessment by consulting and reviewing available information and determining whether there are reasons to believe that crimes within the jurisdiction of the Court have been committed within a given situation, and if so what crimes, by whom and in what context. This is the area in which factual analysis and legal analysis intersect more than in any other phase. Quality during this stage will rest in great part on the quality, variety and completeness of the available information and on whether the available information can lead to conclusive findings (albeit within the ‘reasonable basis’ realm).¹⁰⁹ In the context of the subject-matter jurisdiction analysis, this may be difficult because while situations of mass violence may be widely covered by the media and NGO or civil society reporting, this does not necessarily include information necessary to assess the existence of the core international crimes. Indeed, there may remain grey areas and ‘unknowns’ despite thorough examination of all the available sources, which are one of the biggest challenges for the OTP’s Phase 2 analysis.

This is because the assessment of whether international crimes have been committed requires that a number of specific elements be fulfilled

¹⁰⁹ Noting however that “at the preliminary examination stage, ‘the Prosecutor has limited powers which are not comparable to those provided for in article 54 of the Statute at the investigative stage’ and the information available at such an early stage is “neither expected to be ‘comprehensive’ nor ‘conclusive’”, in Kenya Article 15 Decision, para. 27, see *supra* note 29; as quoted in *Report on Preliminary Examination Activities 2016*, para. 11, p. 4, see *supra* note 48.

for each crime. These elements will be in part general for the category of crimes under consideration, and in part specific to the precise conduct under scrutiny. For example, in the context of war crimes,¹¹⁰ it will be necessary first of all to determine the existence of armed conflict and its classification. Assuming the existence of a conflict, it will then not be enough to assess, for example, that a large number of civilians were killed in its course. Rather, for every incident involving the killing of civilians, factors such as proportionality, means and methods, including precautionary measures, among others, will have to be assessed. In addition, questions as to whether the crimes were committed pursuant to a plan or policy may also be considered.¹¹¹ Similarly in the context of crimes against humanity, the Office will need to determine whether the alleged acts were committed as part of a widespread or systematic attack against a civilian population pursuant to a State or organizational policy.¹¹² This means that in order to assess the existence of crimes against humanity, the Office will need to determine, among others, that a civilian population existed, that an attack was directed towards it, and that this attack was widespread, for example, temporarily and geographically, or systematic, for example, based on the manner in which it was committed.

Fulfilling these requirements through the combination of factual and legal analysis is an exercise that cannot leave space for approximation despite often limited information, and one that demands relatively detailed information about the micro-dynamics of discrete incidents and large-scale conflicts or situations of violence. International crime analysis – understood as comprising contextual, factual and legal aspects – effectively requires that a puzzle be solved with often missing, non-matching or conflicting pieces. How to exercise quality control in this context? There are a number of possible ways concerning (1) how the analysis is conducted and (2) how the information, in particular open source and non-primary information about crimes, is produced and codified by its sources.

¹¹⁰ ICC Statute, Article 8, see *supra* note 1.

¹¹¹ Article 8(1) of the ICC Statute indicates that “the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes”. Although this threshold is not an element of the crime, it does, however, provide statutory guidance indicating that the Court should focus on war crimes cases meeting these requirements. See ICC Statute, Article 8(1), see *supra* note 1.

¹¹² ICC Statute, Article 7, see *supra* note 1.

In terms of internal quality control in its crime analysis, there are a number of standards that the OTP follows, including, among others, (1) applying consistent rules of measurement and attribution,¹¹³ (2) combining micro incident-based analysis with macro pattern-based analysis,¹¹⁴ and (3) maintaining a conservative, hypothesis-testing approach. Adopting this dual analytical approach guarantees that questions about the conducts under scrutiny can be answered from the combination of different perspectives. For example, analysing broad patterns in the course of a conflict can be directly relevant to the ‘widespread’ and ‘systematic’ assessment required to prove the existence of crimes against humanity. Likewise, in the context of war crimes, it can help to understand whether such crimes were committed in ‘large-scale’ or as part of a ‘plan or policy’.¹¹⁵ In a subtler way, such macro-analysis can also be useful to test specific internally-developed hypotheses but also externally-proposed ones, in particular when there may be public pressure towards certain conclusions. While publicly available information and analysis, particularly if produced in the context of armed conflict, may suggest the existence of conduct potentially amounting to the level of ‘international crime’, in conducting crime analysis, the OTP works towards leaving no space to conjectures taken at face value. All allegations are carefully tested and all generalisations debunked, to the extent that the information available allows it.

Another key aspect of the OTP’s internal quality control process in crime analysis is a careful source evaluation of the available sources through the application of “standard methods” and the checking of “internal and external coherence”.¹¹⁶ This is explained in detail by Regulation 24 of the OTP, which states that: “In the analysis of information and evidence regarding alleged crimes, the Office shall develop and apply a consistent and objective method for the evaluation of sources, information and evidence [...] tak[ing] into account *inter alia* the credibility and relia-

¹¹³ *Policy Paper on Preliminary Examinations*, 2013, para. 32, p. 8, see *supra* note 2.

¹¹⁴ An explanation of how crime pattern analysis can be applied in the context of the OTP’s crime analysis can be found in Xabier Agirre Aranburu, “Sexual Violence Beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases”, in *Leiden Journal of International Law*, 2010, vol. 23, no. 3, pp. 609-27.

¹¹⁵ Noting however that for war crimes, for example, this is not always obvious because in a single incident in an overall perfectly lawfully conducted war, one single incident can alone amount to a war crime under the jurisdiction of the ICC.

¹¹⁶ *Policy Paper on Preliminary Examinations*, 2013, para. 32, p. 8, see *supra* note 2.

bility of sources, information and evidence, and [...] examin[ing] information and evidence from multiple sources as a means of bias control”.¹¹⁷ By carefully testing the credibility of the available information, the reliability of the sources that produced it, and checking for biases that may affect their quality, the OTP strives to guarantee that even without access to evidence its assessment will be as sound and conclusive as possible, for the purpose of the preliminary examination subject-matter analysis.¹¹⁸

The quality of Phase 2 crime analysis therefore rests on the OTP taking a standardized¹¹⁹ and consistent approach.¹²⁰ This is all the more relevant when working with a ‘reasonable basis’ standard. For something to be reasonably concluded from a conservative perspective, there has to be substantial, credible and verifiable information to support certain conclusions. The logic followed to reach said conclusions must strictly adhere to the legal analytical framework available. This is a challenging task when operating in an informational environment that, although rich, is also often rife with gaps, generalization, biases and emotions. Producing crime analysis in a sea of imperfect data means that very often the analysis will take a long time, will not be able to capture with precision all conducts by all sides and, where knowledge-gaps remain, might be rendered inconclusive. Of course, the absence of information on certain aspects will never be taken by the OTP as an inculpatory element. At the same time, the Prosecutor will have to make her decision on the basis of the information available. This places part of the quality control onus outside of the OTP on the information producers.

External quality enhancement, for what concerns subject-matter analysis, can be exercised through an OTP-attentive production of information. This is particularly important because, as the Office admitted, at the preliminary examination stage, information is largely obtained from external sources.¹²¹ Of course one cannot assume that when, for example, the media report on the events of a conflict or mass violence, they should

¹¹⁷ Regulations of the Office of the Prosecutor, 2009, Regulation 24, see *supra* note 35; See also *Policy Paper on Preliminary Examinations*, 2013, para. 32, p. 8, see *supra* note 2.

¹¹⁸ *Ibid.*, paras. 31-32, p. 8.

¹¹⁹ Further evidence of standardization is the fact that the OTP uses standard formats for analytical reports. See *ibid.*, para. 32, p. 8.

¹²⁰ The application of consistent methods and criteria is considered by the OTP as part of its duty to impartiality. See *ibid.*, para. 28, p. 7.

¹²¹ *Ibid.*, para. 31, p. 8.

keep the OTP in mind as a potential consumer. Likewise, NGOs and civil society normally speak to their own constituencies first of all and they do not necessarily have the OTP in mind in their reporting. States, who may themselves be involved in the commission of crimes, may have all the interest in not disclosing information about themselves. At the same time, it is now well known that preliminary examinations rely more and more on open source information as well as Article 15 communications and material provided by these stakeholders in the context of meetings and missions. For this reason, it is important that if these information producers have the preliminary examination process in mind as one of its beneficiaries, then the material produced should be consistent with the standards that might strengthen the quality of the information contained in it.

External quality enhancement during Phase 2 can therefore be exercised through a more OTP in-tune production of information. This is not because all potential information producers should have the OTP in mind when reporting on situations of mass violence but because if they do, following some quality control guidelines may make this information more useful. First, a clear ‘who, what, when, where, how’ narrative should be followed: an ‘impact-based’ narrative is a lot less effective than one focused on the dynamics of an incident that may be relevant for the OTP to address questions concerning specific elements of the crime. Second, gaps of knowledge should be explicitly identified. Third, generalizations, in particular as to the characterization of certain incidents as crimes, should only be proposed if there is enough information to make a conclusion effectively ‘general’: a handful of instances does not necessarily constitute a pattern in the context of a long and extended situation of mass violence or conflict. Fourth, causal correlations should only be proposed if the link between factor A and B is strong and evident: a possible causal correlation is different from a certain one. Fifth, a clear methodology should be used and explained, including for source evaluation. Sixth, the language used should as much as possible be neutral: biased language can imply biased thinking and can affect how a source will be perceived. Seventh, if a source reports on the basis of witness statements their identity should of course be protected to the extent necessary. However, if the source had it in mind to submit its information to the OTP, it would be useful that the source obtain in advance consent by its witnesses to disclose the full extent of their testimony or their identity to the OTP. This could, for example, aid the OTP to exploit its ability to conduct interviews

at the seat of the court with relevant sources, already at the preliminary examination stage.¹²² In short, better quality information means for the OTP better quality analysis.

How to create synergy between these information requirements of the OTP and the information production outside of it? Of course, the OTP cannot nor should it explicitly guide external stakeholders towards a ‘how to’ methodology for the production of information, in particular in order to not deter its provision. Information will come in all shapes and sizes. Relevant data can be found where one least expects it. Ultimately it is the OTP’s duty to collect, filter, analyse and evaluate it. At the same time, the OTP could consider clarifying, under its transparency policy objective, for example, in the context of NGO meetings, the ASP or through other output, what minimum standards may render information – especially if this is not coming from primary sources – immediately valuable for the purpose of a preliminary examination. Without advocating for an explicit ‘High Quality Information Memorandum of Understanding’, the OTP could consider making more explicit some of the standards that, from its point of view, would make any submitted or collected information stronger for its analytical purposes. For example, the OTP could suggest that information provided in any of the official languages of the Court, may facilitate the Office’s ability to process it swiftly. The community of practice around the OTP, could also contribute to this effort, for example, by developing shared guidelines about how to produce high quality reporting. This may be particularly useful to those stakeholders who are less familiar with the relevant methodologies on crime reporting and analysis.

Finally, quality control is regularly pursued by the OTP by prompting and requesting information from all key stakeholders.¹²³ In this light, preliminary examination crime analysis will be further facilitated if the OTP is granted more access to primary sources collected by organisations on the ground and close to the crime scene (including, for example, relevant medical, court or military records, full witness testimonies, video and photo material, etc.). Such access will depend in great part on the willing-

¹²² This is a prerogative of the OTP during the preliminary examination stage under Article 15(2) of the Statute. ICC Statute, Article 15(2), see *supra* note 1.

¹²³ Noting that “The Office also seeks to ensure that, in the interests of fairness, objectivity and thoroughness, all relevant parties are given the opportunity to provide information to the Office”: *Policy Paper on Preliminary Examinations*, 2013, para. 33, p. 8, see *supra* note 2.

ness and ability of stakeholders to share information with the OTP, in particular due to confidentiality reasons, but making it available to the OTP, could further enhance its Phase 2 crime analysis.

7.5.3. Quality Control in the Complementarity Assessment of Phase 3

One of the two aspects of Phase 3 is the complementarity assessment.¹²⁴ Much like the subject-matter jurisdiction assessment, the quality of this phase rests on the availability of information, including both present and absent information, and on its quality. However, the information needed at this stage is different from that needed during Phase 2. It is no longer information about potential crimes but information about any existing, planned or pending investigative and prosecutorial proceedings and about the judicial systems carrying them out. Its gatekeepers are normally States. The task of the OTP, at this stage, is that of assessing factors which are partially factual and partially contextual. Factually the OTP will have to assess the existence of proceedings or their prospect under a competent legal system and their covering substantially the same person and the same conduct as that identified by the OTP for its potential cases. Contextually it will have to assess the ‘willingness’ and ‘ability’ requirements for what concerns a State’s attitude towards said domestic proceedings, which together form the ‘genuineness’ assessment. This is a challenging assessment, as assessing the attitudes of domestic jurisdictions and the quality of proceedings necessarily lands the OTP into a sensitive area which requires different types of active quality control mechanisms.

This is primarily because the OTP, at this stage, becomes the arbiter of the quality of domestic proceedings, notwithstanding the formal complementarity regime where the ICC and States are theoretically equal players in the ‘fight against impunity’. Even though, as the OTP has pointed out, “an admissibility determination is not a judgement or reflection on the national justice system as a whole”,¹²⁵ this is still a sensitive task. It is so because it requires the OTP to understand the proceedings of a domestic jurisdiction and its system from multiple perspectives: on their own merit, on the basis of the Rome Statute’s assessment standards and

¹²⁴ Together the complementarity and gravity criteria define the admissibility assessment under Article 17 of the ICC Statute. ICC Statute, Article 17, see *supra* note 1; *Policy Paper on Preliminary Examinations*, 2013, paras. 42-66, pp. 10-16, see *supra* note 2.

¹²⁵ *Ibid.*, para. 46, p. 12.

derived jurisprudence, and *vis-à-vis* cases identified by the OTP as potentially relevant for the purpose of fighting impunity as a whole in a specific situation (that is, the domestic cases must be comparable with those identified by the OTP).¹²⁶

Further, for the OTP to be able to carry out its complementarity assessment, access to information is key. Information about domestic proceedings normally sits with the relevant domestic jurisdictions. The OTP's ability to carry out its complementarity assessment will therefore depend in great part on the willingness of States to share this information (though the absence thereof may at times be equally informative).

Moreover, from an internal point of view, the complementarity assessment is not conducted simply with reference to the parameters set by the Statute, but also in light of the OTP's policy of positive complementarity.¹²⁷ While this policy is not the guiding analytical principle of the complementarity assessment, its existence and the requirement for preliminary examinations to also work towards its fulfilment, places a different quality control onus on the Office. On the one hand the Office will find itself 'judging' existing and prospective proceedings. On the other, in case of yet non-existent proceedings, it might find itself in the position of pushing for them, with the implication that the strict preliminary examination analytical agenda becomes mixed with one of the OTP's broader policy objectives.

Focusing on this last point, this chapter suggests that in order to carry out internal quality control within this context, the first step to be followed is to acknowledge the distinction between the analytical principles imposed on the OTP by Article 17 of the Rome Statute and the positive complementarity principle, as a principle attached to Phase 3 of the preliminary examination process, which however is not a statutory criterion and has no intrinsic analytical standing. This distinction is crucial if we understand the preliminary examination process as first and foremost legalistic and concerned with applying the analytical parameters imposed

¹²⁶ On this latter point see ICC, Situation in Libya, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Appeals Chamber, Judgement on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013, 21 May 2014, ICC-01/11-01/11-547-Red, paras. 83-84 (<http://www.legal-tools.org/doc/0499fd/>).

¹²⁷ *Policy Paper on Preliminary Examinations*, 2013, paras. 100-103, pp. 23-24, see *supra* note 2.

by the Statute onto the available information about existing (present or past but not future) judicial processes.

Of course, from a temporal and pragmatic perspective, Phase 3 is a phase in which both activities may occur concomitantly: on the one hand, the OTP might pursue a positive complementarity agenda with respect to specific situations where the prospect of genuine national proceedings appears possible; on the other, it will pursue an analytical agenda, through the analysis of any past, present or in-progress investigations or prosecutions, in order to assess their genuineness. These are two very different tasks and while over time they have become conflated within the remit of Phase 3, they belong in it in different ways, with the analytical focus – rather than its policy one – remaining the principal objective.

In other words, from a legalistic and core function point of view, the complementarity assessment of Phase 3 revolves around what is known about the investigative and prosecutorial processes that are taking or have taken place at the time when the OTP analysis is taking place.¹²⁸ From a pragmatic point of view, however, one must recognize the dual role of Phase 3, which gives rise to two potential analytical scenarios. In situations in which a complementarity push does not appear possible – no proceedings that satisfy the complementarity requirements have taken place or are in progress, or there is unwillingness or inability on the part of the State to carry out proceedings – the OTP will be able to immediately conduct its analysis on the basis of the criteria set in Article 17 and access to information will likely be the key concern. Quality control, in this scenario, will depend in great part on the relevant domestic jurisdictions and their willingness to share information.¹²⁹

However, in situations in which it appears possible that a positive complementarity push may trigger domestic proceedings that might in the future satisfy complementarity, then the OTP will have to face a different

¹²⁸ The language of Article 17 all speaks in the past and present, seemingly leaving no space for future promising investigations or prosecutions. See ICC Statute, Article 17, see *supra* note 1.

¹²⁹ Note that there exist some discussions regarding the fact that the language of Article 17(1)(a) and (b), which prescribes that the Prosecutor shall consider a case inadmissible if this is or has been investigated or prosecuted by a State with jurisdiction over it, *unless* said State shows itself unwilling or unable to carry out said proceedings genuinely, may de facto shift the burden of proof regarding the admissibility assessment from the OTP to the State at the preliminary examination stage.

task. On the one hand, it will become a force – even if indirect and implicit – behind the possible domestic prosecutorial output that is to come; on the other, it will continue to exercise its Article 17 analytical task. In this scenario, the quality control question for the OTP is how to balance the two Phase 3 tasks – a push for positive complementarity *vis-à-vis* the need to assess existing proceedings – and in particular to decide to what extent any visible or simply potential positive complementarity developments may define and affect the OTP’s statutory complementarity analytical task.

Quality control becomes at this point both an issue of information access as well as internal strategy. From an informational perspective, in the context of a positive complementarity push, information about investigations or prosecutions necessary for complementarity assessment might only be available or complete in the future. While possible from a policy perspective, this may be or eventually become problematic from a legalistic one, as pointed out by a Pre-Trial Chamber, which determined that “this assessment cannot be undertaken on the basis of hypothetical national proceedings that may or may not take place in the future: it must be based on the concrete facts as they exist at the time”.¹³⁰ From a strategic perspective, in line with its last resort mandate, the OTP must be supportive of any positive complementarity prospect. This policy imperative, however, must be balanced with the analytical requirement to analyse the information available when it is available ‘without undue delay’.

Phase 3 is often one of the lengthier phases of the preliminary examination process, regardless of which scenario the OTP is facing. Information about a State’s judicial proceedings is not always accessible because States are not always willing to disclose it (often for confidentiality reasons), because they disclose it in a strategically timed manner, or because the information does not yet fully exist. The challenge that this issue presents, also beyond the preliminary examination stage, was clearly voiced by the OTP in recent times.¹³¹ While all three may be legitimate

¹³⁰ ICC, Situation in Uganda, *Prosecutor v. Joseph Kony et al.*, Pre-Trial Chamber, Decision on the admissibility of the case under article 19(1) of the Statute, ICC-02/04-01/05-377, 10 March 2009, paras. 49-52 (<http://www.legal-tools.org/doc/44f5b3/>), cited in *Policy Paper on Preliminary Examinations*, 2013, para. 47, p. 12, fn. 37.

¹³¹ The OTP explicitly stated: “Over the 2012 – 2015 period, the varying levels of cooperation in the different situations under investigations have in some cases caused considerable delays and hindrance in investigations and prosecutions. This critical external factor remains one of the key challenges for the next three-year strategic period”, Strategic Plan 2016 - 2018, 2015, para. 26, p. 13, see *supra* note 9.

reasons for Phase 3 to take its time, again, given the need to balance the positive complementarity policy objective of the OTP with the legalistic objective of Phase 3 – with the requirement for the Prosecutor to assess the available information within a ‘reasonable basis’ standard, and to complete preliminary examinations without undue delay – how long should the OTP then wait for such information to render an assessment? And in waiting too long, is the OTP not prioritizing its non-statutory positive complementarity task over its statutory analytical one? In terms of the quality control of its Phase 3 complementarity assessment, these are questions that the OTP must carefully weigh on a case by case basis, depending on its trust and expectations that further information or developments might become available.

Ultimately, however, the OTP must balance its different objectives with flexibility. A flexible and balanced approach will by default enhance the quality of the preliminary examination process. The policy objective towards positive complementarity will fulfil the OTP’s duty under the Statute’s framework, where the ICC is a Court of last resort with States acting as its brothers in arms in the fight against impunity. At the same time, the technical completion of a complementarity assessment will satisfy the requirement that preliminary examinations should be based on the strict application of the law to all known and available facts. If States or other relevant stakeholders, for example, after being given the opportunity to do so,¹³² will not make the relevant facts available, then the Prosecutor’s assessment will have to be limited, once again, to the information available to her.

This is where *external* quality enhancement, in the form of transparent and open information sharing, could play an important role in the OTP’s Phase 3 complementarity assessments. Transparent information should focus not only on the proceedings themselves, but also on how the judicial and investigative system carries out their work, which methodology it uses, which reasoning it follows to reach certain conclusions (for example, for completed cases). This could be found in court transcripts as well as evidentiary material used domestically. Of course, much of this information will be confidential and States may not be able to share it for

¹³² “Before making a determination on whether to initiate an investigation, the Office also seeks to ensure that the States and other parties concerned have had the opportunity to provide the information they consider appropriate”, *Report on Preliminary Examination Activities 2016*, 2016, para. 12, p. 4, see *supra* note 48.

obvious reasons, but so long as an information gap exists for what concerns the relevant domestic complementarity activities, the OTP's assessment will be bound to limit itself to what information is available. This may result in findings that do not ring true to the State under scrutiny but that are eventually sufficient from an OTP perspective. States could always challenge these findings at the ICC at a later stage through an admissibility challenge, but such challenge may however not reverse a decision to open an investigation into a situation, but may simply affect a limited number of potential cases, excluding them from the OTP's prosecutorial purview later on.¹³³ Information sharing at this stage therefore would be not only beneficial for the OTP's internal quality control but would also allow States to effectively exercise direct quality control on the Phase 3 process and guarantee that the OTP be able to carry out an assessment of their proceedings which rings true to them as much as to the Office.

7.5.4. Quality Control in the Interests of Justice Assessment of Phase 4

Phase 4 is the most elusive phase as it focuses on the countervailing assessment of the undefined 'interests of justice' criterion.¹³⁴ As a countervailing consideration, its assessment is imposed by the Statute but how it should be carried out is not defined by it. Based on Article 53(1)(c), this assessment takes into account "the gravity of the crime and the interests of victims".¹³⁵ Based on the relevant 2007 policy paper we know that the OTP considers that the assessment "will naturally be guided by the objects and purposes of the Statute – namely the prevention of serious crimes of concern to the international community through ending impunity".¹³⁶ We also know that the OTP considers "that there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the Office of the Prosecutor".¹³⁷ Normally, in addition, the OTP operates under "a strong

¹³³ Challenges to the jurisdiction of the Court are regulated by Article 19 of the ICC Statute. See ICC Statute, Article 19, see *supra* note 1.

¹³⁴ The term was left undefined on purpose. See *Policy Paper on the Interests of Justice*, 2007, p. 2, see *supra* note 76.

¹³⁵ ICC Statute, Article 53(1), see *supra* note 1; *Policy Paper on Preliminary Examinations*, 2013, para. 10, p. 3, see *supra* note 2.

¹³⁶ *Policy Paper on the Interests of Justice*, 2007, p. 1, see *supra* note 76.

¹³⁷ *Ibid.*

presumption that investigations and prosecutions will be in the interests of justice”¹³⁸ and so far no preliminary examination has been halted on interests of justice grounds.

Strong attention to this question was given by the OTP and other stakeholders in the aftermath of the backlash that the OTP faced in its early days after the opening of its investigations in the Ugandan situation and the subsequent issuing of arrest warrants.¹³⁹ At the time, this situation fuelled the now well-known ‘peace versus justice debate’. This revolved around the question of how justice, in particular international criminal justice, should aid peace, and which one should sequentially come first, not only in terms of order but also of importance.¹⁴⁰ This debate may have somewhat abated in recent years, but the question at its core remains, giv-

¹³⁸ *Policy Paper on Preliminary Examinations*, 2013, para. 71, p. 16, see *supra* note 2.

¹³⁹ Multiple sources, from academia and NGOs, contributed over time to this debate in particular in light of the OTP’s approach to the Uganda situation: Amnesty International, Open Letter to the Chief Prosecutor of the International Criminal Court: Comments on the Concept of the Interests of Justice, 16 June 2005 (<http://www.legal-tools.org/doc/ff88f7/>); Human Rights Watch, *Human Rights Watch Policy Paper: The Meaning of the “Interests of Justice” in Article 53 of the Rome Statute*, 1 June 2005 (<http://www.legal-tools.org/doc/4dc3b4/>); Katherine Southwick, “Investigating War in Northern Uganda: Dilemmas for the International Criminal Court”, in *Yale Journal of International Affairs*, 2005, vol. 1, no. 1, pp. 105-19; Tim Allen, *Trial Justice: The International Criminal Court and the Lord’s Resistance Army*, Zed Books, 2006; Louise Parrott, “The Role of the International Criminal Court in Uganda: Ensuring that the Pursuit of Justice does not come at the Price of Peace”, in *Australian Journal of Peace Studies*, 2006, vol. 1, no. 1, pp. 8-29; Kenneth A. Rodman, “Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court”, in *Leiden Journal of International Law*, 2009, vol. 22, no. 1, pp. 99-126; Janine Natalya Clark, “The ICC, Uganda and the LRA: Re-Framing the Debate”, in *African Studies*, 2010, vol. 69, no. 1, pp. 141-60; Janine Natalya Clark, “Peace, Justice and the International Criminal Court Limitations and Possibilities”, in *Journal of International Criminal Justice*, 2011, vol. 9, no. 3, pp. 521-45; Sarah M.H. Nouwen and Wouter G. Werner, “Doing Justice to the Political: The International Criminal Court in Uganda and Sudan”, in *European Journal of International Law*, 2011, vol. 21, no. 4, pp. 941-65.

¹⁴⁰ Payam Akhavan, “Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism”, in *Human Rights Quarterly*, 2009, vol. 31, no. 3, pp. 624-54; Phil Clark, “Dilemmas of Justice: The Challenges Faced by the International Criminal Court Are about More than “Peace vs Justice””, in *Prospect Magazine*, 26 May 2007 (<http://www.legal-tools.org/doc/8a3710/>); Joanna R. Quinn and Lucy Hovil, *Peace First, Justice Later: Traditional Justice in Northern Uganda*, Refugee Law Project, Kampala, 2005 (<http://www.legal-tools.org/doc/eeee6b/>); Clark, 2011, see *supra* note 139; Eric D. Blumenson, “The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court”, in *Columbia Journal of Transnational Law*, 2006, vol. 44, no. 3, pp. 801-74.

en that the OTP has been carrying out preliminary examinations in situations other than Uganda, in which peace processes are ongoing, such as Colombia and Afghanistan,¹⁴¹ and that some States, in particular in Africa, have come to question whose interests the OTP may be representing with its prosecutions.¹⁴² Given this context, it is prime time to revisit the interests of justice question, with a view to potentially aiding its internal analytical assessment.

In light of the open definition as well as the contextual backdrop presented, this chapter suggests that quality control during Phase 4 could include the development of a more systematic methodology to clarify what circumstances and what type of situations would make an investigation *not* in the interests of justice and, by contrast, what factors may instead count positively towards the interests of justice assessment. The objective of this exercise would be not to ‘reinvent the wheel’ but simply to look in depth into what is already known about the criteria set by Article 53(1)(c), to look at some lessons learned (for example, Uganda) and at potential issues that could emerge again regarding this assessment (for example, in on-going situations such as Colombia, or in hypothetical new scenarios that may arise).

For example, when it comes to understanding what ‘interests of justice’ means, the Statute indicates that the “gravity” and “interests of victims” criteria should matter.¹⁴³ The OTP 2007 Policy Paper on the Interests of Justice likewise indicates that the “interests of peace” is different from those of justice.¹⁴⁴ Without debunking these premises, the question is then, how can the OTP work with these criteria in order to enhance the quality of future ‘interests of justice’ assessments? The first possibility that stands out, and is already evident from the OTP’s practice, is that if the interests of justice can be connected at a minimum with the interests

¹⁴¹ *Report on Preliminary Examination Activities 2016*, see *supra* note 48.

¹⁴² A complaint commonly expressed by African States in the recent years has concerned their viewing the ICC as biased towards the continent. See, for example, Mark Caldwell, “African Union criticizes International Criminal Court at member states’ meeting”, in *Deutsche Welle*, 19 November 2015; Richard Lough, “African Union accuses ICC prosecutor of bias”, in *Reuters*, 30 January 2011; “African Union members back Kenyan plan to leave ICC”, in *The Guardian*, 1 February 2016; Solomon Dersso, “Africa’s challenge to the ICC”, in *Al Jazeera*, 12 November 2016.

¹⁴³ ICC Statute, Article 53(1), see *supra* note 1; *Policy Paper on Preliminary Examinations*, 2013, para. 10, p. 3, see *supra* note 2.

¹⁴⁴ *Policy Paper on the Interests of Justice*, 2007, p. 1, see *supra* note 76.

of victims, a better understanding of the interests of victims in each situation may lead to a better ‘interests of justice’ assessment.

Part of the OTP’s quality control of Phase 4 should then revolve around ascertaining what interests victims may hold in each situation. The 2013 Policy Paper on Preliminary Examinations already explains that an ‘interests of victims’ assessment would consider the views “expressed by the victims themselves”, their “trusted representatives”, and among possible others, “community, religious, political or tribal leaders, States, and intergovernmental and non-governmental organisations”.¹⁴⁵ This is a potentially large pool of stakeholders, from which information about victims’ interests could come in multiple forms. To navigate it, the OTP could establish, for example, a survey methodology or questionnaire, in which both open-ended questions and structured questions may be asked. Open-ended questions could aim at building a broad understanding of what victim communities may see as constituting justice for them in the aftermath of the violence they suffered. Structured questions could instead aim at understanding which avenues for redress may be available to them, which avenues they would like to have access to and why, and ultimately whether the victims would see value in retributive trial justice – justice in the court room entailing the punishment of perpetrators – taking place at all (as opposed to other forms of local or domestic justice). If so, the OTP could consider whether to also try assessing whether victims would want the ICC to be in charge of this process or not.¹⁴⁶

This, however, would require the ICC (via the OTP and/or the Registry) to clearly explain the process, benefits and potential pitfalls of the international criminal justice route taken under its auspices to relevant domestic interlocutors. They, in turn, would need to bring this understanding back into the communities and their views back to the ICC. It would include explaining the difference between more short-term benefits, for example, the fact that victims may be able to tell their story, with long-

¹⁴⁵ *Policy Paper on Preliminary Examinations*, 2013, para. 68, p. 16, see *supra* note 2.

¹⁴⁶ Research recently conducted in Northern Uganda in the run up to the Dominic Ongwen and Thomas Kwoyelo trials, at the ICC and local International Crimes Division (‘ICD’) respectively, suggested a local preference for trials to be conducted by the ICC rather than by domestic courts, such as the ICD, which appeared to be generally considered corrupt. See Matilde Gawronski and Lino Owor Ogora, *A Renewed Momentum for Trial Justice? Perceptions of Conflict-Afflicted Communities in Northern Uganda in the Run up to the Dominic Ongwen and Thomas Kwoyelo Trials*, Foundation for Justice and Development Initiative, Gulu, 2017 (<http://www.legal-tools.org/doc/81059c/>).

term ones, for example, the possibility for reparations. Similarly, it would require explaining the limitations under which the ICC operates, so as to create realistic expectations. While this is of course a theoretical possibility, creating a direct and interactive framework with local victim communities and stakeholders at the preliminary examination stage, is likely to be problematic, given that at such early stages neither the Registry nor the OTP normally conduct *in situ* outreach.¹⁴⁷

Another possibility for the OTP might be to place the survey questionnaire on its website, for example, when a preliminary examination formally and publicly moves to Phase 3, making it available to any willing third parties and prompting the submission of answers to such survey as well as of open views about the interests of justice question throughout the preliminary examination process, without direct outreach to communities. How to best address this issue from a logistical perspective remains an open question but a potentially viable model to be followed could be the one used by the ICC's Victims Participation and Reparations Section, in the context of their recent collection of victims representations in the situation of Afghanistan.¹⁴⁸

Ultimately, an 'interests of justice' assessment could not be based solely or even predominantly on a customer-service type of survey. The OTP will still have to evaluate the views of its communities of interest,

¹⁴⁷ This is due to the availability of limited resources as well as to the fact that preliminary examinations can both result in the opening of an investigation as well as simply the closing of the process without the initiation of an investigation. Interactions with communities and victims at this early stage could therefore both create wrong or premature impressions and expectations. At the same time this would not prevent the OTP from conducting targeted consultations with organizations representing victims' interests as was done in the situation of Afghanistan, precisely in order to assess the 'interests of justice' criterion in the situation. See Office of the Prosecutor, Situation in the Islamic Republic of Afghanistan, Public redacted version of "Request for authorisation of an investigation pursuant to article 15", 2017, para. 365, see *supra* note 89.

¹⁴⁸ Pursuant to Regulation 50 of the Regulations of the ICC, between 7 December 2017 and 9 February 2018 the VPRS collected and transmitted representations to Pre-Trial Chamber III from a total number of 699 victims in the situation of Afghanistan. The submission of such representations was facilitated by the provision of a template in different languages on the ICC's website, available until 31 January 2018. In light of these representations, on 20 February 2018, the VPRS transmitted to the Judges a final consolidated report. ICC Registry, Situation in the Islamic Republic of Afghanistan, Annex I-Red to the Final Consolidated Registry Report on Victims' Representations Pursuant to the Pre-Trial Chamber's Order ICC-02/17-6 of 9 November 2017, 20 February 2018, ICC-02/17-29-AnxI-Red (<http://www.legal-tools.org/doc/9942aa/>).

against the almost philosophical notion of ‘interests of justice’ around which Article 53(1)(c) was built and around which the Office has taken a consistent stance over the years. This kind of exercise could also help the Office to better understand the context in which potential investigations and prosecutions might take place. At a minimum, they may be able to provide a good indication as to whether an ICC process will be supported domestically at the community level or not. This may later impact the OTP’s ability to access witnesses and crime scenes at an investigative stage and it would therefore be relevant knowledge to gather for the Office.

Overall, in suggesting the establishment of such methodology, alongside the already existing one, the idea would be to create an internal ‘best practice’ set of guidelines that could be vague and adaptable enough, so as to fit every situation, but clear enough so as to be able to address key questions in a consistent and predictable way. Ultimately the fact that the notion of interests of justice has so far escaped definition can be taken by the OTP as an opportunity to think deeply about it on the basis of its now 20-year long experience in assessing it and the fact that the world out there is becoming more and more vocal and able to communicate its views to the Court. The ‘interests of justice’ and the ‘interests of international criminal justice’ executed by the ICC may in the end not be the same, but a new analysis into the issue may be able to show how the two could meet and lead the Office to a more aware assessment of when and why an OTP investigation and eventual prosecution would be welcomed by victimized communities and when and why it would not.

In parallel with the suggestion above, the production and submission by external stakeholders of information specifically on the interests of justice and of victims, could also enhance the OTP’s assessment in Phase 4 from an external quality enhancement perspective. External stakeholders close to victim communities may make themselves vehicles of information – both in favour and against an OTP intervention – from the ground to the OTP. A number of institutes – think tank or academic – and NGOs, who regularly carry out surveys on justice issues in situation countries, could also independently decide to take on board the ‘interests of justice’ question and produce independent assessments on the matter. Such assessments, if produced in a relevant, methodologically sound and

timely manner, may ultimately also play a role in the OTP's own internal assessment of the interests of justice question.¹⁴⁹

7.6. Conclusions

This chapter has put forward a proposal for a two-way enhancement of quality control in the legalistic process of preliminary examinations based on the idea that this could occur through direct internal as well as indirect and direct external input. It has taken the stance that while different functions may be attributed to preliminary examinations, preliminary examinations are first and foremost a legalistic analytical process aimed at enabling the ICC Prosecutor to make a decision on whether to proceed or not with the investigation of situations under her scrutiny. They have therefore, primarily an institutional 'green light function'.

This chapter has argued therefore that in order to understand how quality can be broadly enhanced, including in terms of "predictability",¹⁵⁰ we need to start from what preliminary examinations do at their legalistic core: the production of a legal assessment on the basis of the analytical grid imposed by the Rome Statute, in particular Article 53(1), of all the relevant available information. Following the four phases of the preliminary examination process, this chapter has suggested that overall quality control rests on the OTP's shoulders, with the analytical process being a sole OTP prerogative, while quality enhancement could also depend on external efforts. Both are applicable to all four phases of the preliminary examination process.

During Phase 1, for example, the OTP can look to enhance the quality of Article 15 communications by being more forthcoming in clarifying the scope of its mandate and the role of Article 15 communications to its potential submitters. Externally, those in possession of relevant information should not hesitate to submit it to the Court.

During Phase 2, the OTP can and does control the quality of its analysis by following consistent standards, by conducting careful source evaluation, and by maintaining a conservative and hypothesis-testing approach overall. Given its heavy reliance on open source information, the

¹⁴⁹ Such proactive encouragement of the provision of relevant views regarding the 'interests of justice' issue in specific situations was already advocated by the OTP in its 2007 policy paper on the topic. See *Policy Paper on the Interests of Justice*, 2007, p. 6, *supra* note 76.

¹⁵⁰ Strategic Plan 2016 - 2018, 2015, para. 52(2), p. 20, see *supra* note 9.

OTP may further seek to enhance the quality of the information used to conduct its crime analysis by clarifying the standards that would make any submitted or collected information stronger for its analytical purposes. Likewise, external stakeholders may contribute to this phase's quality enhancement by producing information following high methodological standards and by providing the OTP with primary source information when possible.

During Phase 3, the quality of the OTP's complementarity assessment may rest on the proactive balancing of the legal analytical principles of Article 17 and the institutional policy objective of fostering positive complementarity. Externally, states, who normally are the gatekeepers of information about their domestic proceedings, should see it in their interest to share this information with the OTP. The sharing of information may itself guarantee a better assessment by the OTP.

Finally, during Phase 4, the OTP can take the opportunity to further develop its internal methodology to better understand what circumstances would make an investigation *not* in the 'interests of justice' and which ones would. Particular attention, to this end, should continue to be given to the the 'interests of victims'. External stakeholders able to access or garner local views, in favour or against ICC prosecutions, should not shy away from sharing these views with the Office.

These suggestions for a two-way street mechanism for quality control and enhancement could be a useful starting point for thinking further about novel checks and balances that could be applied to the process, about how to strengthen existing ones and about how different stakeholders could contribute to it. Above all, however, while this chapter has advocated that the most apposite starting point for quality control and enhancement should be the legalistic analytical aspect of preliminary examinations, ultimately, it remains aware that preliminary examinations are not conducted in a vacuum. The scenario that this chapter has presented for quality control and enhancement should therefore be flexibly adjusted to the day-to-day reality of the process and of the phenomena it analyses, including their context. For this to happen, the ultimate quality control function will necessarily continue to reside with the OTP. In fact, the OTP can only continue to ensure the quality of its preliminary examinations by (1) focusing on the implementation of its analytical mandate as defined by the Rome Statute, (2) developing in-depth knowledge and awareness of the dynamics of each situation on the ground, including understanding its

own role therein, (3) resisting any outside pressure towards results desired by external constituencies, and (4) taking the law, crucially including the fact that this allows for prosecutorial discretion, as the guiding principle of its decisions above any other consideration.¹⁵¹

¹⁵¹ Note that as part of Strategic Goal 1 the OTP reiterates that “A main goal of the Office is to meet the demand for its intervention in accordance with the Rome Statute with the required quality, effectiveness and efficiency”. *Ibid.*, para. 43, p. 18.

The Pre-Preliminary Examination Stage: Theory and Practice of the OTP's Phase 1 Activities

Amitis Khojasteh *

8.1. Introduction

Of the four phases of the preliminary examination process, the first phase, which involves the initial filtering and assessment of information on alleged crimes received under Article 15 of the Statute of the International Criminal Court ('ICC' or 'Court'), is the least reported and, as a consequence, is the subject of speculation.

While Phase 1 overall does not garner as much attention or scrutiny as the other phases, the activities conducted at this early stage are nonetheless a crucial component of the work of the Office of the Prosecutor ('OTP' or 'Office') of the ICC, being an integral part of the Prosecutor's unique role in selecting situations for intervention by the Court.

A preliminary examination may be initiated on the basis of: (i) information on crimes submitted under Article 15 of the Statute by individuals or groups, States, intergovernmental or non-governmental organizations or other reliable sources (also referred to as 'Article 15 communications'); (ii) referrals from States Parties or the UN Security Council; or (iii) declarations lodged under Article 12(3) by a non-State Party, accepting the exercise of the jurisdiction by the Court on an *ad hoc* basis.¹ Pursuant to

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¹ OTP, Regulations of the Office of the Prosecutor, 23 April 2009, ICC-BD/05-01-09, Regulation 25(1) ('OTP Regulations') (<http://www.legal-tools.org/doc/a97226/>); ICC OTP, *Policy Paper on Preliminary Examinations*, 1 November 2013, paras. 4, 73 ('OTP Policy Pa-

the Office's policy, the latter two mechanisms automatically trigger the opening of a preliminary examination.²

By contrast, Article 15 communications do not necessarily lead to the initiation of a preliminary examination.³ Instead, such communications are first subject to an initial assessment – a filtering process which, within the OTP's phase-based approach to preliminary examinations, constitutes the Phase 1 assessment and is essentially a pre-preliminary examination stage.⁴ Following such assessment, the Office will only open a preliminary examination, on the basis of information received under Article 15 of the Statute, when the alleged crimes appear to fall within the jurisdiction of the Court.⁵

Consequently, Article 15 communications must pass an additional hurdle in order to bring about the opening of a preliminary examination.⁶

per on Preliminary Examinations') (<http://www.legal-tools.org/doc/acb906/>). While Article 12(3) declarations may trigger the opening of a preliminary examination, Article 12(3) of the Statute is a jurisdictional provision, as opposed to a trigger mechanism for the exercise of the Court's jurisdiction. Trigger mechanisms for the Court's jurisdiction, as set out in Article 13 of the ICC Statute, include: (1) referral by a State Party, (2) investigation *proprio motu* by the Prosecutor, and (3) referral by the UN Security Council. Accordingly, to activate the Court's jurisdiction, an Article 12(3) declaration requires separate triggering by the Prosecutor acting *proprio motu* or by a State Party referral. See Rome Statute of the International Criminal Court, 17 July 1998, Article 13 ('ICC Statute') (<http://www.legal-tools.org/doc/7b9af9/>). See also, for example, *OTP Policy Paper on Preliminary Examinations*, fn. 25.

² *Ibid.*, para. 76.

³ *Ibid.*, para. 75.

⁴ *Ibid.*, para. 78. See also para. 75. As explained by the OTP's policy paper, for the purposes of internal work processes, "[i]n order to distinguish those situations that warrant investigation from those that do not, and in order to manage the analysis of the factors set out in article 53(1), the Office has established a filtering process comprising four phases", *ibid.*, para. 78. Phase 2 entails analysis of whether the alleged crimes fall within the subject-matter jurisdiction of the Court and identification of potential cases; Phase 3 focuses on the admissibility of potential case in terms of complementarity and gravity; and Phase 4 examines the interests of justice, *ibid.*, paras. 78, 81-83. Although each phase focusses in this respect on a distinct statutory factor for analytical purposes, "the Office applies a holistic approach throughout the preliminary examination process", *ibid.*, para. 77.

⁵ *Ibid.*, para. 75.

⁶ However, once opened, the Office conducts the preliminary examination activities (assessing the factors set out in Article 53(1)(a)-(c)) in the same manner, irrespective of whether the examination was opened on the basis of a referral from a State Party or the UN Security Council, Article 12(3) declaration, or information on crimes obtained pursuant to Article 15. *Ibid.*, para. 12. See also paras. 35, 76.

Such initial filtering and assessment, however, is consistent with the Prosecutor's obligation to "analyse the seriousness of information received" under Article 15(2) of the Statute.⁷ Moreover, this process is also indispensable given the need to manage the large number of communications continuously received by the Office about possible crimes. In this latter respect, it is highlighted that in 2016, the Office received nearly 600 Article 15 communications; in total, since July 2002, the Office has received over 12,000 such communications.

In such circumstances, faced with numerous alleged atrocities around the world purportedly deserving the Court's attention, the OTP must efficiently and effectively filter hundreds of communications every year in order to decide when and where the opening of a preliminary examination is warranted. This process and how it is conducted is significant as it influences, in part, the type of situations and crimes which will later be selected and prioritized by the OTP, thereby potentially shaping how the Office carries out its mandate in years to come. In this regard, while not discounting the importance of referrals and Article 12(3) declarations, Article 15 communications undoubtedly represent a central channel⁸ through which allegations of serious crimes potentially meriting the Court's intervention may be brought to the attention of the Office.⁹

⁷ See ICC Statute, Article 15(2), see *supra* note 1. See also ICC, Rules of Procedure and Evidence, 2nd edition, 9 September 2002, Rule 104(1) ('RPE') (<http://www.legal-tools.org/doc/a6a02b/>). See also Kai Ambos and Ignaz Stegmiller, "Prosecuting international crimes at the International Criminal Court: Is there a coherent and comprehensive strategy?", in *Crime, Law and Social Change*, 2013, vol. 59, no. 4, p. 420; Morten Bergsmo, Jelena Pejic and ZHU Dan, "Article 15", in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court*, C.H. Beck, 2016, marginal no. 13 (also expressing that "[i]t is essential that information submitted to the Prosecutor be properly considered, both as a matter of basic prosecutorial professionalism and in order to maintain confidence in the Office of the Prosecutor"); Human Rights Watch, "ICC: Course Correction: Recommendations to the ICC Prosecutor for a More Effective Approach to 'Situations under Analysis'", 16 June 2011. Such a 'pre-preliminary' stage of filtering is also envisaged under Regulation 27 of the Regulations of the Office of the Prosecutor. See also Ambos and Stegmiller, 2013, p. 420, *supra* note 7.

⁸ Notably, for example, Article 15 communications provide an important opportunity for, among others, victims, NGOs, members of civil society, and ordinary citizens to have a role in triggering the exercise of jurisdiction by the Court.

⁹ Since 2002, the majority of preliminary examinations, namely 13, were opened on the basis of Article 15 communications. These include Afghanistan, Colombia, Guinea, Nigeria, Georgia, Kenya, Honduras, Korea, Venezuela (2006), Iraq/UK, Burundi, the Philippines and Venezuela (2018). By contrast, three were opened on the basis of Article 12(3) declarations lodged by States (Côte d'Ivoire, Ukraine and Palestine), two on the basis of

Notably, however, the Rome Statute does not envisage any mechanism for oversight or quality assessment of the Office's decisions at Phase 1. It could be suggested that this may be problematic given that selection decisions, even at such an inceptive stage, nevertheless can ultimately have an impact on victims' attempts to access justice at the international level as well as on the legitimacy of the Court as perceived by relevant audiences.¹⁰

However, upon closer examination of the activities undertaken at Phase 1, it is possible nonetheless to identify certain mechanisms aimed at ensuring forms of quality control in the process involved at this stage, including: (i) the implementation of a two-step internal filtering and assessment process, (ii) the manner in which discretion is applied in the OTP's decision-making process at this stage, and (iii) the efforts of the Office to act transparently in relation to the Phase 1 process and relevant decisions taken.

UN Security Council Referrals (Libya and Darfur), and six on the basis of referrals by States Parties (Uganda, Democratic Republic of the Congo, the Central African Republic, Mali, Comoros and Gabon). In February 2014, the OTP opened a preliminary examination of the situation in CAR since September 2012 (also known as the 'CAR II' situation) on the basis of information available concerning increasing violence in the country and the commission of a number of alleged crimes; however, later in May 2014, the CAR Government then referred the situation that was already under examination by the Office.

¹⁰ See, generally, Margaret M. deGuzman, "Choosing to Prosecute: Expressive Selection at the International Criminal Court", in *Michigan Journal of International Law*, 2012, vol. 33, no. 2, pp. 265-69 (also using the term 'legitimacy' to refer to "the perception among relevant audiences that the ICC's actions are worthy of respect"); Margaret M. deGuzman and William A. Schabas, "Initiation of Investigations and Selections of Cases", in Goran Sluiter (ed.), *International Criminal Procedure: Principles and Rules*, Oxford University Press, 2013, pp. 131-32, 167-68; Thea Marriott and Rebecca Lee, "Introduction", in Rebecca Lee (ed.), *The International Criminal Court: Confronting Challenges on the Path to Justice*, Henry M. Jackson School of International Studies Task Force, 2013, p. 8. See also more generally Cale Davis, "Political Considerations in Prosecutorial Discretion at the International Criminal Court", in *International Criminal Law Review*, 2015, vol. 15, no. 1, p. 171 (noting the role of the OTP, including "to direct the Court's attention and draw its focus to situations, people, and places", and that as a consequence of such role, "the conduct of the OTP is intrinsically linked to the Court's success and viability"). Regarding the issue of legitimacy, deGuzman, for example, expresses that relevant audiences – such as States, NGOs, affected communities, and the global community – will all "assess the Court's legitimacy in significant degree according to their evaluations of its selection decisions", and explains that "[i]n light of the Court's high degree of selectivity, widespread criticisms of its selections or critiques from highly respected sources can result in broader challenges to the Court's legitimacy", *idem*, 2012, pp. 268, 274.

With a view to shedding further light on the Phase 1 process and existing mechanisms of quality control at the pre-preliminary examination stage, this chapter will thus examine the activities undertaken by the OTP during this stage. In this regard, the chapter will outline and clarify the relevant practices and methodology used by the Office in filtering and analysing information received under Article 15 of the Statute. In addition, focus in this respect will also be given to the role of prosecutorial discretion in this process, namely with respect to the OTP's current approach to so-called 'borderline situations', and to considerations concerning transparency and publicity of the Phase 1 activities conducted by OTP. Finally, the chapter will also address how quality control considerations ultimately factor in during this particular stage of analysis.

8.2. Overview of the Phase 1 Process

Phase 1 consists of an initial assessment of all information on alleged crimes received under Article 15 to determine whether the allegations appear to fall within the Court's jurisdiction.¹¹ Allegations of crimes come to the attention of the OTP via communications submitted by email, fax, post, or in person by, for example, individuals, groups, States,¹² or non-governmental organizations ('NGOs'). Article 15 communications come in different forms and contain widely varying levels of detail, ranging from brief emails of a couple of lines to large submissions with voluminous supporting information and materials. In all cases, these communications are subjected to the same assessment by the Office, the purpose of which is to analyse and verify the seriousness of the information received, filter out information on crimes that are outside the jurisdiction of the Court and identify those that appear to fall within the jurisdiction of the Court.¹³

The Phase 1 process essentially involves two primary activities: (i) the initial basic filtering of communications received; and (ii) the further analysis of allegations that are neither manifestly outside of the Court's

¹¹ OTP *Policy Paper on Preliminary Examinations*, para. 78, see *supra* note 1. The statutory jurisdictional requirements to be met include temporal, subject-matter, and either territorial or personal jurisdiction. See ICC Statute, Articles 5, 11, 12, 13(b), see *supra* note 1.

¹² While a State Party may formally refer a situation to the Court under Article 14 of the Statute, nothing prevents a State, alternatively, from filing a communication under Article 15. In fact, in the past, the Office has received Article 15 communications from States concerning various situations of alleged crimes.

¹³ OTP *Policy Paper on Preliminary Examinations*, para. 78, see *supra* note 1.

jurisdiction nor related to an ongoing preliminary examination or investigation.

8.2.1. Initial Basic Filtering

Article 15 communications received are first filtered according to whether the allegations contained therein concern: (i) matters which are manifestly outside of the jurisdiction of the Court; (ii) a situation already under preliminary examination; (iii) a situation already under investigation or forming the basis of a prosecution; or (iv) matters which are neither manifestly outside of the Court's jurisdiction nor related to an existing preliminary examination, investigation or prosecution, and therefore warrant further factual and legal analysis by the Office.¹⁴ In 2016, for example, the OTP received 593 Article 15 communications alleging the commission of relevant crimes – of which, 410 were manifestly outside of the ICC's jurisdiction, 98 related to ongoing preliminary examinations, 41 related to ongoing investigations and/or prosecutions, and 44 were considered to warrant further analysis.

If the communication concerns allegations which *prima facie* fall outside the scope of the Court's temporal, subject-matter, territorial or personal jurisdiction, it is deemed to be manifestly outside of the Court's jurisdiction and accordingly is dismissed.¹⁵ However, such allegations may be revisited in light of new information or circumstances, such as a change in the jurisdictional situation. Communications concerning allegations or information linked to a situation that is already under preliminary examination or investigation by the OTP are forwarded on to the relevant team within the Office working on that situation or case in order to be further analysed in such context.¹⁶ Finally, with respect to the last category, communications deemed to warrant further analysis (referred to as 'WFA communications') are the subject of a dedicated analytical report (referred

¹⁴ *Ibid.*; OTP Regulations, Regulation 27, see *supra* note 1.

¹⁵ OTP *Policy Paper on Preliminary Examinations*, para. 79, see *supra* note 1. See also ICC Statute, Article 15(6), see *supra* note 1; RPE, Rule 49(2), see *supra* note 7; see also Justice Hub, "How Can People Report Crimes to the ICC?", 7 January 2015 (<http://www.legal-tools.org/doc/e777f0/>). In addition to those that do not meet the requisite jurisdictional criteria, communications that are otherwise manifestly ill-founded or frivolous will also be dismissed.

¹⁶ See *ibid.*

to as a ‘Phase 1 report’) in order to inform the determination of whether a preliminary examination should be opened into a given alleged situation.¹⁷

The filtering of Article 15 communications according to the categories outlined above is subject to several levels of internal review. Communications are first registered, reviewed, and filtered by the staff of Office’s Information and Evidence Unit on a rolling basis as they are received.¹⁸ Subsequently, on a monthly basis, the Office’s Situation Analysis Section (‘SAS’) conducts an independent second review of such communications. The resulting recommendations on the disposition and subsequent action to be taken in relation to the respective communications are then subject to the review and final approval by the Prosecutor.

8.2.2. Analysis of ‘Warrant Further Analysis’ Communications

Phase 1 is often considered to merely consist of a basic filtering process to exclude Article 15 communications alleging crimes that are manifestly outside the Court’s jurisdiction. However, in reality, this stage is more complex, involving in-depth factual and legal assessment, given the second component of the Phase 1 filtering process – that is, the analysis of WFA communications.

The purpose of such analysis is to provide an informed, well-reasoned recommendation to the Prosecutor and other members of the Executive Committee on whether the alleged crimes in question appear to fall within the Court’s jurisdiction and warrant the Office proceeding to Phase 2, that is, the formal commencement of a preliminary examination. To this end, SAS produces Phase 1 reports assessing the allegations raised in WFA communications.

Phase 1 reports completed on such communications are a crucial component of the work of SAS. It is on the basis of such reports that the Prosecutor determines whether to open preliminary examinations or to

¹⁷ OTP *Policy Paper on Preliminary Examinations*, para. 79, see *supra* note 1. This decision is made on the basis of all communications relating to the same situation, as well as publicly available information. Communications relating to one particular situation are thus analysed together, as opposed to separately. See Justice Hub, “How Can People Report Crimes to the ICC?”, see *supra* note 15.

¹⁸ Article 15 communications (including any supporting materials) are registered and stored electronically by the Information and Evidence Unit upon collection, with originals stored in the vault of the Office after digitization. See OTP Regulations, Regulations 23(2), 23(4), 26, see *supra* note 1.

dismiss communications that were not manifestly outside the Court's jurisdiction at first review.

Since mid-2012, SAS has produced over 40 Phase 1 reports relating to WFA communications, analysing allegations on a range of subjects concerning situations in regions throughout the world. While most of the WFA communications in this period were ultimately dismissed, four preliminary examinations were opened following SAS's further analysis and recommendations on such communications, namely those into the situations in Venezuela, the Philippines, and Burundi and the reopening of the situation concerning UK forces in Iraq.¹⁹

8.2.2.1. Applicable Standard at Phase 1

As explained in the Office's policy paper on preliminary examinations, WFA communications require further analysis in order to determine "whether the alleged crimes *appear* to fall within the jurisdiction of the Court and therefore warrant proceeding to the next phase".²⁰ In other words, the evidentiary standard used at Phase 1 is 'appears', as opposed to the higher standard used at the preliminary examination stage of 'reasonable basis to believe'.

The 'reasonable basis' standard has been interpreted by the ICC Pre-Trial Chambers to require that "there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court 'has been or is being committed'".²¹ In this context, Pre-Trial Chamber II further indicated that all of the information need not neces-

¹⁹ Prior to 2012, preliminary examinations opened on the basis of Article 15 include Afghanistan, Colombia, Guinea, Nigeria, Georgia, Kenya, Honduras, Korea and Venezuela (2006).

²⁰ *OTP Policy Paper on Preliminary Examinations*, para. 79 (emphasis added), see *supra* note 1.

²¹ ICC, Situation in the Republic of Kenya, Pre-Trial Chamber, Corrigendum of the 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-Corr, para. 35 ('Kenya Article 15 Decision') (<http://www.legal-tools.org/doc/f0caaf/>); ICC, Situation in the Republic of Côte d'Ivoire, Pre-Trial Chamber, 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, ICC-02/11-14, para. 24 (<http://www.legal-tools.org/doc/7a6c19/>). For more information on the standard, see Matthew E. 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.

sarily “point towards only one conclusion”.²² If ‘reasonable basis’ means sensible or reasonable justification, then ‘appears’ may be appropriately interpreted as amounting something less than that.

The ‘appears’ threshold used at Phase 1 is derived from the statutory provisions regarding the referral by a State Party or the UN Security Council of a situation in which one or more crimes “appears to have been committed”.²³ Its use in this context by the Office is designed to create analogous conditions in respect of Article 15 communications for the triggering of the potential exercise of jurisdiction by the Court in a given situation.²⁴ Drawing from previous practice, the ‘appears’ standard, as used at Phase 1, may be roughly summarized as: the information available *tends to suggest* that the alleged acts *could* amount to crimes within the jurisdiction of the Court.²⁵

This standard is necessary in order to verify the seriousness of alleged crimes which on their face are not manifestly outside the Court’s jurisdiction, to ensure that the reasons for moving forward are well-founded and a decision to proceed to Phase 2 is not taken prematurely without a sufficient factual and legal foundation. In this respect, information received under Article 15 must be subjected to some level of critical analysis and confirmation, rather than simply accepted at face value. Such approach and the standard applied by the Office thus serves, for example, to minimize situations where a preliminary examination is opened on the basis of allegations which later, upon further inspection, are in fact baseless or otherwise appear to fail to satisfy a fundamental condition for jurisdiction. Ultimately, effective additional filtering is essential given the need to carefully select situations for preliminary examination to make certain that the Office’s time and limited resources are devoted to situations which appear to involve the “most serious crimes of concern to

²² Kenya Article 15 Decision, para. 34, see *supra* note 21.

²³ See ICC Statute, Articles 13(a), 13(b), 14(1), see *supra* note 1.

²⁴ It is noted in this regard that the ILC Statute first used the phrase “appears to have been committed” in the draft Article 25 dealing with the “complaints” procedure.

²⁵ In the same vein, while noting that the term ‘appears’ lacks statutory definition, one commentary on the Statute suggests that “the threshold ‘appear’ within the meaning of Article 14 is not high; it involves a *prima facie* assessment and does not require to be premised on a comprehensive evidentiary discussion. Simply put: the possibility that crimes within the jurisdiction of the Court have been committed suffices”. Antonio Marchesi and Eleni Chaitidou, “Article 14”, in Triffterer and Ambos (eds.), 2016, marginal no. 26, see *supra* note 7.

the international community as whole”²⁶ and offer potentially realistic prospects for ICC intervention.

Nonetheless, the standard applied at this early stage of analysis cannot be overly exacting. Rather, the use of a lower standard during Phase 1 is appropriate in view of the purpose and nature of the analysis undertaken at this stage, namely to inform the decision on whether a preliminary examination should be opened in given situation. Such analysis cannot be done in the same depth or detail as that done at the preliminary examination proper. This consideration follows not only from the practical constraints involved at Phase 1, such as time and resource limitations, but moreover from the fact that this stage is meant to be a filtering process and is not intended to replace or be a substitute for the type of analysis conducted at Phase 2, or otherwise anticipate the prospective determination to be made by the Prosecutor under Article 53(1) of the Statute.

8.2.2.2. Scope and Nature of the Analysis

Phase 1 reports assess alleged crimes brought to the Office’s attention via Article 15 communications. Individual Article 15 communications are not required to be comprehensive to the extent that they in themselves demonstrate that the threshold for opening a preliminary examination is met. Rather, communications are viewed as a means by which the Court’s attention is directed to a situation of concern, which is then further examined independently and objectively by the OTP. Accordingly, the focus of Phase 1 reports is not limited to the specific allegations contained in an individual communication received. Instead, information received by the Office on alleged crimes is analysed in conjunction with other related communications as well as relevant and reliable open source information. Communications are thus not analysed in isolation (from each other), but rather are used to inform the Office’s analysis of a set of allegations as a whole.

By and large, most situations referred to in WFA communications fall into one of the three general categories:

1. *Due diligence situations*: This includes situations where the allegations are limited in their scope and/or on their face will likely not fall within the Court’s subject-matter jurisdiction. However, as such allegations fall within the Court’s temporal and territorial and/or

²⁶ See ICC Statute, Preamble, para. 9 and Articles 1, 5(1), see *supra* note 1.

personal jurisdiction (and are thus not ‘manifestly’ outside the Court’s jurisdiction), they require some limited research and analysis to confirm and explain the recommendation. This category may also include situations where a new submission or information is provided in relation to allegations which were previously dismissed.²⁷

2. *Unique, discrete issue situations*: This includes situations where the allegations requiring analysis centre around a specific preliminary jurisdictional or factual issue – that is, an issue distinguishable from the standard analysis of whether alleged crimes are within the Court’s subject-matter jurisdiction. Such situations often raise policy-related issues.²⁸
3. *Complex factual and/or legal situations*: This includes situations involving complex set of alleged facts (such as a large number and type of alleged crimes, spanning multiple years, and/or involving multiple actors) and/or complicated or novel legal issues requiring

²⁷ For example, shortly after announcement of the decision to close the preliminary examination of the situation in Honduras, an additional Article 15 communication concerning alleged crimes connected to the same situation was received by SAS. In such circumstances, the Office thus conducted a brief review and analysis of the communication in order to determine whether the specific allegations and information contained therein proved any basis for reconsidering the conclusion of the Office to close the preliminary examination of the situation in Honduras for lack of subject-matter jurisdiction. In this regard, the Office assessed whether the communication provided, for example, information on additional crimes or other new information that could affect the previous legal analysis conducted and conclusions reached by the Office in its Article 5 report.

²⁸ Such a situation, for example, arose with respect to the Office’s consideration of alleged crimes by ISIS in Syria and Iraq. While the Court has no territorial jurisdiction over crimes committed in the territories of those States, it could exercise personal jurisdiction of those members of ISIS who were nationals of States Parties and participated in such crimes, such as so-called ‘foreign fighters’. However, the Prosecutor considered that, in the enduring absence of territorial jurisdiction over Syria and Iraq, the prospects of the Office investigating and prosecuting those most responsible, within the leadership of ISIS, appeared limited. In reaching such conclusion, the Office took into account both the OTP’s policy to focus on those most responsible for mass crimes and the information available that indicated that the political and military leadership of ISIS was primarily led by nationals of non-States Parties. In light of these considerations, the Prosecutor accordingly concluded that the jurisdictional basis for opening a preliminary examination into the situation was too narrow at this stage. See ICC OTP, “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS”, 8 April 2015 (<http://www.legal-tools.org/doc/b1d672/>) (‘OTP Statement on Alleged Crimes Committed by ISIS’).

more in-depth analysis and discussion. Such situations may potentially warrant opening a preliminary examination (that is, the alleged crimes on their face appear more likely to fall within subject-matter jurisdiction) but usually require fact-intensive research as well as more detailed legal analysis.²⁹

Depending on the category, different levels and types of analysis by the Office are required and accordingly, the content and format of reports may differ. However, in general, the Phase 1 analysis of WFA communications involves two primary steps: (i) factual analysis in consultation with reliable open sources to corroborate the allegations, and (ii) legal analysis of the substantiated allegations in accordance with the applicable provisions of the Statute.

The purpose of the first step is to verify the occurrence and seriousness³⁰ of the conduct or incidents alleged and thereby identify the allegations to be further analysed and distinguish those which, alternatively, are unfounded and do not provide a basis for any further action or consideration. The Office thus first seeks to corroborate the key factual allegations raised in WFA communications, using credible open source information, such as that from the UN, national or international commissions, regional and sub-regional organizations, and internationally recognized NGOs.³¹

²⁹ Examples of such types of situations include the Office’s analysis of: (i) alleged crimes by, on the one hand, State forces in the context of counter-narcotics operations and, on the other hand, by drug-trafficking organizations in Mexico; (ii) alleged crimes, respectively, by State forces against opposition parties and their supporters, and by members of the opposition against the civilian population in Bangladesh over the course of several years; (iii) alleged crimes by Burundian State forces against protesters and other persons perceived as political opponents or sympathisers of the opposition following the political unrest from April 2015 onwards; (iv) alleged crimes allegedly committed by Venezuelan government against political opposition members, protesters and others in the context of demonstrations and political and social unrest since 2014; and (v) alleged forcible displacement and related crimes committed in the context of alleged land-grabbing and forcible evictions in Cambodia.

³⁰ As explained in a commentary on Article 15(2) of the Statute, the “analysis of the ‘seriousness’ of information received is a purely evidentiary test, as opposed to one of appropriateness” and the “seriousness of the information may both concern the nature of the alleged crimes and the strength of the incrimination contained in the information”, see Bergsmo, Pejić and ZHU, 2016, marginal no. 13, see *supra* note 7.

³¹ In this regard, it is recalled that as the Office lacks investigative powers at the preliminary examination stage, information relied upon to inform its determinations, including at the Phase 1 stage, is largely obtained from external sources. The Office thus pays particular attention to the assessment of the reliability of sources and credibility of the information. See *OTP Policy Paper on Preliminary Examinations*, paras. 31-32, see *supra* note 1. See also

By consulting such open sources, the Office can also then obtain additional information to better inform the Office's assessment of the overall alleged situation. As the applicable standard at Phase 1 is lower than that used during a preliminary examination, the depth of the research and extent of the information collected by the Office at this stage does not necessarily need to be extensive. Instead, the focus is on identifying several diverse and reliable sources as well as summarizing the relevant information available on the issue(s) presented, in terms of information which may support or alternatively undermine the allegations received. This process can nevertheless take time, especially where there are a significant number of relevant factual allegations to be substantiated or where the State concerned engages with the Office, such as by providing counter-claims or information. Given the nature of the exercise, it is not necessary that all information required to make comprehensive legal findings be available at Phase 1, so long as there is sufficient information available to confirm the key, relevant underlying facts and make relatively informed preliminary conclusions on the critical threshold legal issues.

Following this exercise, the Office then analyses the allegations that have been confirmed by open source research in accordance with the applicable provisions of the Statute, supplementary instruments, and relevant jurisprudence. In general, the focus of the analysis conducted is on the jurisdictional requirements;³² though within these parameters, the focus varies on a case-by-case basis, depending on the relevant issues raised in a given situation. In most cases, however, the analysis focuses on whether the alleged crimes appear to amount to any of the crimes under Article 5 of the Statute.³³ While the analysis undertaken at Phase 1 need not rise to the level of detail of Phase 2, it nonetheless must address and consider whether the basic elements of the crimes alleged *appear* to be met, particularly with respect to the contextual elements of the relevant alleged crimes. In this respect, it is noted that the majority of WFA communications raise allegations concerning alleged crimes against humanity,

generally *ibid.*, para. 79; ICC Statute, Article 15(2), see *supra* note 1; RPE, Rule 104(2), see *supra* note 7.

³² By contrast, generally, admissibility (in terms of complementarity and gravity) are not assessed at the Phase 1 stage of analysis.

³³ In certain cases, such as in the 'discrete, unique issue' type of situations, as noted above, the analysis alternatively may focus on critical preliminary jurisdictional issues, such as those related to the exercise of personal jurisdiction.

and in some cases, challenges may arise in drawing the line between large scale human rights violations and crimes against humanity, or between an ‘endemic practice’ and a ‘systematic’ attack against the civilian population pursuant to a State or organizational policy. In addressing such challenges and more generally in analysing allegations, the Office acts consistently and objectively across situations presented in the interpretation and application of the relevant provisions of Rome Statute, the Elements of Crimes and relevant jurisprudence as well as with reference to previous positions taken by the Office on similar legal issues and/or factual situations.

Although limited by the level of research conducted and information available at Phase 1, the conclusions nevertheless must be persuasive in respect of their interpretation of the information available and the application of the relevant law. However, the legal conclusions reached do not necessarily need to be definitive but rather can be subject to adjustment, reconsideration, and/or elaboration depending on further research and additional information that may only become available later, such as during Phase 2, if the Office decides to open a preliminary examination.

Finally, in this context, it is noted that in some cases, it could be that overall there is insufficient information to make a determination. In many cases, this may be indicative of the allegations being frivolous or baseless – in which event dismissal is appropriate. However, in limited cases, the insufficiency of information may be for other reasons, in which case it could be more appropriate to consider opening a preliminary examination in order to allow for further collection of information and in-depth research to reach a subject-matter determination. For example, this could be the case where the information required for the assessment of a particular required legal element³⁴ is contradictory (due to the existence of different accounts) and/or insufficient (such as due to lack of detailed reporting on the issue at that particular time). Such situations must be assessed by the Office on a case-by-case basis in order to determine the most appropriate course of action in the given circumstances. However, in such a case, the Office considers factors such as: whether the information gap only relates to certain discrete issue(s) and whether, despite the information gap, the information available tends to support that the other basic requisite legal

³⁴ Such as whether an armed group involved in a conflict is sufficiently organized for the purposes of establishing a non-international armed conflict, or a group alleged to have committed crimes against humanity would qualify as an organization for the purposes of Article 7 of the Statute.

elements of the alleged crimes could be met; the possible reasons for the lack of sufficient information on the particular issue; whether the lack of sufficient information to conclude a crime was committed is the result of a complete absence of information anywhere, or whether the information gap could potentially be resolved with further in-depth research and additional resources, such as access to information that is more easily facilitated during the Phase 2 stage; whether the information available, albeit limited or insufficient, is nevertheless possibly indicative or suggestive of a crime, or not. In some circumstances, the Office may also directly follow-up with senders of communications in order to raise such issues and explore the possibility of a relevant sender providing any additional information that might be available on particular areas of interest identified by the Office.

8.2.2.3. Internal Review and Timelines

The analysis of WFA communications is conducted by SAS. Such analysis is guided by internal guidelines designed to ensure consistency in approaches to open source research conducted, evaluation of available information, interpretation and application of the applicable law and jurisprudence, and more generally the drafting of Phase 1 reports. Additionally, the process as a whole is managed by one member of SAS who serves as a Phase 1 Coordinator, in addition to other preliminary examination tasks, and who monitors and oversees all pending WFA communications. Following a review process within SAS, the finalized Phase 1 reports containing the analysis of and recommendations on WFA communications are submitted to the Prosecutor and the Executive Committee for consideration and approval.

Just as there are no timelines provided in the Statute for bringing a preliminary examination to a close,³⁵ similarly there are no prescribed timelines for Phase 1 determinations on alleged crimes brought to the Office's attention through Article 15 communications. Nevertheless, the Office seeks to reach determinations within a timely manner. With respect to the initial basic filtering process, review of all communications received is generally carried out on a monthly basis, with senders of communications informed shortly thereafter regarding the outcome. By contrast, decisions on WFA communications logically require further time,

³⁵ OTP *Policy Paper on Preliminary Examinations*, para. 14, see *supra* note 1.

given the nature of the analysis conducted, as described above. The Office however aims to reach determinations on the outcomes of such communications within a reasonable timeframe, without undue delays, especially given the legitimate interests of senders in a timely response as well as the importance of prompt action for maximizing the effectiveness and impact of any possible further steps taken by the Office in relation to a given situation. This goal, however, is subject to the circumstances of each individual situation under Phase 1 review, such as the complexity of the alleged conduct involved or in some cases, the existence of consultations and interactions with relevant external stakeholders, and operational limitations in terms of availability of resources.³⁶

8.3. Prosecutorial Discretion at Phase 1

The Prosecutor's discretionary function is typically discussed in the context of the selection of situations for investigation and the selection of cases and charges for prosecution. However, to a certain extent, prosecutorial discretion also plays a role in the selection of situations for preliminary examination within the *proprio motu* framework under Article 15.

In this regard, it is suggested that the Prosecutor indeed enjoys some discretion in the decision to open preliminary examinations on the basis communications and information received under Article 15 of the Statute. This proposition is supported by the Statute³⁷ as well as more broadly speaking from a common-sense perspective in light of a number of considerations. In particular, to a certain extent, the exercise of discretion in the Phase 1 selection of situations for preliminary examination is necessary and legitimate given the unique mandate of the Court as well as its capacity constraints and the resulting need for some degree of selec-

³⁶ In this regard, it is noted that while SAS's resources have gradually increased over time, the section still has limited personnel at its disposal. The section is composed of one head of section and 12 analysts, as well as around two to three interns at any given time. Currently, this staff is divided between 10 on-going preliminary examinations, with the majority of staff working on more than one preliminary examination at a time. Notably, there is no full-time, dedicated team or staff on Phase 1 activities. Rather, Phase 1 work is conducted in addition to relevant staff's duties and responsibilities in connection with assigned preliminary examinations.

³⁷ See, for example, ICC Statute, Article 15(1) (stating that "[t]he Prosecutor *may* initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court" (emphasis added)), see *supra* note 1.

tivity:³⁸ the ICC is a permanent court, its jurisdiction is not constrained by any time limits (but for the principle of non-retroactivity) and it has at least the potential for universal reach. Consequently, the ICC's jurisdiction extends over thousands of potential crimes and perpetrators. However, at the same time, it is unfeasible for the Court to take on and address all possible cases of serious international crimes. Against such background, the Prosecutor is tasked with the responsibility of identifying those that potentially warrant action by the Court.

In the context of Phase 1, the application of prosecutorial discretion is reflected in particular in the selectivity exercised by the Office in relation to some decisions taken on WFA communications. As previously explained, WFA communications are subjected to additional analysis, and in general, the Office's policy is to initiate a preliminary examination, and thus proceed to Phase 2, when it 'appears' that crimes within the Court's jurisdiction have been committed. In reaching such determination and selecting situations for preliminary examination, the Prosecutor's decisions are based on the information available and guided by the relevant legal criteria outlined in the Statute, as well as are taken in accordance with the overarching principles of independence, impartiality and objectivity.³⁹ In practice, however, the Office may be faced with situations in which the most appropriate action to be taken is not readily clear due to a number of a variety of different factors. In particular, the Office may occasionally encounter situations where alleged crimes, while not manifestly outside the Court's jurisdiction, do not necessarily clearly appear to fall within its subject-matter jurisdiction – what could be described as 'borderline situations'. In such situations, the Office has indicated that in determining whether or not to open a preliminary examination, it will take into account additional factors, including those related to policy and those

³⁸ See, for example, Ambos and Stegmiller, 2013, p. 416, see *supra* note 7 (expressing that given the potential universal scope of the Court's jurisdiction, "more difficult choices have to be made and selectivity plays an important role"); Matthew R. Brubacher, in "Prosecutorial Discretion within the International Criminal Court", in *Journal of International Criminal Justice*, 2004, vol. 2, no. 1, p. 76; James A. Goldston, "More Candour about Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court", in *Journal of International Criminal Justice*, 2010, vol. 8, no. 2, pp. 389-90; William A. Schabas, "Victor's Justice: Selecting 'Situations' at the International Criminal Court", in *John Marshall Law Review*, 2010, vol. 43, no. 3, pp. 542-43.

³⁹ See, for example, *OTP Policy Paper on Preliminary Examinations*, para. 25, see *supra* note 1.

relevant to a forward-looking assessment of the exercise of the Court's jurisdiction.⁴⁰

In particular, the Office will first consider whether the lack of clarity, with respect to whether the crimes appear to fall within the Court's jurisdiction, applies to most or only a limited set of allegations, and in the case of the latter, whether they are nevertheless of such gravity to justify further analysis.⁴¹ The Office may therefore decide not to proceed further, pending additional information becoming available to fill in the gaps, unless the information already available tends to suggest that the alleged crimes are or were committed on a large scale or appear to be particularly serious for other reasons. Additionally, the Office will consider whether the exercise of the Court's jurisdiction may be restricted due to factors such as a narrow geographic and/or personal scope of the jurisdiction⁴² and/or the existence of national proceedings relating to the relevant conduct.⁴³ Hence, the Office may decide not to proceed further if the alleged most responsible perpetrators appear to be outside of the Court's reach because they did not commit crimes on the territory nor are nationals of a State Party,⁴⁴ or because they are already being investigated and/or prosecuted at the national level. In general, the Office will take into account its prosecutorial strategy of focusing on those most responsible for the most serious crimes under the Court's jurisdiction,⁴⁵ and as a general rule, will

⁴⁰ ICC OTP, *Report on Preliminary Examination Activities 2016*, 14 November 2016, para. 15 ('OTP 2016 Report on Preliminary Examination Activities') (<http://www.legal-tools.org/en/doc/f30a53/>).

⁴¹ *Ibid.*

⁴² For example, in this respect, the Office may consider whether the vast majority of the alleged crimes relevant to a given situation appear to fall within the Court's jurisdiction, or instead whether the Court only has jurisdiction over a limited segment of the alleged crimes or conduct at issue due to limitations in territorial and/or personal jurisdiction. Such a consideration, for example, played a role in the Prosecutor's decision in 2015 not to open a preliminary examination into alleged crimes committed by ISIS. See OTP Statement on Alleged Crimes Committed by ISIS, see *supra* note 28.

⁴³ OTP 2016 Report on Preliminary Examination Activities, para. 15, see *supra* note 40.

⁴⁴ See, for example, OTP Statement on Alleged Crimes Committed by ISIS, see *supra* note 28.

⁴⁵ See OTP Regulations, Regulation 34(1), see *supra* note 1; ICC OTP, *Policy Paper on Case Selection and Prioritisation*, 15 September 2016, paras. 42-44 ('OTP Policy Paper on Case Selection') (<http://www.legal-tools.org/doc/182205/>); ICC OTP, *Paper on Some Policy Issues Before the Office of the Prosecutor*, September 2003, pp. 3, 7 (<http://www.legal-tools.org/doc/f53870/>).

follow a ‘conservative’ approach in terms of deciding whether to open a preliminary examination.⁴⁶ Such approach adopted by the Office may be correctly interpreted as the use of prosecutorial discretion at Phase 1.

On the one hand, it could be suggested that in such circumstances as those described above, the Office instead should take a more progressive approach whereby new preliminary examinations should be opened as long as some of the alleged crimes appear to fall under the ICC jurisdiction. While such an approach could seem appealing in certain respects, on the other hand, it overlooks key pragmatic considerations, and is ultimately unrealistic since it could potentially undermine the ability of the OTP to effectively carry out and fulfil its mandate.⁴⁷ The decision to open a preliminary examination has significant implications for the Office, in terms of the investigative prospects, public expectations, and the impact on resource allocation. The opening of numerous preliminary examinations could spread the Office’s limited resources too thin,⁴⁸ and consequently potentially negatively impact the quality of the assessments conducted during the examination or the time necessary for the completion of such assessments.⁴⁹ Past experience has also shown that closing or completing a preliminary examination may be much more challenging than opening one. In light of these considerations, the Office needs to effectively filter WFA Article 15 communications, and in doing so to be selective in deciding which situations are recommended for opening a preliminary examination. In this context, it is further important to highlight that the Office does not open preliminary examinations for complementarity enhancement or preventive purposes – rather, these are ancillary objectives that may only be pursued *if* there is first a sound factual and legal basis to initiate a preliminary examination.

8.4. Transparency in and Publicity of Phase 1 Activities

Measures undertaken by the Office aimed at promoting transparency and publicizing preliminary examination activities, including those at Phase 1,

⁴⁶ OTP 2016 Report on Preliminary Examination Activities, para. 15, see *supra* note 40.

⁴⁷ See generally, for example, Carsten Stahn, “Damned If You Do, Damned If You Don’t: Challenges and Critiques of Preliminary Examinations at the ICC”, in *Journal of International Criminal Justice*, 2017, vol. 15, no. 3, pp. 413–34.

⁴⁸ See, in this regard, *supra* note 36.

⁴⁹ See, for example, Stahn, 2017, pp. 8, 10 (also noting the ‘width vs. depth’ dilemma), *supra* note 47.

may serve a number of key purposes and interests, such as: promoting better understanding of the preliminary examination process, correcting misperceptions, increasing predictability and thereby enhancing public perception of the Court's legitimacy and the credibility of the Office.⁵⁰ As frequently suggested, increased publicity of the Office's activities may also potentially contribute to catalysing national investigations and prosecutions⁵¹ and deterring on-going or future crimes,⁵² thereby furthering the Court's overall goals of ending impunity and preventing crimes.⁵³

However, the interest in transparency must be balanced against the need for confidentiality, particularly in the context of the Office's Phase 1 activities. In this respect, it is important to recall that pursuant to Rule 46 of the Rules of Procedure and Evidence, the Office must protect the confidentiality of information provided to the Office under Article 15 of the Statute.⁵⁴ Accordingly, the Office publicizes aspects of its work and activities only where confidentiality and security considerations so permit.⁵⁵ As

⁵⁰ See generally, for example, OTP *Policy Paper on Preliminary Examinations*, paras. 93-94, 99, see *supra* note 1; ICC OTP, Strategic Plan 2016-2018, 16 November 2015, para. 55(3) (<http://www.legal-tools.org/doc/2dbc2d/>) ('OTP Strategic Plan 2016-2018').

⁵¹ See, for example, Fatou Bensouda, "Reflections from the International Criminal Court Prosecutor", in *Case Western Reserve Journal of International Law*, 2012, vol. 45, no. 1, pp. 508-09; David Bosco, "The International Criminal Court and Crime Prevention: By-product or Conscious Goal", in *Michigan State Journal of International Law*, 2011, vol. 19, no. 2, p. 181; OTP Strategic Plan 2016-2018, para. 55, see *supra* note 50.

⁵² In other words, the fact that a situation is under analysis by the OTP could signal or serve as a warning to perpetrators that they may be held to account, as to potentially influence their behaviour and help to prevent the further commission of crimes or an escalation of violence. See, for example, OTP Strategic Plan 2016-2018, para. 55(4), see *supra* note 50; Human Rights Watch, "ICC: Course Correction: Recommendations to the ICC Prosecutor for a More Effective Approach to "Situations under Analysis"", see *supra* note 7; Bosco, 2011, pp. 180-81, see *supra* note 51.

⁵³ See ICC Statute, Preamble, para. 5, see *supra* note 1; OTP *Policy Paper on Preliminary Examinations*, paras. 93-94, see *supra* note 1. See also OTP Strategic Plan 2016-2018, para. 55(4), see *supra* note 50; *Ibid.*, Annex – Results of the Strategic Plan (June 2012-2015), para. 18; Bensouda, 2012, p. 508, see *supra* note 51; Human Rights Watch, "ICC: Course Correction: Recommendations to the ICC Prosecutor for a More Effective Approach to "Situations under Analysis"", see *supra* note 7; Bosco, 2011, pp. 172-75, see *supra* note 51. See also generally OTP *Policy Paper on Preliminary Examinations*, paras. 101-06, see *supra* note 1.

⁵⁴ RPE, Rule 46, see *supra* note 7.

⁵⁵ See *ibid.*, Rules 46, 49; OTP Regulations, Regulation 28(2), see *supra* note 1. See also, for example, Claire Grandison, "Maximizing the Impact of ICC Preliminary Examinations", in *Human Rights Brief*, 10 February 2012 (<http://www.legal-tools.org/doc/eb1697/>).

a result, the Office generally engages in limited public reporting with respect to its Phase 1 activities. For example, as a matter of practice, the Office in this regard does not publish Phase 1 reports completed on WFA communications and only in limited cases publicly comments on allegations which are under Phase 1 analysis.

Beyond the issue of confidentiality, increased publicity of the Office's activities also gives rise to a number of potential challenges and disadvantages. This is particularly true in respect of the Office's Phase 1 activities. For example, publicizing Phase 1 activities may risk unduly raising expectations.⁵⁶ Public statements indicating that the Office has received certain communications, or is contemplating opening a preliminary examination into a given situation, are likely to generate significant attention, including among affected communities, in the media, and consequently the broader public.⁵⁷ Such statements are likely to consequently raise expectations that the Court will intervene.⁵⁸ The Office, however, opens preliminary examinations on the basis of information received under Article 15 only in limited circumstances, and as previous experience shows, most allegations received ultimately do not result in the opening of a preliminary examination. Accordingly, in such circumstances, expectations of affected communities are likely to be frustrated, which could contribute to undermining the public's confidence in the credibility and legitimacy of the Court.⁵⁹

Furthermore, as past experience has shown, some communications submitted to the Office may be politically driven. Thus, the Office must exercise caution and deflect any potential attempts at instrumentalizing

⁵⁶ See, for example, Stahn, 2017, p. 13, see *supra* note 47.

⁵⁷ Human Rights Watch, "ICC: Course Correction: Recommendations to the ICC Prosecutor for a More Effective Approach to "Situations under Analysis"", see *supra* note 7.

⁵⁸ Human Rights Watch has also pointed out that public statements by the OTP indicating that it may act in relation to a situation may in some circumstances also "inadvertently subvert national efforts", as "where confidence in national authorities to deliver justice is low, this can deter these constituencies from undertaking efforts to press their governments to carry out their primary obligations to bring accountability". *Ibid.*

⁵⁹ See, for example, *ibid.* (also noting that "a pattern of raised expectations followed by a failure to act can also dilute the impact of announced OTP preliminary investigations in helping catalyse national prosecutions and deterring ongoing crimes"). In this regard, Human Rights Watch further suggested that such situations may also "give rise to broader to broader perceptions of the ICC as a paper tiger, lessening the weight future statements of possible ICC action may carry". *Ibid.*

the Court for short-term political gains, including by not encouraging or facilitating such attempts by giving undue publicity to such types of communications and allegations contained therein.

In addition, in certain specific circumstances, publicizing situations of alleged crimes that are under Phase 1 analysis may not have a deterrent or preventive impact, but instead could influence the alleged perpetrators at issue to cover up evidence, intimidate potential witnesses or take other measures in order to frustrate any possible future examination or investigation.⁶⁰

While such examples of the potential risks do not mean that the Office should entirely forgo publicizing its activities, they do suggest that it is appropriate for the Office to exercise caution with respect to the extent it reports on its activities, particularly those at the early stage of Phase 1. In this regard, overall, such potential drawbacks tend to militate against revising the Office's current approach of generally keeping this stage of analysis a low profile, quiet process and broadly publicizing its activities and/or decisions *only* in limited circumstances and after careful deliberation of the advantages and disadvantages involved based on the circumstances of each case.

Moreover, from a logistical perspective, there are limits to the personnel and time that the Office can and should devote to publicizing its Phase 1 activities – such scarce resources arguably should primarily be focused on the Office's main task of analysis.⁶¹ This approach is con-

⁶⁰ See Bosco, 2011, p. 181, see *supra* note 51. Publicity could also more generally “compromise access to victims and witnesses or complicate dialogues with States”. Stahn, 2017, p. 13, see *supra* note 47. Advance warning or indications of the Office's monitoring of, and contemplation of opening a preliminary examination into, a given situation, such as through a public statement, could provide an impetus for a State Party to consider preemptively withdrawing from the Statute. For example, following the Prosecutor's statement regarding her monitoring of the situation in the Philippines, President Duterte, as well as other Filipino government officials, raised the possibility that Philippines might withdraw from the Court. Neil Jerome Morales and Stephanie van den Berg, “Philippines’ Duterte says may follow Russia's withdrawal from ‘useless’ ICC”, in *Reuters*, 17 November 2016 (<http://www.legal-tools.org/doc/9138b0/>); DJ Yap, “Yasay: Philippines better off withdrawing from ICC”, in *Philippine Daily Inquirer*, 19 November 2016 (<http://www.legal-tools.org/doc/e2cca4/>).

⁶¹ See, for example, Human Rights Watch, “ICC: Course Correction: Recommendations to the ICC Prosecutor for a More Effective Approach to ‘Situations under Analysis’”, see *supra* note 7. See also generally OTP Strategic Plan 2016-2018, para. 55(5) (noting that “the effective use of resources is also essential during preliminary examination activities”), see *supra* note 50; *Ibid.*, Annex 1 – Results of the Strategic Plan (June 2012 – 2015), para. 11

sistent with the perspective that Phase 1 analysis is an initial filtering mechanism for the primary purpose of informing a decision on whether or not to open a preliminary examination (that is, a means for selection of situations for preliminary examination). Further, where resources are devoted to publicizing the Office's activities, such efforts should likely then be prioritized in relation to areas where the OTP can have the greatest potential impact. Accordingly, the priority should be on publicizing the Office's other core activities.⁶²

Despite these considerations, however, the Office does in fact take steps to act transparently, to the extent possible and appropriate, with respect to activities and decisions undertaken during Phase 1. In particular, to this end, the Office engages in a number of activities aimed at ensuring communication of its process and decisions to relevant stakeholders as well as, in certain circumstances, to the broader public.

Consistent with the OTP's Regulations, all senders of information under Article 15 are sent an acknowledgement by the Office upon receipt of their communication(s).⁶³ Given the Prosecutor's obligation to protect the confidentiality of information submitted under Article 15,⁶⁴ as mentioned previously, the Office normally does not publicize or comment on communications received.⁶⁵ However, if the sender of a given communication makes such communication public, the Office may then publicly confirm receipt of the communication, such as in response to media queries or requests by States, individuals, or other interested parties.⁶⁶

("The Office is constantly confronted with an over-demand of its services which calls for the most efficient use and management of its resources.").

⁶² For example, in this regard, arguably the potential for catalytic or deterrent effects are likely greater with respect to preliminary examination and investigation and prosecution activities, versus those of Phase 1, where the prospect for ICC intervention is more abstract and thus the OTP's potential leverage to influence the behaviour of relevant actors is reduced.

⁶³ OTP Regulations, Regulation 28(1), see *supra* note 1. See also *OTP Policy Paper on Preliminary Examinations*, para. 88, see *supra* note 1.

⁶⁴ See RPE, Rule 46, see *supra* note 7. See also OTP Regulations, Regulation 28(2), see *supra* note 1.

⁶⁵ See *OTP Policy Paper on Preliminary Examinations*, para. 88, see *supra* note 1.

⁶⁶ See OTP Regulations, Regulation 28(1), see *supra* note 1; *OTP Policy Paper on Preliminary Examinations*, para. 88, see *supra* note 1. See also generally OTP Regulations, Regulation 15(1), see *supra* note 1.

Following the initial basic review and filtering, senders of communications are also subsequently informed of the outcome of the Office's assessment, the reason underlying it, and, where applicable, the action that will accordingly be taken with respect to the information provided.⁶⁷ Additionally, with respect to WFA communications, once the Office later completes its additional analysis and takes a decision on whether or not there is a basis to proceed to Phase 2 in relation to the allegations received, senders of such communications are also accordingly informed, including of the reason(s) for such decision. During the Phase 1 process, the Office also at times engages directly with communication senders and, where appropriate, other relevant stakeholders,⁶⁸ often on a confidential basis, in relation to situations under Phase 1 analysis. Such engagement includes, for example, follow-up by the Office in some cases to seek additional information or clarifications from communication senders and in-person meetings to discuss issues related to the Phase 1 process generally, specific allegations and information received under Article 15, and/or decisions taken by the Office.

When the Office decides to open a preliminary examination, such decisions are not only conveyed to the relevant communications senders but are also accompanied by a public announcement by the Prosecutor.⁶⁹ By contrast, such an approach is typically not taken in relation to situations where the Office has decided not to proceed in relation to information on alleged crimes received under Article 15. While such decisions are directly communicated to senders,⁷⁰ the Office however generally does not more broadly publicize or disseminate these decisions. That said,

⁶⁷ Such communication of the decisions taken in relation to information submitted under Article 15 is consistent with the Prosecutor's relevant obligations under the Statute and Rules of Procedures and Evidence. See ICC Statute, Article 15(6), see *supra* note 1; RPE, Rule 49, see *supra* note 7.

⁶⁸ For example, once it has been made public (by the sender) that a communication relating to a given situation have been received by the Office, governments and other concerned actors can and do frequently engage with the Office.

⁶⁹ OTP *Policy Paper on Preliminary Examinations*, para. 95, see *supra* note 1. See, for example, ICC OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela, 8 February 2018 (<http://www.legal-tools.org/doc/207e84/>); ICC OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the situation in Burundi, 25 April 2016 (<http://www.legal-tools.org/doc/62ee7b/>).

⁷⁰ See ICC Statute, Article 15(6), see *supra* note 1; RPE, Rule 49, see *supra* note 7.

the Office has issued public statements in limited cases, explaining its decisions not to open a preliminary examination into a given situation, including those (i) in relation to alleged crimes committed by ISIS,⁷¹ and (ii) on the basis of the purported Article 12(3) declaration lodged on behalf of former Egyptian President Mohamed Morsi (following his removal from office) with respect to alleged crimes committed on the territory of Egypt since 1 June 2013.⁷² Such public statements by the Office were necessary and important given the numerous inquiries received by the Office and the considerable public interest and speculation generated by such communications.⁷³ In light of the attention they attracted and the nature of issues involved, these situations thus warranted the Office directly addressing and clarifying publicly the decision not to proceed and the particular rationale behind it.⁷⁴

Additionally, with respect to public reporting, the Office also provides annual statistics on the number of Article 15 communications received and how many of those were deemed either to be manifestly outside the Court's jurisdiction, linked to a preliminary examination or investigation, or to warrant further analysis.⁷⁵ In a few particular cases, the

⁷¹ See OTP Statement on Alleged Crimes Committed by ISIS, see *supra* note 28.

⁷² ICC OTP, The determination of the Office of the Prosecutor on the communication received in relation to Egypt, 8 May 2014 (<http://www.legal-tools.org/doc/2945cd/>) ('OTP Determination on Communication Received on Egypt'). See also generally OTP Strategic Plan 2016-2018, Annex – Results of the Strategic Plan (June 2012-2015), para. 17, see *supra* note 50.

⁷³ See OTP Statement on Alleged Crimes Committed by ISIS, see *supra* note 28; OTP Determination on Communication Received on Egypt, see *supra* note 72.

⁷⁴ See OTP Statement on Alleged Crimes Committed by ISIS, see *supra* note 28; OTP Determination on Communication Received on Egypt, see *supra* note 72. See also generally OTP Strategic Plan 2016-2018, Annex – Results of the Strategic Plan (June 2012-2015), para. 17, see *supra* note 50. In the situation of the alleged crimes by ISIS, the 2015 statement also provided a useful opportunity for the Prosecutor to publicly reaffirm and emphasise the essential role and responsibility of national authorities in the investigation and prosecution of mass crimes, including the alleged crimes in question which the Prosecutor described as constituting "serious crimes of concern to the international community", while at the same time express a commitment to work, as appropriate, with relevant States in order support domestic investigations and prosecutions of relevant crimes by their nationals, such as through information sharing. OTP Statement on Alleged Crimes Committed by ISIS, see *supra* note 28.

⁷⁵ See, for example, OTP 2016 Report on Preliminary Examination Activities, para. 18, see *supra* note 40.

Office has also issued public preventive statements in relation to situations that were being monitored by the Office at Phase 1.⁷⁶

Admittedly, however, there is still room for enhanced transparency in the selection of situations for preliminary examinations and the explanation of reasons underlying the conclusions taken at Phase 1. Cognizant of this, the Office has recently decided to provide a more detailed response to the senders of WFA communications outlining the reasoning for such decisions⁷⁷ – a new approach that the Office implemented in 2017. Such approach aims not only at increasing communication senders’ understanding of the criteria guiding the OTP’s decision-making process and the basis for the conclusions reached, but also reinforcing the perceived credibility and seriousness of the Office’s actions and deliberation process. By more clearly articulating and conveying the legal basis for its decisions, the Office can potentially alleviate suspicion and counter speculation or allegations that a decision taken with respect to a given situation was motivated by political or other non-legal factors and thereby build greater trust in its decision-making process.

8.5. Quality Control in Phase 1

The activities undertaken during Phase 1 constitute an important component of the work of the OTP as they inform the decision to open a preliminary examination, when otherwise not automatically triggered by a referral or Article 12(3) declaration, and can thus play a role in the types of situations and crimes which may later become the subject of proceedings before the Court. The question thus arises as to what level of external oversight or other mechanisms are available in order to ensure quality in this integral, early stage of analysis by the Office.

⁷⁶ ICC OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda concerning the situation in the Republic of the Philippines, 13 October 2016 (<http://www.legal-tools.org/doc/bbc78e/>); ICC OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the worsening security situation in Burundi, 6 November 2015 (<http://www.legal-tools.org/doc/878e16/>); ICC OTP, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, regarding the recent pre-election violence in Burundi, 8 May 2015 (<http://www.legal-tools.org/doc/345bf9/>). So-called ‘preventive statements’ issued by the Office are generally meant to “deter the escalation of violence and the further commission of crimes” and “put perpetrators on notice”. *OTP Policy Paper on Preliminary Examinations*, para. 106, see *supra* note 1.

⁷⁷ OTP 2016 Report on Preliminary Examination Activities, para. 15, see *supra* note 40.

In this regard, importantly, it is pointed out that the Statute does not provide for any explicit external control over the OTP's assessment of Article 15 communications at Phase 1. In particular, there is no mechanism allowing judicial review of the Prosecutor's decision to initiate, or decline to initiate, a preliminary examination on the basis of such communications. For example, the sender of an Article 15 communication cannot challenge the Prosecutor's decision not to open a preliminary examination following a Phase 1 assessment by seeking review by the ICC Chambers – as illustrated, for example, in the case of the purported Article 12(3) declaration lodged on behalf of former Egyptian President Morsi.⁷⁸ As noted by the Pre-Trial Chamber in that case, in the context of *proprio motu* proceedings under Article 15 of the Statute, the possibility of judicial review is limited to situations where the Prosecutor decides not to proceed based on Article 53(1)(c) of the Statute, that is, based on the interests of justice provision.⁷⁹ Decisions taken by the Prosecutor during Phase 1 concerning whether the relevant jurisdictional criteria are met therefore fall outside of the scope of judicial review provided for under the Statute.⁸⁰

Given the number of Article 15 communications continuously received and processed by the Office as well as the nature of the assessment undertaken at Phase 1, the deference afforded to the Prosecutor is in fact more appropriate, considering, among other things, that judicial supervision at this early filtering stage would likely be too burdensome. Further, the absence of judicial oversight does not mean that there are no means available to safeguard the quality and reasonableness of decisions taken by the Prosecutor as Phase 1. Rather, in such circumstances, the maintenance of a certain standard in terms of quality, legal reasoning and coher-

⁷⁸ See ICC, Pre-Trial Chamber, Decision on '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, paras. 8-9 ('Decision on Egyptian Request for Review') (<http://www.legal-tools.org/doc/bfbb8f/>).

⁷⁹ *Ibid.*, paras. 7-8. See also ICC Statute, Article 53(3)(b), see *supra* note 1.

⁸⁰ See Decision on Egyptian Request for Review, para. 9, see *supra* note 78. By contrast, in the case of referral by a State Party or the UN Security Council, a decision by the Prosecutor not to proceed based on, *inter alia*, Article 53(1)(a) may be reviewed by the Pre-Trial Chamber, upon a request from the relevant referring State or the Security Council. See ICC Statute, Article 53(3)(a), see *supra* note 1.

ence in terms of decisions taken accordingly instead falls primarily on the Office itself.

In this regard, to ensure quality in the internal review and evaluation of Article 15 communications, the Office has notably implemented, as described above, an organized, consistent process for effectively and efficiently filtering and assessing the numerous communications and allegations received under Article 15. This involves: a systematic procedure for the initial filtering and categorization of communications received, independently substantiating allegations received with reliable open sources, applying a standard of proof that is commensurate with the object and purpose of this early stage of analysis, conducting objective and impartial analysis in accordance with the relevant statutory provisions and jurisprudence, and subjecting analysis and conclusions to levels of internal review within the Office.

Such approach, built on a multi-layer framework of centralized review, also ensures the coherence of the decisions taken by the Office and reduces the possibility that similar allegations may be treated differently or in an inconsistent manner, or that conclusions are made on the basis of extemporaneous considerations. Likewise, the fact that the Office has established in clear terms the scope and the limit of its discretion during the Phase 1 process prevents the risk of arbitrariness in decisions taken on ‘borderline situations’.

In addition, the quality of this internal process is potentially further enhanced by the Office’s consultation with external actors during this process. In particular, at Phase 1, the Office frequently engages directly with communication senders and, where appropriate, other relevant actors, to explain the process, discuss allegations and submissions, and seek additional information or clarifications where necessary. After a decision is taken, senders of dismissed communications can also seek to convince the Prosecutor to reconsider a decision by submitting additional information – a possibility which is always noted in the Office’s final response to senders of dismissed communications.⁸¹ As past practice has shown, senders in fact often do take advantage of this option and follow-up with additional information. Overall, such direct exchanges and dialogues serve to improve the quality of the analysis and decisions of the Office, allowing senders and other relevant stakeholders in the process to provide views

⁸¹ See generally *ibid.*, Article 15(6); RPE, Rule 49(2), see *supra* note 7.

and input which may better inform or assist the Office's analytical and decision-making process at Phase 1. Furthermore, such engagement gives communication senders and other relevant actors the possibility to be heard and to better understand the Office's approaches and positions.

The Office also further engages in a number of other activities in order to enhance transparency in the Phase 1 process, which also potentially provide a means towards further quality control. These efforts may contribute to a system of diffuse control over the decisions and choices of the Office in this important early stage of the process.

Most importantly, the Office conveys its decisions and reasons for such decisions directly to the senders of Article 15 communications. In accordance with the new approach implemented in 2017, the Office has also begun providing more detailed explanations regarding the specific legal reasoning and considerations underlying its decisions on WFA communications. In cases where such types of communications are dismissed, more clarity and specificity regarding the reason for the dismissal may better enable senders to understand the particular issues on which they can provide additional information in any further communications on the same situation in order to seek reconsideration of a decision.

In terms of public reporting, the Office makes public announcements when preliminary examinations are opened and, in a limited number of cases, has issued public statements explaining decisions not to open a preliminary examination. Further, the Office's efforts in the last several years to publicly explain its filtering process in general and more recently to outline the policy considerations that the Office may consider in 'borderline situations', can be seen as an attempt to shape the Prosecution's discretion in a clear and transparent manner, as to promote greater public understanding of and predictability in the Office's selection of situations for preliminary examinations.

All of these various measures undertaken by the Office to share information concerning the Phase 1 process and decisions taken ultimately have the effect of subjecting its policies, decisions and reasoning to public discourse and scrutiny. In this regard, while not subject to judicial oversight, the Office may nonetheless be held accountable for the quality and consistency of its work processes, analysis and conclusions at Phase 1 by a variety of actors and entities through their reactions to and feedback on the Office's practices and selection choices at this stage. Further, more generally, such external feedback may provide useful input that may be

taken into account by the Office in order to improve the Phase 1 process as well as to further inform its selection of situations for preliminary examination.⁸²

8.6. Conclusion

The OTP possesses a significant degree of autonomy in carrying out its Phase 1 activities and selecting situations for preliminary examination on the basis of Article 15 communications. This arrangement, however, is appropriate given the need to efficiently and effectively manage and respond to the hundreds of communications received per year.

Furthermore, despite the absence of a formal mechanism of external oversight, the quality and coherency of the decisions taken by the Office at Phase 1 are ensured in part internally through the Office's implementation of a consistent assessment process guided by sound and transparent legal criteria and relevant policy considerations, and subject to levels of internal review.

Additionally, in conducting its Phase 1 activities, the Office does not work from the shadows. Rather, it engages with communication senders and other relevant stakeholders and conveys its decisions to the relevant audiences. In doing so, the Office has taken increasing steps to make the Phase 1 process and decisions taken at this stage more understandable to communication senders and, in certain circumstances, also to other relevant stakeholders and the general public. Through such efforts, the Office demonstrates the seriousness of its review process and explains why certain alleged situations have moved forward to Phase 2, while others have not. Moreover, through such transparency, the Office exposes its decisions, and the reasoning underlying them, to external scrutiny and importantly provides senders of communications as well as other interested parties with the opportunity to seek reconsideration of decisions, such as through the submission of new facts or information.

Overall, this approach ensures a level of accountability and enables individuals, NGOs, and other actors to play a meaningful role in the process, while at the same time preserves the necessary level of prosecutorial

⁸² For other considerations on how external input can contribute towards enhancing quality at the Phase 1 stage, see Matilde E. Gawronski, "The Legalistic Function of Preliminary Examinations: Quality Control as a Two-Way Street", in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 1*, Torkel Opsahl Academic EPublisher, Brussels, 2018, chap. 7.

independence and discretion in the ultimate selection of situations for preliminary examination.

Part 2
Case Studies or Situation Analysis

The ICC Involvement in Colombia: Walking the Fine Line Between Peace and Justice

Marina Aksenova*

9.1. Introduction

This chapter explores the involvement of the International Criminal Court ('ICC') in Colombia. In particular, it focuses on the approach of the Office of the Prosecutor ('OTP') to Colombia's compliance with its obligations under the Rome Statute and general international law on the one hand, and Colombia's reception of international oversight of the peace deal negotiations and its prior transitional justice efforts on the other. The OTP preliminary examination reports of 2012, 2014, and 2016 as well as other communication from the ICC show a great deal of discretion afforded to Colombia in designing and implementing its local accountability mechanisms. Such flexibility became particularly important as the Colombian government and the leaders of the Revolutionary Armed Forces of Colombia ('FARC') initiated peace talks in Havana in 2013 to end the protracted civil war. James Stewart, Deputy Prosecutor of the ICC, expressly noted in his public address in Bogota in May 2015 that the peace agreement would affect the Prosecutor's assessment of the situation in Colombia.¹ The OTP further observed the importance for its evaluation of

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¹ James Stewart, "Transitional justice in Colombia and the role of the International Criminal Court", Speech delivered by the ICC Deputy Prosecutor in Bogota on 13 May 2015, p. 9 (<http://www.legal-tools.org/doc/05d0ce/>).

contextualizing crimes and appraising suspended or reduced sentences rendered by domestic courts in the light of the circumstances of each individual case.² At the same time, the OTP consistently stressed the importance of the effective punishment for those most responsible for crimes committed during the protracted civil war.³

The chapter adopts a socio-legal approach. It relies on a number of interviews with members of the Colombian Constitutional Court, civil society actors and the office of the Attorney General of Colombia conducted in Bogota in March 2017. It also contrasts the legal framework applicable to preliminary examinations of the ICC with the provisions of the peace deal and domestic criminal law. While it is essential to note that the ICC in conducting preliminary examinations is not specifically tasked with passing judgments on the quality of domestic law, this factor nonetheless plays a role in evaluating Colombia's ability and willingness to conduct its own investigations. The architecture of the ICC is such that by virtue of ratifying the Rome Statute of the ICC, States subscribe to, at least, some of its norms when implementing local transitional justice mechanisms aimed at tackling mass atrocities. The Court is complementary to national criminal jurisdictions.⁴ Complementarity is thus one way of ensuring dissemination of international criminal law values via alternative means – that is, not through international criminal trials. Pursuant to this principle, the ICC monitors domestic actors for the purpose of establishing whether there exist “reasonable grounds to proceed to investigation at an international level”.⁵ Such an evaluative framework for assessment presents a perplexing question: how much flexibility do national authorities enjoy in implementing local standards conceived internationally? In other words, can complementarity be compared to the doctrine of

² ICC Office of the Prosecutor (‘OTP’), Situation in Colombia: Interim Report, November 2012, paras. 206, 210 (‘OTP 2012 Report’) (<http://www.legal-tools.org/doc/7029e5/>); see also J. Easterday, “Beyond the ‘shadow’ of the ICC: struggles over control of the conflict narrative in Colombia”, in Christian De Vos, Sara Kendall, and Carsten Stahn (eds.), *Contested Justice: the Politics and Practice of the International Criminal Court*, Cambridge University Press, Cambridge, 2015, pp. 448–49, at p. 448.

³ Stewart, 2015, p. 8, see *supra* note 1; OTP 2012 Report, para. 11; OTP, Statement of ICC Prosecutor, Fatou Bensouda, on the conclusion of the peace negotiations between the Government of Colombia and the Revolutionary Armed Forces of Colombia – People’s Army, 1 September 2016 (‘Bensouda Statement’) (<http://www.legal-tools.org/doc/c64dd0/>).

⁴ Rome Statute of the International Criminal Court, 17 July 1998, Article 17 (‘ICC Statute’).

⁵ *Ibid.*, Article 53(1).

the margin of appreciation embedded, for example, in the jurisprudence of the European Court of Human Rights?⁶

In its most recent report on preliminary examination activities dated 14 November 2016, the OTP adopted a cautious approach to the issue by pledging to continue examining developments related to peace negotiations, in particular the changes to the text of the agreement, *to the extent relevant to preliminary examinations*.⁷ Based on the text of the report, the ICC retained considerable discretion for any future assessment, while at the same time affording Colombia a wide margin of appreciation in implementing the peace deal, including the creation of the Special Jurisdiction for Peace ('SJP'), which is the mechanism tasked with investigating and prosecuting those most responsible for conflict-related crimes.⁸ The OTP stressed a plethora of objectives sought by the new mechanism and challenges in achieving them:

The SJP seems designed to establish individual criminal responsibility, bring perpetrators to account and to fully uncover the truth, while also seeking to fulfill sentencing objectives of deterrence, retribution, rehabilitation and restoration. Fulfillment of these objectives will not only depend on the procedures and conditions set forth in the Agreement, but also on the effectiveness of restrictions on liberty imposed on individuals, the nature of which have yet to be clearly laid out.⁹

Colombia has been under preliminary examination by the ICC since 2004. The engagement of the ICC in the country had started even earlier, however, with the signature by the government of President Andres Pastrana of the Rome Statute of the ICC in 1998. Pastrana, who had initiated peace talks with the members of the FARC, believed that the ratification of the Statute could act as deterrent for guerrillas and promote a commit-

⁶ This doctrine grants national authorities discretion in implementing their obligations under the European Convention on Human Rights. See S. Greer, *The Margin of Appreciation: Interpretation and Discretion under European Convention on Human Rights*, Council of Europe Publishing, 2000.

⁷ OTP, *Report on Preliminary Examinations Activities 2016*, 14 November 2016, para. 265, emphasis added ('OTP 2016 Report') (<http://www.legal-tools.org/doc/834809/>).

⁸ *Ibid.*, para. 257.

⁹ *Ibid.*

ment to the peace process.¹⁰ From the start of preliminary examinations, the OTP has been active in Colombia, imparting international criminal law values through both formal and informal means. The OTP issued a number of country reports on preliminary examinations conducted by the ICC covering, among others, Colombia.¹¹ The Chief Prosecutor sent private letters to the members of the Colombian Constitutional Court, and gave interviews to the press on some of the most contentious issues, such as the applicable standard for command responsibility.¹² In 2015, ICC Deputy Prosecutor James Stewart delivered a public lecture at one of the universities in Bogota, during which he clarified the position of the OTP on sentencing and prioritization of cases in the domestic context.¹³ The OTP conducted multiple country visits to Colombia: the members of the prosecution met with different local actors including the Colombian Attorney General, members of the Constitutional Court, General Prosecutor and civil society organizations. Finally, the OTP issued a number public statements on its website, most prominently endorsing the peace deal initially signed on 24 August 2016¹⁴ – the date on which, after four years of negotiations, the government of President Juan Manuel Santos and the FARC guerrillas reached a much-celebrated peace deal marking the end of a protracted civil war.

The signing of the peace deal was seen by the international community and by many in Colombia as essential in effectuating necessary societal changes and putting to rest one of the longest civil wars in history. The eventual deal reflected agreement on various items of the negotiating agenda, including rural reform, solutions to the illicit cultivation of drugs, bilateral cessation of hostilities and demobilization, guarantees of political participation for the FARC, and, finally, justice for victims (item 5 of the

¹⁰ N. Sanchez Leon, *Acceptance of International Criminal Justice: Country Study on Colombia*, International Nuremberg Principles Academy, 2016, p. 4.

¹¹ OTP, *Report on Preliminary Examination Activities 2011*, 13 December 2011 ('OTP 2011 Report') (<http://www.legal-tools.org/doc/4aad1d/>); OTP 2012 Report; *idem*, *Report on Preliminary Examination Activities 2014*, 2 December 2014 ('OTP 2014 Report') (<http://www.legal-tools.org/doc/3594b3/>); *idem*, *Report on Preliminary Examination Activities 2015*, 12 November 2015 ('OTP 2015 Report') (<http://www.legal-tools.org/doc/ac0ed2/>); OTP 2016 Report.

¹² A. Alsema, "Prosecutor warns ICC will try military commanders if Colombia transitional justice fails", in *Colombia Reports*, 26 January 2017.

¹³ Stewart, 2015, see *supra* note 1.

¹⁴ Bensouda Statement.

agenda).¹⁵ The deal was put to a popular vote five weeks after its signature with a view to ensuring its legitimacy and with the high expectations of approval. Strikingly, however, the Colombian voters rejected the deal by a narrow margin on 2 October 2016.¹⁶ The government, nonetheless, proceeded with the adoption of its revised version by engaging fast track powers to pass legislation through Congress.¹⁷ This move allowed avoiding the risk of holding a second referendum and losing. The deal is therefore currently at the stage of implementation. The ICC, within the framework of preliminary examinations, closely monitors this process. A recent example of this activity is a column published in Colombian weekly *Semana* in January 2017 by Fatou Bensouda, where she observed with concern the removal of all references to Article 28 of the Rome Statute from the revised peace deal. This provision sets the standard for command responsibility. Bensouda warned that the ICC would take over the cases of senior military and guerrilla commanders if Colombia fails to effectively prosecute them for war crimes and crimes against humanity in the absence of appropriate legal standard.¹⁸

The interaction between the ICC and Colombian domestic actors can thus be described as a ‘dialogical model’. This model can be contrasted with a simple linear way of communication, whereby information is transmitted in a linear, unidirectional way.¹⁹ In contrast, the dialogical model presupposes active engagement of both the transmitter and the receiver of information in the process of constructing its meaning.²⁰ Language is seen as a social practice rather than a mere device for communication.²¹ The OTP transmits international criminal law messages by en-

¹⁵ Colombia, Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera, 24 August 2016 (<http://www.legal-tools.org/doc/d6c6a1/>).

¹⁶ “Colombia referendum: Voters reject Farc peace deal”, in *BBC News*, 3 October 2016 (<http://www.legal-tools.org/doc/b386a8/>).

¹⁷ Colombia, Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera, 24 November 2016 (<http://www.legal-tools.org/doc/30a81e/>) (‘Peace Deal’).

¹⁸ A. Alsema, “Prosecutor warns ICC will try military commanders if Colombia transitional justice fails”, see *supra* note 12.

¹⁹ M. Colombo, “Theoretical Perspectives in Media-Communication Research: From Linear to Discursive Models”, in *Forum: Qualitative Social Research*, May 2004, vol. 5, no. 2, art. 26.

²⁰ *Ibid.*

²¹ *Ibid.*

gaging with various stakeholders, using different techniques. What is important is that the underlying principles and values of the discipline are clearly communicated and endorsed in the process of domestic transitional justice building. In this sense, the principle of complementarity allows for the fulfilment of the overarching symbolic purpose of international criminal law within the domestic context. Saffon and Uprimny note that in the field of disarmament and peace negotiations with armed groups, the principles of international criminal justice have acted as “virtuous restrictions” in Colombia for they harnessed the political dynamics of the peace negotiations and as a result, included the interests and expectations of antagonistic actors.²²

The chapter proceeds as follows. Section 9.2. explains the complementarity framework employed by the ICC in Colombia and provides a timeline for the Court’s involvement in the country. It outlines the modalities of the ICC’s engagement. It also sheds light on the deeper legitimacy deficit of the peace agreement, which results from the government’s decision to move forward with the updated version of the peace agreement without a second popular referendum. Section 9.3. explores the compatibility of specific international criminal law standards with the provisions of the peace deal and implementing legislation. These questions open up space for a closer and more tangible interaction between the ICC and domestic law actors. The discourse pertaining to the appropriate legal standards can be seen as more superficial as compared to a deeper legitimacy deficit discourse. It nonetheless provides for an important opportunity for the ICC to engage in an active dialogue with local actors, thereby backing transitional justice processes in Colombia so long as they comply with standards developed at the international level. The problem here is the degree of flexibility afforded to domestic actors in enforcing these standards. This section focuses on the following legal issues: the nature of the deal, the policy of prioritization of cases, penalties for those found responsible, and the appropriate standard of command responsibility. Some conclusions are drawn in the final section of the chapter.

²² Maria P. Saffon and Rodrigo Uprimny, “Uses and Abuses of Transitional Justice in Colombia”, in Morten Bergsmo and Pablo Kalmanovitz (eds.), *Law in Peace Negotiations*, Torkel Opsahl Academic EPublisher, Oslo, 2007.

9.2. The Dialogical Model of the ICC Involvement in Colombia

The ICC prosecution team has been conducting preliminary examinations in Colombia since 2004. Preliminary examination is a technical implementation of the principle of complementarity, which gives primacy to national jurisdictions.²³ The Rome Statute specifies that the purpose of preliminary examinations is to establish whether there is reasonable basis to proceed with an investigation pursuant to criteria set out in Article 53 of the Statute.

In accordance with the Rome Statute, the OTP is responsible for making this determination with reference to jurisdiction, admissibility and the interests of justice.²⁴ Admissibility consideration comprises complementarity and gravity assessments, meaning that the prosecution evaluates “the existence of relevant national proceedings in relation to the potential cases being considered for investigation by the Office” in the light of the policy of focusing on those most responsible for the most serious crimes within the jurisdiction of the Court. Where national proceedings exist, the OTP examines their genuineness.²⁵ Gravity assessment includes the evaluation of the scale, nature, and manner of commission of the crimes, and their impact,²⁶ while the ‘interests of justice’ is a countervailing consideration allowing for not proceeding with investigations if this would not serve the interests of justice, taking into account the gravity of crime and interests of victims.²⁷

As one of the core pillars of the ICC, the principle of complementarity appears in Article 1 of the Rome Statute, which sets main parameters of the Court’s operation:²⁸

An International Criminal Court (“the Court”) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal

²³ ICC Statute, Article 17.

²⁴ OTP, *Policy Paper on Preliminary Examinations*, 1 November 2013 (‘*Policy Paper on Preliminary Examinations 2013*’) (<http://www.legal-tools.org/doc/acb906/>).

²⁵ *Ibid.*, para. 8.

²⁶ *Ibid.*, para. 9.

²⁷ ICC Statute, Article 53(1)(c); *Policy Paper on Preliminary Examinations 2013*, para. 10.

²⁸ *Ibid.*, Article 17. The Article gives detailed account of the principle of complementarity.

jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Inclusion of the principle of complementarity in the introductory provision of the Rome Statute reflects one of the principal concerns of many States during the preparation of the document – that is, maintaining and preserving national criminal jurisdiction. The negotiating parties were well aware of the primary jurisdiction of the *ad hoc* tribunals for the former Yugoslavia and Rwanda established by the UN Security Council under Chapter VII of the UN Charter as temporary mechanisms aimed at deterring and punishing atrocities in the respective regions. Parties to the Rome Statute were reluctant to give similar broad powers to the ICC, a permanent and treaty-based body, as this would have entailed, in the eyes of the negotiators, giving up sovereignty over domestic prosecutions of possible international crimes committed in their territory or by their nationals. Among the most challenging issues during the drafting of the Rome Statute was therefore finding a way to *supplement* the exercise of national jurisdiction.²⁹ Complementarity was found to be the solution: the ICC acts only when national courts are ‘unable and unwilling’ to perform their tasks. Such design leaves domestic authorities with a lot of wiggle room in complying with standards set out in the Rome Statute.

As mentioned earlier, the nature of the ICC’s involvement in Colombia can be assessed within the framework of ‘dialogical model’.³⁰ Table 1 (at the end of this section) maps the chronology and type of interactions between the ICC and domestic actors in Colombia. In addition to legal communications in the form of statements and reports, the ICC provided limited support, mostly in terms of expertise and outreach, for peace negotiations between the government and FARC guerrilla forces. This type of activity falls under the umbrella of ‘positive complementarity’. The term refers to the Court’s efforts to promote capacity building and domestic compliance.³¹ It may be conceptualized as a second pillar of the broader notion of complementarity, the first one dealing strictly with ad-

²⁹ Roy S. Lee, “Introduction: The Rome Conference and Its Contributions to International Law”, in R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results*, Kluwer Law International, 1999, p. 27, emphasis added.

³⁰ Colombo, 2004, see *supra* note 19.

³¹ Especially after the Kampala Review Conference. See ICC Assembly of States Parties, Review Conference of the Rome Statute of the International Criminal Court: Official Records, 11 June 2010 (<http://www.legal-tools.org/doc/146df9-1/>).

missibility assessment. Positive complementarity is achieved via different routes including outreach activities, adjusting prosecutorial strategy, promoting States' engagement, involving civil society and consolidating academic efforts to this effect.³²

What follows is that since the beginning of preliminary examinations in Colombia, the OTP engaged with local actors through a sequence of symbolic communications that had the effect of producing limited international backing for transitional justice processes in the country, as well as shaping to some extent public discourse and pointing to potential pitfalls in designing local transitional justice mechanisms. This dialogical way of engagement with local actors is thus reflective of the idea of symbolic power discussed by Bourdieu.³³ This power embodies the possibility to impose visions and divisions of the social world.³⁴ This process of imposition through law and legal institutions results in law becoming the force capable of transforming social reality. Values contained in law go beyond strict legal constructs or limitations of a particular case or situation. One may object that the possibility of commencing formal investigations in Colombia amounts to exercising actual rather than symbolic power. The ICC OTP has yet not made a decision to move to the formal stage of investigation but it has not ruled out such prospect in the future. Interviews with the local actors revealed, however, that they are more affected by the reputational damage potentially resulting from the incompatibility of domestic transitional justice mechanisms with international law standards, rather than the actual threat of the ICC investigations as such. It is well understood that even if the ICC commences proceedings, its reach would be very limited.

The dialogical model of the ICC's engagement in Colombia is well demonstrated by the controversy related to the letters privately sent by the ICC Chief Prosecutor Fatou Bensouda to the Constitutional Court of Co-

³² Morten Bergsmo, Olympia Bekou and Anika Jones, "Complementarity After Kampala: Capacity Building and the ICC's Legal Tools", in *Goettingen Journal of International Law*, 2010, vol. 2, no. 2, p. 793. See also Philip Ambach, "A Look Towards the Future – the ICC and 'Lessons Learnt'", in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2016, p. 1281.

³³ P. Bourdieu, *Language and Symbolic Power*, Harvard University Press, 1991.

³⁴ P. Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field", in *Hastings Law Journal*, 1987, vol. 38, no. 5, p. 839, cited by J.V.H. Holtermann and M.R. Madsen, "European New Legal Realism and International Law: How to Make International Law Intelligible", in *Leiden Journal of International Law*, 2015, vol. 28, no. 2, pp. 211–30.

lombia in July 2013. One of the letters criticized the possibility of suspended sentences for war crimes, crimes against humanity and genocide under the Legal Framework for Peace (*Marco Legal/Jurídico para la Paz*, hereinafter ‘LFP’). The law, passed in 2012, provided for a transitional justice mechanism primarily tackling crimes committed by the paramilitaries and included the possibility of suspending sentences in non-prioritized cases.³⁵ Bensouda argued that a sentence that is grossly and manifestly inadequate would invalidate the authenticity of domestic proceedings, thereby rendering the case admissible to the ICC.³⁶ The other letter disapproved of the practice of prioritization of cases under the LFP.³⁷ The ICC Prosecutor criticized the law and warned against replicating international prosecutorial guidelines at the domestic level for there is a difference between the ICC and State’s internal obligations. Eduardo Montealegre, Colombia’s Attorney General at the time, held a different view. He supported the practice of prioritization of cases under LFP and as a possible solution for the future agreement with the FARC.³⁸

The letters by the OTP created a backlash within domestic legal community.³⁹ Local actors viewed such a move as insensitive due to its timing – the letters were sent prior to the relevant ruling by the Constitutional Court on the matter and shortly after the peace talks with the FARC commenced in Havana, which added tension to the situation. The local audience perceived the letters as interference by the ICC in the domestic application of international criminal law standards. The question raised by many with the Colombian legal community was whether the Rome Statute imposes on a State a duty to prosecute. This particular instance of interaction exposed the lack of a clear understanding as to the degree of flexibility afforded to domestic actors under the complementarity framework when it comes to designing domestic transitional justice mechanisms. James Stewart, Deputy Prosecutor at the ICC, corrected the OTP position on prioritization during his public lecture at El Rosario University in Bo-

³⁵ Congress of Colombia, Legislative Act 01, 31 July 2012 (‘Legislative Act 01, 2012’) (<http://www.legal-tools.org/doc/dee32b/>).

³⁶ “Una ‘carta bomba’: La Fiscal de la Corte Penal Internacional se le atraviesa al Marco Jurídico para la Paz”, in *La Semana*, 17 August 2013 (<http://www.legal-tools.org/doc/791aa4/>).

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

gota in 2015, when he praised national authorities for making meaningful progress investigating and prosecuting crimes of paramilitaries, despite difficulties prioritizing cases.⁴⁰ He further stressed that the focus of the ICC is on those most responsible for the most serious crimes, thereby narrowing the scope of possible scrutiny of domestic proceedings by the OTP.⁴¹

Another important consequence of the dialogical method of ICC's involvement in Colombia is the inevitable practice of balancing peace and justice considerations when imparting international criminal law values. In deciding the format of interactions with domestic actors, the OTP undeniably showed some degree of deference to the peace process. Since 2007, the formal position of the Office has been to distinguish the 'interests of justice' and 'interests of peace', the latter falling outside of the mandate of the OTP.⁴² In practice, however, the ICC paid close attention to peace talks and currently closely monitors its implementation. Statements by Fatou Bensouda on 24 September 2015 and 1 September 2016 praised milestones achieved in peace negotiations but also stressed the importance of genuine accountability.⁴³

The dialogical engagement of the ICC in Colombia proved generally beneficial for the advancement of the international criminal justice principles and shaping the transitional justice landscape in Colombia. Nonetheless, there are points of tension created by the lack of clear agreement as to the degree of flexibility afforded to domestic actors within the complementarity framework of the ICC. At the core of interaction between the ICC and domestic actors in Colombia is the quest for the appropriate idea of justice for victims and perpetrators of mass atrocities as conceived at an international and domestic level. The process of preliminary examinations exposes the degree of convergence between the

⁴⁰ Stewart, 2015, see *supra* note 1, p. 7. See also N. Leon, "Symposium on the Colombian Peace Talks and International Law: Could the Colombian Peace Accord Trigger the ICC Investigation on Colombia?", in *AJIL Unbound*, 2016, vol. 110, p. 175.

⁴¹ *Ibid.*, p. 9.

⁴² OTP, *Policy Paper on the Interests of Justice*, 2007 (<http://www.legal-tools.org/en/doc/bb02e5/>). See also Stewart, 2015, *supra* note 1, p. 17.

⁴³ Bensouda Statement. See also OTP, Statement of the Prosecutor on the Agreement on the Creation of a Special Jurisdiction for Peace in Colombia, 24 September 2015 (<http://www.legal-tools.org/doc/e1fe89/>).

idea of justice promoted by the ICC and in Colombia through the peace deal.

There is one aspect of the peace deal where the involvement of the ICC is rather limited, however. The deeper issue in the discourse surrounding the peace deal and its implementation in Colombia is the legitimacy deficit ensuing from the government's decision to press ahead with the deal despite the 'no' vote in the referendum. In order to secure approval of the second deal, the President chose not to risk holding a second referendum but rather invoked his special powers in passing 'fast-track' legislation through Congress. The fast-track solution means that the main laws implementing the peace deal were adopted as a 'package deal' in a 'yes' or 'no' vote in Congress. Such laws enter into force upon their adoption and prior to their review by the Constitutional Court. This is in contrast with the regular procedure, whereby the Constitutional Court scrutinizes the project of the law before it enters into force. While the Constitutional Court retains its critical review powers with respect to fast-track laws, the fact they are already in force make it more difficult to strike them down from a political point of view. It is noteworthy that the Constitutional Court in May 2017 retracted the fast-track mechanism, which means that all future laws implementing the deal will have to be adopted according to a regular procedure.⁴⁴

Despite the government's decision not to hold the second referendum, it has tried to mitigate the effects of the 'no' vote. Over the course of several weeks following the initial rejection of the deal, the government of President Santos introduced amendments, for instance, providing for a more limited role of international judges within the newly created SJP and guaranteeing special treatment for the army.⁴⁵ The scope of possible amendments to the deal was, however, rather limited as the negotiators balanced conflicting interests of different stakeholders – 'yes' and 'no' campaigns, the FARC, and the civil society.

The legitimacy deficit of the deal caused by the lack of popular support is one of the biggest obstacles on the way to its successful execution because unresolved concerns of the 'no' campaign keep reappearing during the process of adoption of implementing legislation. The Colombi-

⁴⁴ A. Alsema, "All eyes on Santos as Colombia's peace process spirals out of control", in *Colombia Reports*, 22 May 2017 (<http://www.legal-tools.org/doc/721a64/>).

⁴⁵ Peace Deal, paras. 19, 65 and 66.

an Congress has already passed two laws in the peace deal package. The first one is the amnesty law for minor offences committed during armed conflict, which was approved by Colombia's Congress on 6 December 2016, despite strong opposition of the right-wing Democratic Centre party.⁴⁶ The amnesty law was essential in securing demobilization of the FARC by guaranteeing amnesties for political crimes (such as rebellion or sedition). The second law in the package concerned the most contentious part of the peace deal, namely the issue of justice and reparations, and was approved by the Congress on 4 April 2017.⁴⁷ Despite multiple disagreements, the Colombian Congress passed amendments to the Constitution creating the 'Integral System of Truth, Justice, Reparation and Non-repetition' (*Sistema Integral de Verdad, Justicia, Reparación y no Repetición*) (hereinafter '*El Sistema* law').⁴⁸ The new law creates a unique transitional justice mechanism oriented towards truth and reparations to victims.⁴⁹ One result of lingering disagreements in Congress is that the *El Sistema* law deviates somewhat from the original peace deal as it creates two separate legal regimes – one for the army and largely regulated by Colombian law, and the other for the FARC under the auspices of international law.⁵⁰ The law introduces a separate chapter dedicated exclusively to the army and designates it as *lex specialis*.

The legitimacy question can only be addressed if the peace deal is viewed in continuum. One of the pitfalls of the international community and many local actors in Colombia around the time of the signing of the deal was to regard it as a decisive victory and an end in itself.⁵¹ Arguably, a more constructive position would be to situate the deal as one of the steps in Colombia's complex transitional justice process. At the moment, the key to the survival of the deal is its effective implementation. The relevance of the ICC engagement at this broader legitimacy level is limited. The ICC stays in the background, providing its support for the deal

⁴⁶ "Colombia approves amnesty deal for thousands of Farc rebels", in *The Guardian*, 29 December 2016 (<http://www.legal-tools.org/doc/f816d6/>).

⁴⁷ Peace Deal, Section 5.

⁴⁸ Congress of Colombia, Legislative Act 01, 4 April 2017 (<http://www.legal-tools.org/doc/6305d2/>).

⁴⁹ See also Peace Deal, para. 5.1(a), stating that SJP's objective is satisfaction of victims' rights.

⁵⁰ Chapter VII of the *El Sistema* law applies only to State agents.

⁵¹ H.A. Garcia, Keynote Address at the American Society of Comparative Law, Younger Comparativists Committee, 6th Annual Conference, Koç University, 28-29 August 2017.

and successive transitional justice measures, while carefully pointing out potential pitfalls. It can be said that international criminal law adds legitimacy to the deal, while simultaneously exposing itself to the possibility of being ‘hijacked’ by those who campaign against the peace deal. In this sense, the principles of international criminal justice can be used to justify strikingly different views. For instance, in 2015, the General Prosecutor, in defending the peace process, argued that international law does not require actual imprisonment of the guerrillas. In contrast, the Attorney General, in opposing the process, invoked international standards of fighting impunity to insist that it is necessary for the FARC leadership to serve jail sentences.⁵²

Year(s)	Type of Interaction
1998	Andres Pastrana initiated talks with the FARC with the hope that adoption of the Rome Statute would help with peace talks.
2002	Colombia ratified the Rome Statute of the ICC.
2004	The OTP opened preliminary examination in Colombia.
2004–2012	Colombia sent in total 114 communications to the OTP.
2005	Colombia adopted the Justice and Peace Law used to investigate paramilitaries as well as politicians linked to illegal armed groups.
2004–2010	The Supreme Court of Colombia carried out trials of politicians allied with paramilitary groups pursuant to the Justice and Peace Law (2005). The situation became tense because the public viewed visits by the OTP as endorsement by the ICC of the activity of the Supreme Court convicting over 50 congressional representatives. ⁵³
13 December 2011	The OTP issued an annual interim report on Colombia identifying the crimes committed in the context of the civil war, including killings, enforced disappearances, rape and sexual violence, forcible transfer of the population, torture and conscription of children ⁵⁴ and responsible groups, including illegal armed

⁵² D. Valero, “Claves de lo que dijo la CPI sobre Colombia y la paz”, in *Diario El Tiempo*, 16 May 2015.

⁵³ Leon, 2016, p. 7, see *supra* note 10.

⁵⁴ OTP 2011 Report, paras. 65-71.

	groups, paramilitaries, police and army officials, and politicians with links to illegal armed groups. ⁵⁵ The OTP in light of its positive approach to complementarity welcomed the efforts of the Colombian government at seeking international support for its national proceedings. ⁵⁶
19 June 2012	The Colombian Senate approved the LFP, a transitional justice measure which included prioritization and selection of cases against those bearing greatest responsibility for crimes against humanity and war crimes, while providing for conditional suspension of all other non-selected cases and ensuing sentences. ⁵⁷
November 2012	The OTP issued a full interim report on Colombia and stressed the issues of false positives (killings of civilians by the army with the purpose of falsely presenting them as guerrilla fighters), sexual and gender-based crime and enforced disappearances.
1 July 2013	Start of the peace talks in Havana, Cuba.
26 July 2013	ICC Chief Prosecutor Fatou Bensouda sent a letter to the Constitutional Court of Colombia criticizing the possibility of suspended sentences for war crimes, crimes against humanity and genocide under the LFP. She argued that a sentence that is grossly and manifestly inadequate would invalidate the authenticity of domestic proceedings rendering the case admissible to the ICC. ⁵⁸
7 August 2013	ICC Chief Prosecutor Fatou Bensouda sent another letter to the Colombian Constitutional Court criticizing the practice of prioritization of cases under the LFP. Bensouda warned against replicating international prosecutorial guidelines at the domestic level for there is a difference between the ICC and State's internal obligations. In contrast, Eduardo Montealegre, Colombia's Attorney General at the time, supported the practice of prioritization of cases under LFP and as a possible solution for the future agreement with the FARC. ⁵⁹
28 August	The Constitutional Court issued its ruling C579 in which it up-

⁵⁵ *Ibid.*, para. 74.

⁵⁶ *Ibid.*, para. 85.

⁵⁷ Legislative Act 01, 2012.

⁵⁸ "Una 'carta bomba'", in *La Semana*, see *supra* note 36.

⁵⁹ *Ibid.*

2013	held domestic prioritization of cases under LFP based on Article 12 of the Constitution declaring peace to be a duty of State. ⁶⁰ The Constitutional Court also ruled out the practice of suspended sentences for grave international crimes. The Court recognized the need to strike a balance between different principles and values such as peace and reconciliation and the rights of victims to truth, justice, reparation and guarantee of non-repetition.
2 December 2014	The OTP issued its interim report on Colombia in which it praised peace negotiations and on-going discussion relating to the recognition of victims and their rights. ⁶¹ The OTP pledged to continue engaging with relevant domestic authorities regarding the admissibility criteria set out in the Rome Statute in an effort to ensure that any eventual peace deal remains compatible with the Statute. ⁶² The OTP further stressed that it would continue monitoring the justice agenda to make sure there is no impunity for senior perpetrators. ⁶³
13 May 2015	Deputy ICC Prosecutor James Stewart outlined the OTP position with respect to Colombia in El Rosario University in Bogota. He corrected a previous misunderstanding caused by the private letters of Bensouda, stating that the policy of prioritization at the domestic level is compatible with the obligations under the Rome Statute. He argued that (i) the Rome Statute does not prescribe the specific type or length of sentences; (ii) in sentencing, States have wide discretion; and (iii) effective penal sanctions may take many different forms. ⁶⁴
24 September 2015	ICC Chief Prosecutor Fatou Bensouda commended the SJP – an agreement on justice reached within the framework of peace negotiations. ⁶⁵ She stressed that justice is a pillar for peace and her office would continue to review the agreed provisions in detail.

⁶⁰ Sentencia de Constitucionalidad N° 579/13 de Corte Constitucional, 28 de Agosto de 2013. See also Washington Office on Latin America, “Colombia Peace Process Update”, 15 November 2013 (<http://www.legal-tools.org/doc/f6a3d6/>).

⁶¹ OTP 2014 Report, para. 113.

⁶² *Ibid.*, para. 114.

⁶³ *Ibid.*, para. 131.

⁶⁴ J.I. Acosta-López, “The Inter-American Human Rights and the Colombian Peace: Redefining the Fight Against Impunity”, in *AJIL Unbound*, November 2016, vol. 110, p. 182.

⁶⁵ Bensouda Statement.

12 November 2015	The OTP issued its interim report on Colombia in which it assessed the progress of peace negotiations. ⁶⁶ The OTP noted progress in investigating high-ranking officials for ‘false positives’ cases, but delay in providing evidence demonstrating “concrete and progressive” investigative steps in cases relating to the focus of preliminary examinations, in particular sexual violence cases. ⁶⁷
1 September 2016	ICC Chief Prosecutor Fatou Bensouda praised the peace deal as a historic achievement. ⁶⁸ She noted, however, that of paramount importance are genuine accountability, which includes effective punishment. She noted with satisfaction that the peace deal excludes amnesties for crimes against humanity and war crimes and stressed the ICC’s ongoing support of Colombia’s peace efforts.
14 November 2016	The OTP issued its annual interim report on Colombia, in which it stressed the problem of ‘false positives’. The report stated that the Colombian authorities have carried out a significant number of investigations and prosecutions against mid- and low-level perpetrators of the Colombian army, but the information of commanding officers is limited. ⁶⁹ The same report identified gaps in information on prioritizing sexual offences and analysed the specifics of the future SJP created by the peace deal. The OTP pledged to continue examining developments related to the peace deal agreement. ⁷⁰
6 December 2016	The Colombian Congress passed the first law in the peace deal implementation package: the amnesty law for minor offences committed during armed conflict.
4 April 2017	The Colombian Congress passed the <i>El Sistema</i> law amending the Constitution and creating the ‘Integral System of Truth, Justice, Reparation and Non-repetition’. ⁷¹

Table 1: Overview of ICC’s engagement in Colombia.

⁶⁶ OTP 2015 Report, para. 149.

⁶⁷ *Ibid.*, para. 154.

⁶⁸ Bensouda Statement.

⁶⁹ OTP 2016 Report, paras. 243-44.

⁷⁰ *Ibid.*, para. 263.

⁷¹ See *supra* note 48.

9.3. Compatibility of Standards

The influence of international criminal law, and the ICC as the institution monitoring compliance with its norms, on the Colombian transitional justice mechanism is more tangible when it comes to specific questions of compatibility of legal standards enshrined in the Rome Statute and the ones applicable in the domestic context.

9.3.1. New Vision of Justice – Less Retribution, More Reparations

One of the fundamental features of the peace deal is its reliance on restoration and reparation in crafting the idea of justice.⁷² The justice component of the deal combines retributive and restorative elements under the same umbrella. Item 5 of the peace deal agenda dealing with justice matters presented particular challenges during the negotiations, as the FARC initially insisted on the idea of collective, rather than individual, responsibility for crimes committed during the protracted civil war. The underlying rationale was that it was structural deficiencies in the country that provoked criminality; therefore, responsibility must be attributed collectively to the system supporting such a flawed structure. It was possible to reach an agreement relying on the idea of ‘justice for all’ rather than ‘justice for the FARC’, meaning that all parties to the conflict, including the army, which holds a prominent position in Colombian governing circles, agreed to submit themselves to the jurisdiction of a future tribunal. As a result, the peace deal envisages the creation of a holistic justice system aimed at unifying Colombia’s scattered transitional justice landscape. Diego Martinez, one of the lawyers representing the FARC during the negotiations with the government, gave the following assessment to the system: “it is based on restorative justice, the idea that more truth leads to less punishment, encouraging a targeted and personalized judicial truth to the victims. And it admits, from the beginning, amnesty when it comes to political crimes”.⁷³

The emphasis is not so much on retribution but rather on establishing the truth about the past, creating mechanisms for reparations for victims and guarantees of non-repetition. The implementing legislation – *El*

⁷² The preamble to peace deal speaks about the rights of victims to truth, justice and reparation. Section 5 of the Peace Deal elaborates on the mechanisms whereby these goals are attained.

⁷³ V. Abierta, “Understanding the Special Jurisdiction for Peace”, Interview with Diego Martinez (<http://www.legal-tools.org/doc/c4f66b/>).

Sistema law – brings this system to life by approving the creation of its various components: the Truth Commission, the Unit for the Search of Missing Persons, the SJP, and other measures aimed at reparation and non-repetition.⁷⁴ The new law makes it clear that the system incorporates both restorative and retributive aspects as it seeks to achieve justice not only through penalties but also through repairing damage caused to victims affected by the conflict.⁷⁵ This is both innovative and controversial. Arguably this system is different from the one established by the ICC where victims do participate in the proceedings as parties and have the right to seek reparations, but still do so within the retributive criminal justice paradigm.⁷⁶ In other words, at the ICC the victims complement the proceedings, while in Colombia they are the primary driving force.

In practice, such ‘dual’ focus of the system created by the peace deal entails a number of consequences. For instance, the *El Sistema* law expressly provides opportunities for reparations. It is well known that the FARC acquired significant wealth during conflict, for example, through illegal mining. The law creates explicit incentives for the FARC to declare their assets to the government (to be later used for reparations) by including them in a special inventory covered by the SJP jurisdiction. Offences relating to assets discovered at a later stage and not on the inventory will be subject to ordinary criminal jurisdiction. While reparations take a prominent role within the system, some retributive elements are seriously curtailed through the practice of prioritization of cases, amnesties or commuted sentences for less serious or political crimes and lenient penalties. To this date, the ICC OTP has not criticized the orientation of the system as a whole but rather insisted on the idea that effective punishment and responsibility of those most responsible should be the key elements in Colombia’s justice pursuits.

9.3.2. Prioritization

According to the peace deal, the new SJP will have primary jurisdiction over all cases arising out of the conflict.⁷⁷ It is logistically impossible to prosecute all those responsible within the limited time frame allotted to

⁷⁴ *El Sistema* Law, Article 1.

⁷⁵ *Ibid.*, Article 13.

⁷⁶ ICC Statute, Article 75.

⁷⁷ Oficina del Alto Comisionado para la Paz, “ABC: Jurisdicción Especial para la Paz” (ABC: Special Jurisdiction for Peace) (<http://www.legal-tools.org/doc/0e0b9b/>).

the SJP, namely 10 years with a five-year extension period.⁷⁸ Prosecuting everyone involved in the conflict is estimated to require 114 years. The only feasible solution is therefore prioritization of cases and choosing the most representative or ‘symbolic cases’. The Office of the Attorney General in Colombia, presently tasked with collecting all the relevant material to pass on to the SJP, is working on grouping potential cases with reference to their gravity and symbolic value. The first level of prioritization will happen on the basis of the types of crimes. There are currently seven themes singled out for further prosecution at the SJP: sexual violence, ‘false positives’, enforced disappearances, mass murders, displacements, recruitment of children, and environmental crimes.

Initially the ICC OTP opposed the policy of prioritization in Colombia. As explained above, in one of her private letters to the Constitutional Court of Colombia in 2013, Bensouda raised objections to this practice in domestic settings.⁷⁹ She referred to the framework established by the “Justice and Law” (2005) mostly aimed at facilitating demobilization of paramilitaries and the LFP (2012).⁸⁰ The mechanism created by the LFP targeted primarily paramilitaries, as well as their partners and sponsors, such as politicians and the military promoting supporting paramilitary activities. The OTP stressed early on that while prioritization of cases against those most responsible as a national policy is welcome, measures aimed at shielding individuals from criminal responsibility for grave international crimes is of concern, even if these are low-level perpetrators.⁸¹ As mentioned above, the Constitutional Court of Colombia upheld the practice of prioritization, however, arguing that the Constitution provides for the State’s countervailing obligation of peace, which underlies the need to prioritize cases.⁸² The ICC adjusted its position later on.⁸³

⁷⁸ *El Sistema* Law, Article 15.

⁷⁹ “Una ‘carta bomba’”, in *La Semana*, see *supra* note 36.

⁸⁰ OTP 2012 Report, para. 201.

⁸¹ *Ibid.*

⁸² Constitutional Court of Colombia, Instrumentos Juridicos de Justicia Transicional-No sustituye elementos estructurales y definitorios de la Constitución Política/Marco Juridico para la Paz-Contenido y alcance, Sentencia C-579/13 (<http://www.legal-tools.org/doc/ede533/>).

⁸³ Stewart, 2015, see *supra* note 1.

9.3.3. Penalties

The issue of penalties is one of the most contested and discussed in the framework of the Colombian peace process. One of the narratives that emerged in the press around the time of the rejection was overwhelming public concern over the possibility of guerrilla fighters avoiding jail time if they confessed to crimes and demobilized.⁸⁴ The interviews conducted in Colombia in March 2017 disproved such a narrow interpretation of the facts, however, pointing rather to several interrelated factors that led to a ‘no’ vote. The first is the strong cult of personality and influence of the former President Álvaro Uribe, who actively campaigned against signing a peace treaty with guerrillas by appealing to concerns and fears of different groups within the population. Leniency of the future sentences rendered by the SJP was one of the aspects of this campaign. Bad weather conditions on the polling day, coupled with the lack of infrastructure in many parts of the country also effectively prevented many people from travelling to polling stations. Finally, little information and time was allotted to voters to study the deal prior to the referendum.

Pursuant to the *El Sistema* Law, the SJP will have the power to choose between ordinary and alternative penalties when sanctioning those coming before it. With respect to the FARC, the alternative penalty is currently understood as sentencing persons to reside within a designated demobilization zones, or *Zonas Veredales Transitorias de Normalización*, for a period of five to eight years (with restricted liberty), coupled with reparations to victims and other restorative measures. Moreover, those given alternative penalties will be able to participate in political life along with serving the sentence imposed by the SJP.⁸⁵ It was unclear until the *El Sistema* law was passed whether this right could be exercised simultaneously with the sanction or whether the convicted person must wait five to eight years prior to joining political life (a position advocated by some NGOs). Confession is the condition for receiving lighter treatment in the form of alternative penalties, and the decision as to the nature of punishment will depend on the time when such confession is made. Those who confess early in the process are likely to benefit from alternative penalties, while those who confess later during trial face five to eight years of jail

⁸⁴ “Latin America: Saving Colombia’s peace”, in *The Economist*, 6 October 2016 (<http://www.legal-tools.org/doc/203390/>).

⁸⁵ *El Sistema* Law, Article 20.

time; those who do not acknowledge their responsibility at all risk fifteen to 20 years of imprisonment.⁸⁶ The leniency of sentences provided by the deal was one of the key arguments of the ‘no’ campaign.

It is important to note that State agents and the army cannot benefit from amnesty because auto-amnesty is prohibited under the law. The deal specifies however that all warring parties receive differentiated but comparable treatment.⁸⁷ What this means in practice is that the deal and the implementing law provide for the possibility of commuting sentences of those who cannot be subject to amnesty, which is a comparable solution. Similar treatment is more challenging when it comes to alternative penalties because State agents and the army cannot serve their sentences in the zones specifically designated for demobilized guerrillas. As things stand, they will serve their punishments in prisons. This aspect creates discontent in some of the ‘no’ voters arguing for tougher treatment of the FARC.

The question is whether lenient sentences for mass atrocities amount to impunity. Drastically curtailed sentences of five to eight years of imprisonment for war crimes and crimes against humanity had already been rendered to perpetrators in Colombia (in particular paramilitaries) pursuant to previous Justice and Peace Law (2005). There is a distant possibility to raise an issue of the incompatibility of excessively lenient punishment of perpetrators of war crimes and crimes against humanity with the State’s obligation to fight impunity. This is especially so, if one accepts that the primary purpose of punishment is retribution that is harsh treatment imposed on the person and proportionate to the gravity of his conduct.⁸⁸ The ICC held in its case law that the aim of its own sentences is retribution and deterrence.⁸⁹ Would this same reasoning be applicable to the assessment of domestic proceedings in the context of complementarity? This question was to some extent settled by the ICC Deputy Chief Prosecutor in 2015 when he clarified that alternative sentences for grave international crimes are compatible with the Rome Statute, but not suspended

⁸⁶ Peace Deal, Section 5.1.2., paras. 60-62.

⁸⁷ *Ibid.*, para. 44.

⁸⁸ “Proportionate Sentences: A Desert Perspective”, in A. von Hirsch, A. Ashworth and J. Roberts (eds.), *Principled Sentencing*, 3rd edition, Hart Publishing, Oxford, 2009.

⁸⁹ See, for example, ICC, Situation in the Democratic Republic of the Congo, *Prosecutor v. Germain Katanga*, Trial Chamber, Decision on Sentence Pursuant to Article 76 of the Statute, 23 May 2014, ICC-01/04-01/07-3484-tENG, para. 43 (<http://www.legal-tools.org/doc/5af172/>).

or commuted sentences, which cannot be characterized as ‘effective punishment.’ In this regard, Seils convincingly argues that transitional justice context in Colombia modifies the traditional policy objectives of punishment, which in the framework of peace negotiations can be seen as a mixture of reformative, retributive, and communicative goals. The last aspect is particularly vital for re-establishing the values undermined by the war and solidifying society’s disapproval of the wrongful conduct.⁹⁰

Theoretically speaking, the OTP could have interpreted lenient treatment (alternative penalties) as one of the signs of Colombia’s unwillingness to undertake genuine investigations. This, in turn, could have paved the way to formal investigations. This scenario is a far-fetched one, however, because there is no direct reference in the Rome Statute to the length or type of penalties to be imposed on perpetrators of mass atrocities locally. Such a restrictive reading of the principle of complementarity could have created further domestic backlash. The Rome Statute does not provide a framework for evaluating domestic sentencing regimes, which allows for a conclusion that there is a degree of flexibility in implementing domestic sentencing regimes. The interviews in Bogota uncovered that, from the Colombian standpoint, the leniency of sentences, while being one of the points of dissatisfaction of people who voted ‘no’ in the peace deal referendum on 2 October 2016, was not the core concern. Discontent pertained to broader accountability issues and general popular suspicion of the changes brought to Colombia with signing of the deal and establishing the SJP.

9.3.4. Command Responsibility

One of the most recent worries of the ICC with respect to Colombia pertained to the standard of command responsibility enshrined in the peace deal and the subsequent implementation law.⁹¹ The OTP concerns over the definition of command responsibility in the peace deal were not resolved in implementing legislation. The *El Sistema* law contains a chapter on the army including a controversial provision on command responsibility, which uses a narrower definition than the one contained in the Rome Statute of the ICC. According to Article 24, responsibility of the members of

⁹⁰ Paul Seils, “Squaring Colombia’s Circle: The Objectives of Punishment and the Pursuit of Peace”, in *ICTJ Briefing*, International Center for Transitional Justice, June 2015 (<http://www.legal-tools.org/doc/bf8e9c/>).

⁹¹ “Una ‘carta bomba’”, in *La Semana*, see *supra* note 36.

armed forces is triggered only with respect to the conduct of subordinates over which the commander had effective control and knowledge based on the information available to them before, during or after the event.⁹² This construction, based to some extent on Colombian penal law, makes it difficult, if not impossible, to convict a commander based in Bogota for crimes committed in the regions.

Article 25 of the Colombian Criminal Code provides for responsibility for omissions for those who fail to discharge their duty to prevent criminal conduct.⁹³ This provision resulted in some high-level convictions of the members of the Colombian army, making the generals wary of any possible tightening of the standards on command responsibility in the peace deal. The case of General Uscátegui is a good example that attracted a lot of public attention. He was found responsible for failing to prevent paramilitaries from executing crimes in the municipality of Mapiripán in July 1997. The Supreme Court of Colombia sentenced the general to thirty-seven years of imprisonment. The judges reasoned that, as a local military commander on the ground, the Uscátegui was well informed about the violent capture of the municipality by paramilitaries but failed to take steps to protect the local population.⁹⁴ The general recently requested to have his sentenced reviewed by the SJP, arguing that he would defend his innocence until the day he dies.⁹⁵

While there is a clear discrepancy between Article 28 of the Rome Statute and Article 24 of the *El Sistema* law, the real question is whether domestic policy makers have the flexibility in implementing international criminal law standards that are not the definitions of crimes.⁹⁶ While there is near universal acceptance in Colombia of the need to incorporate the definitions of international offences as well as broader principles of international criminal justice in the domestic legal system, there is less con-

⁹² Juan Pappier, “The ‘Command Responsibility’ Controversy in Colombia”, in *EJIL: Talk!*, 15 March 2017.

⁹³ Congress of Colombia, *Colombia: Código Penal*, 24 July 2000, Ley no. 599 (<http://www.legal-tools.org/doc/13e6bc/>).

⁹⁴ Colprensa and Olga Rendón, “Conceden libertad al general (r) Uscátegui, condenado por masacre de Mapiripán”, in *El Colombiano*, 5 May 2017 (<http://www.legal-tools.org/doc/682fa3/>).

⁹⁵ *Ibid.*

⁹⁶ R. Uruña, “Playing with Fire: International Criminal Law, Transitional Justice, and the Implementation of the Colombian Peace Agreement”, in *AJIL Unbound*, 2016, vol. 110.

sensus when it comes to the modes of liabilities, defences and procedural elements.⁹⁷

One of the arguments against direct transposition of the notion of command responsibility from international into domestic law is that the ICC is still defining its own standard as the *Bemba* case, which deals at length with issues of command responsibility, is currently under appeal.⁹⁸ The Constitutional Court of Colombia is likely to rule on the issue of command responsibility in the course of its review of the *El Sistema* law. If the current formulation of command responsibility remains intact, it may lead to possible responsibility gaps triggering future involvement of the ICC. Colombia remains under preliminary examination by the ICC, whose Chief Prosecutor has already signalled her concern over the issue of command responsibility.⁹⁹ Fatou Bensouda exercised her symbolic power by giving a public interview to a Colombian weekly and alerting the domestic legal communities about the importance of not letting senior leadership go unpunished. This statement is not so much a threat of potential investigations by the ICC (although it is part of the message), but more a restatement of the values the ICC tries to communicate outwards.

9.4. Conclusion

The case of Colombia demonstrates the relationship between the ICC and local actors within the framework of the principle of complementarity. The OTP assumed different roles in Colombia, both legitimizing local actors and pushing for certain outcomes in the movement towards peace. While working on establishing whether there is ‘reasonable basis to proceed’ under the Rome Statute, the ICC engaged in symbolic interaction with a number of domestic authorities. The involvement of the ICC in Colombia as a part of the dialogical model influenced the justice element of the eventual peace agreement: the OTP tried to steer the discourse to a certain direction and define the contours of national prosecutions. For instance, the ICC held a strong position with regards to suspended and commuted sentences and is currently closely monitoring the standard for

⁹⁷ Leon, 2016, see *supra* note 10.

⁹⁸ ICC, Situation in the Central African Republic, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber, Judgment pursuant to Article 74 of the Statute, 21 March 2016, ICC-01/05-01/08-3343 (<http://www.legal-tools.org/doc/edb0cf/>).

⁹⁹ “El acuerdo de paz de Colombia demanda respeto, pero también responsabilidad”, in *La Semana*, 21 January 2017 (<http://www.legal-tools.org/doc/9450bc/>).

command responsibility pertaining to senior leadership. The engagement of the ICC was not without pitfalls, however, as the change of heart on the issue of prioritization of cases demonstrates. This not very cautious move of the ICC in the form of private letters to the Constitutional Court of Colombia was a sign of a healthy adjustment to the local needs within the principle of complementarity.

While the power of the Court to dominate public discourse with regards to the specific standards is tangible, its influence on the broader legitimacy concern of the voters is limited. The government's decision to proceed along the fast-track route, rather than holding a second plebiscite or giving up on the deal altogether, delivered a strong blow to the legitimacy of the eventual outcome, dividing the country into two camps, creating room for identity politics. The standoff between two ideological camps makes it essential for the success of the deal to move forward with its implementation in an expedited fashion. With presidential and parliamentary elections fast approaching in 2018, the hope is that the deal will gain its legitimacy through its effective implementation, thereby eliminating the possibility for a future government to challenge the hard-won peace arrangement. The role of the ICC in further implementation of the peace deal remains to be seen.

‘Magical Legalism’ and the International Criminal Court: A Case Study of the Kenyan Preliminary Examination

Christian M. De Vos*

10.1. Introduction

This chapter offers a critical examination of the International Criminal Court’s (‘ICC’) two-year preliminary examination in Kenya, which formally ran from February 2008 to March 2010.¹ As the only ICC situation thus far to have moved from an extended examination stage to attempted prosecutions, the closure of the Court’s ill-fated intervention in Kenya stands as a cautionary tale: about the hubris with which then Prosecutor Luis Moreno-Ocampo approached the situation; about the poor quality of the preparations undertaken by the Office of the Prosecutor (‘OTP’) during the course of the examination; and about the ability of governments to obstruct and hobble a Court that relies on State co-operation to do its work. The outcome of the Kenyan experience – with charges against two of the original ‘Ocampo Six’ not confirmed, and the other four later with-

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¹ March 2010 marks when Pre-Trial Chamber II granted the ICC Prosecutor’s request to open an investigation into the Kenyan situation. Although the Prosecutor’s request to do so was filed in November 2009 – already signalling his intention to move beyond the preliminary examination – it technically remained in this phase until the Court’s decision granted him full investigatory powers. See International Criminal Court (‘ICC’), Situation in the Republic of Kenya, Pre-Trial Chamber, 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 (‘Kenya Article 15 Decision’) (<http://www.legal-tools.org/doc/338a6f/>).

drawn – also portends poorly for the OTP’s much vaunted policy of ‘positive complementarity’.² Indeed, as this anthology makes clear, the ICC’s ability to catalyse national-level accountability depends above all on safeguarding the quality of its work, as well as the perception by national actors that it poses a credible threat of successful prosecution. Unfortunately, the Court’s intervention in Kenya has harmed those efforts.

The idea of the ICC as a catalyst for domestic accountability has dominated much of the literature on complementarity and, in many ways, Kenya was Prosecutor Moreno-Ocampo’s first opportunity to test his now famous assertion that “the number of cases that reach the Court should not be a measure [of] its efficiency”; rather, the absence of trials, “as a consequence of the regular functioning of national institutions, would be a major success”.³ Whereas the Court’s previous situations – in the Democratic

² See ICC, Situation in the Republic of Kenya, *The Prosecutor v. William Samoei Ruto et al.*, Pre-Trial Chamber, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, 23 January 2012 (confirming charges against William Ruto and Joshua Sang, but declining to confirm charges against Henry Kosgey) (<http://www.legal-tools.org/doc/96c3c2/>); ICC, Situation in the Republic of Kenya, *The Prosecutor v. Francis Kirimi Muthaura et al.*, Pre-Trial Chamber, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, 23 January 2012, ICC-01/09-02/11-382-Red (confirming charges against Francis Muthaura and Uhuru Kenyatta, but declining to confirm charges against Mohammed Hussein Ali) (<http://www.legal-tools.org/doc/4972c0/>). Subsequently, in March 2013, the Prosecutor was granted permission to withdraw charges against Francis Muthaura, on the basis that “serious investigative challenges, including a limited pool of potential witnesses” led her to the conclusion that there was no longer a reasonable prospect of conviction. See ICC, Situation in the Republic of Kenya, *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Trial Chamber, Prosecution Notification of Withdrawal of the Charges against Francis Kirimi Muthaura, 11 March 2013, ICC-01/09-02/11, para. 11 (<http://www.legal-tools.org/doc/4786c1/>). This was followed by the withdrawal of charges against President Uhuru Kenyatta in May 2014, again on the basis of insufficient evidence and, finally, the termination of proceedings by Trial Chamber V(A) against William Ruto and Joshua Sang in April 2016. In withdrawing the cases, Prosecutor Bensouda noted the Kenyan government’s lack of cooperation and non-compliance with the OTP’s investigation, as well as the deaths of several important potential witnesses and the recanting of earlier testimony by other key witnesses.

³ OTP, Ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court: Statement made by Mr. Luis Moreno-Ocampo, 16 June 2003 (<http://www.legal-tools.org/doc/733fde/>). The literature on complementarity and its catalytic potential is vast and ever growing, but key texts in the canon include Jo Stigen, *The Relationship between the International Criminal Court and National Jurisdictions: The Principle of Complementarity*, Martinus Nijhoff Publishers, 2008; Jann K Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*, Oxford University Press, 2008; William W. Burke-White, “Proactive Complementarity: The International Criminal Court and Na-

Republic of Congo, Uganda, and Darfur – had either been invited by those governments or referred to the Court under the authority of the United Nations Security Council, success in the Kenyan preliminary examination was meant to show that the ICC was not merely a judicial power, but also a political one. The mere threat of its “shadow”, as the then Prosecutor often noted, could prompt a national accountability process, and thereby deter future crime as well.⁴

This chapter argues that the OTP’s preliminary examination in Kenya was, in part, hobbled by an excessive faith in what the ICC could politically accomplish, and an insufficient investment in what should have been its core function: the investigation and prosecution of international crimes. This abundance of faith in law and legal institutions, I suggest, is symptomatic of legalism, famously defined by the political theorist Judith Shklar as “the ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by legal rules”.⁵ More specifically, it recalls what the sociologist Stanley Cohen has referred to as ‘magical legalism’. Cohen deployed the term in a somewhat different sense than I do here: he coined it as a form of interpretive State denial that bad acts no longer take place merely because the action itself has been deemed illegal.⁶ In Cohen’s words, “Pow-

tional Courts in the Rome System of International Justice”, in *Harvard International Law Journal*, Winter 2008, vol. 49, no. 1, pp. 53-108; Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity*, Cambridge University Press, 2011; and Sarah M.H. Nouwen, *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan*, Cambridge University Press, 2013.

⁴ Moreno-Ocampo has argued that, “the ‘shadow’ metaphor provided a clear image to express the role of our office and of the Court. A Court isolated in the Hague could never end impunity around the world; its impact depends on the size of its ‘shadow’”, Luis Moreno-Ocampo, “Prologue: The Prosecutor’s Use of Legal Policies”, in Martha Minow, C. Cora True-Frost and Alex Whiting (eds.), *The First Global Prosecutor: Promise and Constraints*, University of Michigan Press, 2015, p. 10; see also Luis Moreno-Ocampo, “The Office of the Chief Prosecutor: The Challenges of the Inaugural Years”, in *Gruber Distinguished Lecture in Global Justice*, 28 January 2013.

⁵ Judith N. Shklar, *Legalism: Law, Morals, and Political Trials*, Harvard University Press, 1964, p. 1.

⁶ Stanley Cohen, *States of Denial: Knowing About Atrocities and Suffering*, Polity Press, 2001, p. 108. In Cohen’s words, “Magical legalism is a method to ‘prove’ that an allegation could not possibly be correct because the action is illegal”. The example he provides is the prohibition of torture: “torture is strictly forbidden in our country; we have ratified the Convention Against Torture, therefore what we are doing cannot be torture”.

erful forms of interpretive denial come from the language of legality itself”.⁷ But the ICC Prosecutor’s conduct of the Kenyan preliminary examination also reflected a form of denial. It assumed that the mere threat of criminal prosecution – the ‘language of legality’ – would be enough to move domestic political actors to action, while failing to sufficiently appreciate or engage with the country’s complex political and social contexts. As Kieran McEvoy has put it, “the notion of magical legalism speaks directly to the disconnect between the ‘real world’ in some transitional societies and the plethora of ‘law talk’ which often characterizes debates amongst [...] political elites”.⁸

In the context of Kenya, I suggest that ‘magical legalism’ led to at least three fatal presumptions in the conduct of the OTP’s preliminary examination: (1) that sufficient political support could be summoned to establish a domestic accountability mechanism, when it should have been realized sooner in the course of the examination that such a mechanism would not be forthcoming; (2) that the threat of ICC prosecutions alone would be sufficient to create such a mechanism, when deeper, field-based engagement by the OTP was needed to fortify and make good on that threat; and (3) that Kenyan advocates for accountability would support a national process in lieu of The Hague, when in fact most of the ICC’s supporters in Kenya insisted on international prosecutions first before contemplating complementary, domestic proceedings. These presumptions, I argue, demonstrate the allure of legalism, and how it reflects, in McEvoy’s words, “a capacity to disconnect from the real political and social world of transition”.⁹ Indeed, as this chapter demonstrates, legal formations in Kenya were subordinated to a dynamic politics of transition, one that saw politicians on both sides of the accountability divide unite to defeat the prospect of a domestic tribunal, to abandon it almost entirely, and for many amongst them to then construct a powerful and compelling narrative of African State victimhood and of the ICC as a Western, neo-colonial project.

The chapter proceeds in four sections. Section 10.2. briefly examines how preliminary examinations were structured within the overall

⁷ *Ibid.*, p. 107.

⁸ Kieran McEvoy, “Letting Go of Legalism: Developing a ‘Thicker’ Version of Transitional Justice”, in Kieran McEvoy and Lorna McGregor (eds.), *Transitional Justice from Below: Grassroots Activism and the Struggle For Change*, Hart Publishing, 2008, p. 23.

⁹ *Ibid.*, pp. 25-26.

architecture of the OTP at the time of its engagement in Kenya, as well as the emergent thinking of them as a form of complementarity's coercive power, wherein the threat of prosecutorial action could help to prompt domestic criminal proceedings. The chapter then turns to a history of the Kenyan examination specifically in order to explore the political dynamics at play throughout that period, and what presumptions guided the OTP's practice at the time. Drawing on this history, Section 10.4. unpacks the three ways highlighted above that legalist presumptions hobbled the ICC's preliminary examination, and laid the groundwork for the troubled investigations and prosecutions that followed. Finally, the conclusion offers several recommendations for how the OTP could improve and strengthen the quality of its examinations practice, including through a more co-operative, place-based approach to both preliminary examinations and investigations; greater attunement to the *sui generis* contexts of ICC interventions and the shifting political dynamics in which they unfold; and to a more modest vision for what the Court can and should be expected to achieve.

A brief note on methodology: Much of the research for this chapter was conducted during my time as a Ph.D. researcher at Leiden University's Grotius Centre for International Legal Studies. Between June 2011 and December 2012, I made three separate trips to Nairobi to conduct field-based research on whether and how the ICC's preliminary examination had served (and its promised trials might serve) as a catalyst for domestic accountability in Kenya.¹⁰ In the course of that research, I interviewed a wide array of actors engaged in ICC-related work: Court officials working in Nairobi; practitioners in the field of human rights and transitional justice; domestic lawyers, judges, and bar associations; a representative from Kenya's Office of the Director of Public Prosecutions; as well as several international diplomats and donors. Information shared in the course of these interviews deeply inform my analysis; however, because of the sensitivity of the subject matter (many interlocutors only spoke with the express understanding that their views were not for attribu-

¹⁰ Trips were undertaken in June 2011, January 2012, and November-December 2012. More recently, a fourth trip to Nairobi, in July 2017, allowed me to pursue follow-up interviews with several original interlocutors as well. This research, which also included field-based research in Uganda and the Democratic Republic of Congo, forms the basis of a forthcoming book. The support of the Netherlands Organisation for Scientific Research for enabling such field research is gratefully acknowledged.

tion), I have wherever possible referred to facts and findings that are supported by the public record. Limited references to interview subjects occur only where the assertions provide explicit, additional validation of claims central to my analysis.

10.2. Preliminary Examinations and the OTP

10.2.1. Legal Framework

The preliminary examination is a unique pre-investigative stage within the ICC's statutory framework: Triffterer describes it as "the investigative steps which the Prosecutor may take after he or she is seized of a situation but prior to his or her determination of whether there is a reasonable basis to proceed with an investigation".¹¹ As scholars have noted, however, the term itself appears only once in the Rome Statute.¹² Specifically, Article 15 of the Statute mandates the Prosecutor to first determine, regardless of the manner in which a situation comes before the Court, whether there is a "reasonable basis to proceed" with an investigation.¹³ Given this relative lack of definition, the scope, length, and conduct of preliminary examinations fall largely within the discretion of the OTP. At a minimum, however, they involve assessing whether the jurisdictional and admissibility requirements are met in order to open a formal investigation, and whether, "taking into account the gravity of the crime and the interests of victims,

¹¹ Otto Triffterer, *Commentary on the Rome Statute of the International Criminal Court*, 2nd edition, Beck/Hart, 2008, p. 592.

¹² See, for example, 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. 414; David Bosco, "Discretion and State Influence at the International Criminal Court: The Prosecutor's Preliminary Examinations", in *American Journal of International Law*, 2017, vol. 111, no. 2, p. 396.

¹³ Rome Statute of the International Criminal Court, 17 July 1998, Article 15, ('ICC Statute') (<http://www.legal-tools.org/doc/7b9af9/>). As the Court has since explained, "reasonable basis" is the lowest evidentiary standard in the Statute: as compared to evidence gathered during the investigation stage, it is neither "comprehensive" nor "conclusive". See, for example, Kenya Article 15 Decision, para. 27; ICC, Situation in the Republic of Côte d'Ivoire, Pre-Trial Chamber, 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 ('Côte d'Ivoire Article 15 Decision') (<http://www.legal-tools.org/doc/7a6c19/>). In both decisions, the Chamber further noted that this standard reflected the Prosecutor's more limited powers during the examination stage as compared to the investigation stage under Article 54.

there are nevertheless substantial reasons to believe than an investigation would not serve the interests of justice".¹⁴

As noted elsewhere in this volume, the OTP's Jurisdiction, Complementarity, and Cooperation division ('JCCD') – specifically, its Situation Analysis Section – is primarily responsible for conducting preliminary examinations. Led by Phakiso Mochochoko since February 2011, the JCCD is, as one commentator has noted, the "division that heavily influences policy decisions and the Prosecutor's selective choices originate there".¹⁵ Seeking, in part, to provide clarity on its approach to preliminary examinations, the OTP first published a policy paper on the subject in October 2010 – after the Kenyan examination had concluded, and since revised as of November 2013.¹⁶ The Office identified three general principles – independence, impartiality, and objectivity – that guide preliminary examination practice and set forth a four-phase procedure:

Phase 1: During this phase, the Office conducts an "initial assessment" of all information and communications on alleged crimes received under Article 15. As an initial filtering exercise, the initial purpose is to both exclude information that is outside the ICC's jurisdiction and to analyse the se-

¹⁴ These criteria are enumerated in Article 53(1)(a)-(c) ("Initiation of an Investigation") of the ICC Statute. Rule 104 of the Rules of Procedure and Evidence and Regulation 27 of the OTP's Regulations also govern preliminary examinations. Regulation 27 requires the Office to make a "preliminary distinction" amongst information that pertains to matters that are either manifestly outside the Court's jurisdiction, related to an ongoing examination, or unrelated to an existing situation.

¹⁵ Ignaz Stegmiller, *The Pre-Investigation Stage of the ICC*, Duncker and Humblot, Berlin, 2011, p. 457. In full, the JCCD is responsible for the following: "(a) the preliminary examination and evaluation of information pursuant to articles 15 and 53, paragraph 1 [of the ICC Statute] and rules 48 and 104 and the preparation of reports and recommendations to assist the Prosecutor in determining whether there is a reasonable basis to proceed with an investigation; (b) the provision of analysis and legal advice to [the Executive Committee] on issues of jurisdiction and admissibility at all stages of investigations and proceedings; (c) the provision of legal advice to [the Executive Committee] on cooperation, the coordination and transmission of requests for cooperation made by the Office under Part 9 of the Statute, the negotiation of agreements and arrangements pursuant to article 54, paragraph 3 [of the ICC Statute]; and (d) the coordination of cooperation and information-sharing networks". Regulations of the Office of the Prosecutor, 23 April 2009, ICC-BD/05-01-09, Regulation 7 ('OTP Regulations') (<http://www.legal-tools.org/doc/a97226/>).

¹⁶ OTP, *Policy Paper on Preliminary Examinations*, 1 November 2013 ('*Policy Paper on Preliminary Examinations 2013*') (<http://www.legal-tools.org/doc/acb906/>).

riousness/gravity of information that “appears to fall within the jurisdiction of the Court”.

Phase 2: The second phase represents the “formal commencement” of an examination: it includes all communications not rejected in Phase 1, as well as referrals by States Parties or the Security Council. The purpose at this stage is to ascertain whether the pre-conditions for the exercise of jurisdiction are satisfied and “whether there is a reasonable basis to believe” that the crimes fall within the ICC’s subject matter jurisdiction.

Phase 3: The third phase focuses on the admissibility of potential cases in terms of complementarity and gravity (“the scale, nature, manner of commission of the crimes, and their impact”).

Phase 4: The final phase involves examining whether any “interests of justice” – a “countervailing consideration” – should apply before making a final recommendation to the Prosecutor on whether there is a reasonable basis to initiate an investigation.

The discretion afforded the OTP during the preliminary examination stage is significant. Unlike investigations, where the Prosecutor must obtain the authorization of the Pre-Trial Chamber to proceed, judicial oversight of preliminary examinations is limited, nor are the Article 17 admissibility requirements applicable at this stage. Furthermore, there is no time limit for conducting preliminary examinations, nor any guidance as to what constitutes a “reasonable time” to conclude one. In the Office’s view, such discretion was intentional on the part of the drafters, to accommodate such factors as the degree of State co-operation, the availability of information, and the scale of the alleged crimes.¹⁷

¹⁷ In the first situation in the Central African Republic, Pre-Trial Chamber III noted that preliminary examinations were to be conducted “within a reasonable time regardless of its complexity” and, to that end, requested the Prosecutor to provide it with a report containing information on the current status of the preliminary examination, as well as an estimate of when it would be concluded. See ICC, Situation in the Central African Republic, Pre-Trial Chamber, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, ICC-01/05-6, 30 November 2006 (<http://www.legal-tools.org/doc/76e607/>). In reply, the OTP opined that, “there is no obligation under the Statute or the Rules to provide such an estimate or to give such a date”. See ICC, Situation in the Central African Republic, Pre-Trial Chamber, Prosecution’s Re-

The temporal dimension of preliminary examinations also allows the Office to engage in potentially wide-ranging dialogue with a State; indeed, as discussed further below in the Kenyan situation, domestic political developments can have a significant influence on the timing or duration of preliminary examinations. Importantly, however, while the OTP has stated that its examination activities are conducted in the same manner regardless of how a situation comes before the Court – in its words, “no automaticity is assumed”¹⁸ – it would appear that, in practice, different standards may well apply. For instance, while several *proprio motu* examinations have lasted for one year or more (Colombia, Kenya), Security Council-referred situations have remained in examination status for a matter of days.¹⁹

With respect to information gathering in the preliminary examination phase, multiple ICC Pre-Trial Chambers have repeatedly affirmed that the lower evidentiary standard required of examinations is reflected in the Prosecutor’s correspondingly more limited powers as compared to the investigation stage under Article 54.²⁰ Nevertheless, although the OTP states that it “does not enjoy investigative powers” during the examinations phase, the Prosecutor does have the authority to gather information.²¹ Article 15 of the Rome Statute provides, for instance, that “he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organization, or other reliable sources that he or she deems appropriate, and may receive written

port 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, ICC-01/05-7, 15 December 2006 (<http://www.legal-tools.org/doc/1dd66a/>). The Office nevertheless stated that it was “committed to completing its analysis of the CAR situation as expeditiously as possible and informing the relevant parties in a timely fashion in accordance with the Rules and Regulations of the Court”. *Ibid.*

¹⁸ *Policy Paper on Preliminary Examinations* 2013, para. 28; see also OTP, *Report on Preliminary Examination Activities 2013*, November 2013, para. 10 (<http://www.legal-tools.org/doc/dbf75e/>).

¹⁹ For a fuller discussion of these temporal disparities, see Bosco, 2017, pp. 396-409, see *supra* note 12.

²⁰ Kenya Article 15 Decision, para. 27; see also Côte d’Ivoire Article 15 Decision. Paul Seils has also described this as the “difference between preliminary examination and investigation might be usefully distinguished [...] as the difference between the development of initial hypotheses and the testing of those”, see *infra* note 23.

²¹ *Policy Paper on Preliminary Examinations* 2013, para. 85.

or oral testimony at the seat of the Court”.²² As Paul Seils (the JCCD’s former Head of Situation Analysis) notes, this should entitle the OTP “to collect sufficient information to ascertain not only that incidents constituting crimes were committed, but also on who have been responsible as a result of their actions in connection with the incident”.²³ Seils adds that by clarifying the OTP’s entitlement in this regard, it would allow the Office to “reimagine the scope and reach of its inquiries while still not straying into the field of investigation”. To that end, as other commentators have noted, nothing in the Statute restricts the OTP from seeking to undertake field-based missions or temporary *in situ* placements while a preliminary examination is underway.²⁴

While the outcome of a preliminary examination depends on the circumstances of each situation, three options are ultimately available to the OTP. It may first decline to initiate an investigation (as it did in Venezuela and Honduras) or, alternatively, it may choose to proceed (as it did with Kenya and Georgia).²⁵ According to Seils, “By the time the process of preliminary examination reaches its conclusion there should almost always be substantial clarity on the type of the alleged criminal conduct, the numbers of incidents and victims of that conduct and related matters

²² ICC Statute, Article 15(2). The Office “does not enjoy investigative powers” at the preliminary examination stage, however, “other than for the purpose of receiving testimony at the seat of the Court”.

²³ Paul Seils, “Putting Complementarity in its Place”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015, p. 319. Seils adds that by clarifying the OTP’s entitlement in this regard, it would allow the Office to “reimagine the scope and reach of its inquiries while still not straying into the field of investigation”: *ibid.*

²⁴ See, for example, War Crimes Research Office, *Investigative Management, Strategies, and Techniques of the International Criminal Court’s Office of the Prosecutor*, Washington, DC, 2012, pp. 35-36. The Office’s Policy Paper likewise notes that, “for the purpose of analysing the seriousness of the information” it receives, it “may also undertake field missions to the territory concerned in order to consult with the competent national authorities, the affected communities and other relevant stakeholders, such as civil society organisations”. See *Policy Paper on Preliminary Examinations* 2013, para. 85.

²⁵ Closed examinations where the OTP made public its decision not to proceed to investigation include the situations in Palestine, Comoros, the Republic of Korea, Honduras, and Venezuela. An examination of Iraq, which concerns allegations of abuses committed by British soldiers, was reopened following an earlier decision to close the examination.

concerning aggravation or impact”.²⁶ Alternatively, a third approach is to keep a situation under preliminary examination, in order to “collect information in order to establish a sufficient factual and legal basis” for a final determination.²⁷ As of late 2017, ten situations remained under such review.²⁸

10.2.2. Relationship to Complementarity

There has been relatively little empirical examination to date of the effects of preliminary examinations, although as Carsten Stahn notes, the phase “has become one [of] the most important centres of activity of the Court and focal point of contemporary critiques”.²⁹ Anecdotal accounts support the contention that the preliminary examination procedure can have a deterrent effect. Juan Méndez, for instance, has argued that the Court’s examination of Côte d’Ivoire (which later became an investigation) played an important role in deterring further escalation of violence, following a rise in ethnic hate propaganda after a failed attempt to overthrow then President Laurent Gbagbo.³⁰ Likewise, in Nigeria (whose preliminary examination was made public in late 2010) many advocates attribute the publication of several statements by Prosecutor Bensouda in the lead-up to the general and State elections of 2015 as having had an impact in avoiding the outbreak of violence.³¹ Perhaps most illustrative of the OTP’s ‘positive’ complementarity approach is Colombia, which has remained within the examination phase for more than ten years. As Aksenova also pointed out in the last chapter, the passage of the country’s so-

²⁶ Pauls Seils, “Making complementarity work”, in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity*, Cambridge University Press, 2011, p. 993; Seils, 2015, p. 326, see *supra* note 23.

²⁷ Seils has, in fact, argued for a more open-ended approach to examinations as an exercise in “creative ambiguity”. Seils, 2015, p. 326, see *supra* note 23.

²⁸ See OTP, *Report on Preliminary Examination Activities 2017*, 4 December 2017 (<http://www.legal-tools.org/doc/e50459/>). Following this report, the OTP announced the opening of additional examinations in The Philippines and Venezuela as well (this is the second examination initiated in Venezuela; the first was closed in February 2006).

²⁹ Stahn, 2017, p. 414, see *supra* note 12.

³⁰ See Juan E. Mendez and Jeremy Kelley, “Peace Making, Justice, and the ICC”, in Christian De Vos, Sara Kendall, and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Cambridge University Press, Cambridge, 2015.

³¹ See, for example, Nigerian Civil Society Situation Room, Report on Nigeria 2015 General Elections, Abuja, July 2015 (<http://www.legal-tools.org/doc/c9f89a/>).

called Justice and Peace Law – meant to establish a criminal accountability process for violence committed during the country’s long-running armed conflict – was an outcome, in part, of the OTP’s public, long-running scrutiny of the situation and indeed helped shaped the contours of its protracted peace negotiations.³²

The Colombian example also illustrates the OTP’s adoption of a progressively more public approach to preliminary examinations, one that, as detailed further below, was largely pioneered in the context of Kenya. While earlier examinations were mostly confidential, their potential virtue as a tool to prompt States into action has, like complementarity itself, been discovered over time. As Human Rights Watch notes, “This increased publicity is closely tied to the OTP’s policy of using preliminary examination to promote two aims at the heart of the Rome Statute: spurring national justice officials to pursue their own rigorous investigations (complementarity) and signaling to would-be rights violators that the international community is watching (deterrence)”.³³ Compliance with these norms is thus reinforced in the approach to preliminary examinations as well.

To that end, the Office now often publicizes, where confidentiality and security considerations permit, when it initiates an examination and provides periodic updates of its activities.³⁴ These measures include publishing, as of 2011, an annual summary of activities performed during the course of the year, and including information for a time in the Office’s

³² See, for example, René Urueña, “Prosecutorial Politics: The ICC’s Influence in Colombian Peace Processes, 2003-2017”, in *American Journal of International Law*, 2017, vol. 111, no. 1, pp. 104–25; Nelson Camilo Sanchez Leon, “Could the Colombian Peace Accord Trigger an ICC Investigation on Colombia?”, in *AJIL Unbound*, 2016, vol. 110, pp. 172-77; Alejandro Chehtman, *The ICC and its Normative Impact on Colombia’s Legal System*, DOMAC, Reykjavik University, Reykjavik, DOMAC/16, October 2011.

³³ Human Rights Watch, *ICC: Course Correction: Recommendations to the Prosecutor for a More Effective Approach to ‘Situations under Analysis’*, 16 June 2011 (<http://www.legal-tools.org/doc/43aefb/>).

³⁴ Regulation 28 governs the publicity of activities taken under Article 15. While the Office is required to “send an acknowledgement in respect of all information received on crimes to those who provided the information”, it is within the Prosecutor’s discretion to “make public such acknowledgement”, and “to make public the Office’s activities in relation to the preliminary examination of information on crimes under article 15”, or a determination that there is no reasonable basis to proceed with an investigation. See OTP Regulations, Regulation 28.

weekly bulletin.³⁵ OTP policy documents also provide that it may disseminate statistics on information on alleged crimes under Article 15; make public the commencement of a preliminary examination through press releases and public statements (as it did in Kenya in February 2008); publicize events, such as OTP high-level visits to the concerned countries (as Prosecutor Bensouda recently did in Colombia in July 2017); and issue periodic status reports.³⁶ Collectively, these measures seek to bring greater transparency to the examination process but also greater scrutiny to those States under review.

It would also appear that the OTP's investment in the preliminary examinations stage has expanded under Prosecutor Bensouda's leadership. As noted in her assessment of the Office's current strategic plan:

As one of the three core activities of the Office, stronger emphasis is now placed on the Office's preliminary examinations activities. Through its preliminary examinations work, the Office is committed to contributing to two overarching goals: the ending of impunity, by encouraging genuine national proceedings through its positive approach to complementarity, and the prevention of crimes.³⁷

The Prosecutor has likewise drawn a direct link between preliminary examinations and the catalytic potential of complementarity. Writing in 2012, she noted that the phase "gives the States concerned the possibility of intervening to put an end to crimes before the Office of the Prosecutor initiates an investigation", enabling the latter "to act as a catalyst for national proceedings".³⁸

³⁵ Reports on Preliminary Examination Activities from 2011-14 are available online at the OTP's website. It would appear, however, that the Office has since discontinued its practice of weekly briefings; the last one posted is from November 2013.

³⁶ See, for example, OTP, Prosecutorial Strategy 2009-2012, 1 February 2010, paras. 38-39 (<http://www.legal-tools.org/doc/6ed914/>); see also *Policy Paper on Preliminary Examinations* 2013, paras. 89-90.

³⁷ Fatou Bensouda, "Foreword", in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, 2015; see also "Interview with Fatou Bensouda, ICC Chief Prosecutor", in *Victims' Rights Working Group Bulletin*, Victims' Rights Working Group, Fall 2012, no. 21, p. 4.

³⁸ Fatou Bensouda, "Reflections from the International Criminal Court Prosecutor", in *Case Western Reserve Journal of International Law*, Fall 2012, vol. 45, nos. 1-2, pp. 505-11, at p. 508.

There are potentially important ‘positive’ complementarity components to the preliminary examination stage as well. Indeed, according to the OTP, “at all phases of its preliminary examination activities, consistent with its policy of positive complementarity, the Office will seek to encourage where feasible genuine national investigations and prosecutions by the State(s) concerned and to cooperate with and provide assistance to such State(s) pursuant to Article 93(10) of the Statute”.³⁹ The extent to which the OTP has affirmatively provided information to national authorities through use of the Article 93(10) regime is uncertain: there is no mention of such assistance in any of the Office’s preliminary examination reports. Moreover, the provision of such information appears to itself be at odds with the OTP’s declaration that, at the preliminary examination stage, it “does not enjoy investigative powers” and “cannot invoke the forms of cooperation specified in Part 9 of the Statute from States”.⁴⁰

10.3. The ICC’s Preliminary Examination in Kenya

The ICC was first thrust into Kenya a decade ago, following the violence that consumed the country in the wake of its December 2007 presidential election. As historians have noted, previous elections in Kenya had also seen outbreaks of violence, though not on the scale witnessed in 2007/2008. Gabrielle Lynch notes that while the crisis “was unexpected”, it was also “compatible” with an increasingly ethnicized political landscape that had witnessed previous inter-communal attacks, as well as “high levels of popular political skepticism, institutional decay, a culture of impunity, elite opportunism, and related strategies of action”.⁴¹ At the time, the two most prominent politicians amongst those who would later become ICC defendants were also members of rival political parties. Uhuru Kenyatta (the now President, elected in 2013) had backed then President Mwai Kibaki of the Party of National Unity (PNU), who was running for re-election; William Ruto (the now Deputy President, also elected in 2013) supported Raila Odinga of the Orange Democratic Movement (ODM). In the contested wake of the election, attacks were carried out against perceived PNU supporters (largely associated with the Kikuyu, Kenya’s largest ethnic group), while perceived ODM supporters, includ-

³⁹ *Policy Paper on Preliminary Examinations* 2013, para. 94.

⁴⁰ *Ibid.*, para. 85.

⁴¹ Gabrielle Lynch, *I Say To You: Ethnic Politics and the Kalenjin in Kenya*, Univeristy of Chicago Press, 2011, p. 3.

ing members of the Kalenjin, Luo and Luhya communities, were victims of retaliatory violence.⁴²

As a regional actor, the African Union engaged with the Kenyan State in the immediate aftermath of the violence. Beginning in late January 2008, an AU Panel of Eminent African Personalities, overseen by former UN Secretary-General Kofi Annan, mediated a political settlement through the Kenyan National Dialogue and Reconciliation process; this led to the National Accord and Reconciliation Agreement, signed between Kibaki and Odinga in February 2008. It set forth a four-part agenda to address the consequences of the violence, including the establishment of a power-sharing, coalition government between Kibaki and Odinga; the creation of a Commission of Inquiry on Post-Election Violence ('CIPEV'), also known as the Waki Commission (named for its chair, Court of Appeal Judge Philip Waki); and a Truth, Justice and Reconciliation Commission.⁴³

The ICC's involvement in Kenya ran alongside the African Union's engagement. According to later submissions made by the OTP, the Office's preliminary examination formally commenced once "the violence erupted in the context of national elections held on 27 December 2007" and remained in this posture for approximately two years, until at least the Prosecutor's announcement in November 2009 that he would submit a request to the Court for permission to open a full investigation. In the interim, the OTP undertook many of the same measures to cajole Kenyan

⁴² For a more detailed history of the election violence in Kenya and its historical antecedents, see Makau Mutua, *Kenya's Quest for Democracy: Taming Leviathan*, Fountain Publishers, Kampala, 2009 and Daniel Branch, *Kenya: Between Hope and Despair, 1963-2011*, Yale University Press, 2011. Like Lynch, Branch traces an escalation of government corruption over time that evolved in conjunction with an increasingly ethnicized political landscape.

⁴³ Kenya, National Accord and Reconciliation Act, 2008, adopted 20 February 2008 (<http://www.legal-tools.org/doc/b0d17f/>); Kenya National Dialogue and Reconciliation: Commission of Inquiry on Post-Election Violence, adopted 4 March 2008 (<http://www.legal-tools.org/doc/ccab40/>); Kenya National Dialogue and Reconciliation: Truth, Justice and Reconciliation Commission, adopted 4 March 2008 (<http://www.legal-tools.org/doc/1daf73/>). The Truth, Justice and Reconciliation Act provided that the Commission's broad objective would be to seek and promote justice, national unity, reconciliation and peace, among the people of Kenya by inquiring in to the human rights violations in Kenya and recommending appropriate redress (paraphrased). See "Objectives of the Commission", Truth, Justice and Reconciliation Act, 2008, adopted 28 November 2008, part II, Section 5 (<http://www.legal-tools.org/doc/a99644/>). Its temporal jurisdiction was enormous: December 12, 1963 to February 28, 2008. See "General Parameters", Kenya National Dialogue and Reconciliation: Truth, Justice and Reconciliation Commission, 2008, see *supra* note 43.

authorities into action as those identified in its policy paper. Following the formal declaration that President Kibaki had been re-elected, Prosecutor Moreno-Ocampo issued a public statement on 5 February 2008, recalling that Kenya was both a State Party to the Statute and that the Office would “carefully consider all information” related to alleged crimes within the Court’s jurisdiction.⁴⁴ From this time onward, communications channels existed between State-level actors in Kenya and the OTP. The Prosecutor sought additional information, including a copy of the report on the post-election violence undertaken by the Kenya National Human Rights Commission (‘KNHRC’, the State’s national human rights commission), which it had produced in August 2008.⁴⁵ OTP submissions also indicate that letters dated March 2008 sought additional information from the government, the Kenya Human Rights Commission (a prominent NGO), and the Waki Commission.⁴⁶

10.3.1. The Waki Commission and the ICC: January–October 2008

The CIPEV’s remit was to “investigate the facts and circumstances surrounding the [post-election] violence, the conduct of state security agencies in their handling of it, and to make recommendations concerning these and other matters”.⁴⁷ The Commission’s mandate expired in October 2008, at which point it published its final report. Notably, while the Commission emphasized the gravity of the post-election violence, it also noted that it was “an episode in a trend of institutionalization of violence in Kenya over the year”.⁴⁸ In its view,

⁴⁴ OTP, OTP Statement in Relation to Events in Kenya, 5 February 2008 (<http://www.legal-tools.org/doc/765584/>).

⁴⁵ Kenya National Commission on Human Rights, *On the Brink of the Precipice: A Human Rights Account of Kenya’s Post-2007 Election Violence*, August 2008 (<http://www.legal-tools.org/doc/aedd06/>) (‘KNHRC report’). The KNHRC report was referenced in the OTP’s Article 15 request and controversially, was relied on significantly by the Office in bringing its charges against the six officials initially accused. See ICC, Situation in the Republic of Kenya, Pre-Trial Chamber, Request for authorization of an investigation pursuant to Article 15, ICC-01/09-3, 26 November 2009, paras. 29-31 (‘Kenya Article 15 Request’) (<http://www.legal-tools.org/doc/c63dcc/>); see further the discussion on OTP investigations below, including Section 10.5., text before note 96 (second lesson).

⁴⁶ Kenya Article 15 Request, para. 7.

⁴⁷ Commission of Inquiry into Post-Election Violence, “Executive Summary”, in *Report of the Commission of Inquiry into Post-Election Violence*, 15 October 2008 (‘CIPEV Report’), p. vii (<http://www.legal-tools.org/doc/e852a9/>).

⁴⁸ *Ibid.*, p. viii.

The elements of systemic and institutional deficiencies, corruption, and entrenched negative socio-political culture have, in our view, caused and promoted impunity in [Kenya]. Election related violence provides the best illustration of the malady where, in five-year cycles since 1992 when multiparty politics was introduced, pre- and post-election violence has rocked various parts of the country despite official inquiries and identifications of the root causes being made.⁴⁹

Chief amongst the Commission's many recommendations was that a Special Tribunal for Kenya ('STK') – established by an act of Parliament and operating outside of the existing judicial system – be established to "seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 General Elections in Kenya".⁵⁰ It further provided:

2. The Special Tribunal shall apply Kenyan law and also the International Crimes Bill, once this is enacted, and shall have Kenyan and international judges, as well as Kenyan and international staff to be appointed as provided hereunder.
3. In order to fully give effect to the establishment of the Special Tribunal, an agreement for its establishment shall be signed by representatives of the parties to the Agreement on National Accord and Reconciliation within 60 days of the presentation of the Report of the Commission of Inquiry into the Post-Election Violence to the Panel of Eminent African Personalities, or the Panel's representative. A statute (to be known as "the Statute for the Special Tribunal") shall be enacted into law and come into force within a further 45 days after the signing of the agreement.⁵¹

Crucially, the Commission, aware that the ICC Prosecutor was already engaged in Kenya and in an effort to ensure that its recommendation was implemented, also urged referral of the post-election violence to the Court in the event that the STK failed to materialize, or if "having commenced operating, its purposes [were later] subverted".⁵² To back up

⁴⁹ *Ibid.*, p. 444.

⁵⁰ *Ibid.*, p. 472.

⁵¹ *Ibid.*, pp. 472-73.

⁵² *Ibid.*, p. 473, para. 5.

its threat, the Commission also gave to Annan a sealed envelope with a list containing names of those suspected to bear the greatest responsibility. If the STK was not established within the Commission's specified time frame, and if the government proved unwilling or unable to investigate and prosecute, the envelope and the report's confidential findings would be turned over to the OTP.⁵³

Complementarity's coercive dimension was thus the dominant logic behind the CIPEV's recommendation, and the Commission's recommendations gave renewed leverage to the ICC's engagement. In Christopher Stone's words, "the Waki Commission became the prime vehicle for the pressure that the OTP was exerting on the national government in Kenya".⁵⁴ In this regard, the Commission's conditioned approach was itself a novelty. As Kenyan human rights advocate Muthoni Wanyeki has noted, it was "in contrast with the recommendations of previous commissions of inquiry [in Kenya], which had been only partially implemented, if at all, often preferring to focus on more straightforward legal, policy or institutional reforms rather than on more contentious and pressing matters of legal and political accountability".⁵⁵

10.3.2. Special Tribunal for Kenya: October 2008–February 2009

The issuance of the Waki Report's recommendations, together with the ICC examination already underway, lent political urgency to the STK's establishment. Indeed, while the proposed tribunal raised unique constitutional challenges, work on preparing a draft statute began promptly after the government adopted (unanimously, and without amendment) the Waki Commission's report on 16 December 2008. Martha Karua, Kenya's then Minister for Justice, National Cohesion and Constitutional Affairs took

⁵³ One interlocutor who was closely engaged in the Waki Commission explained that there had been no prior communication between the Commission and the ICC Prosecutor: the recommendation that the envelope of suspects be referred to the Court in the event an STK was not established reportedly came as a surprise to Moreno-Ocampo. Interview with a Waki Commission member, September 2017.

⁵⁴ Christopher Stone, "Widening the Impact of the International Criminal Court: The Prosecutor's Preliminary Examinations in the Larger System of International Criminal Justice", in Martha Minow, C. Cora True-Frost and Alex Whiting (eds.), *The First Global Prosecutor: Promise and Constraints*, University of Michigan Press, 2015, p. 296.

⁵⁵ L. Muthoni Wanyeki, "The International Criminal Court's cases in Kenya: origin and impact", in *Institute for Security Studies*, August 2012, no. 237, p. 8 (<http://www.legal-tools.org/doc/8a4f67/>).

the lead in its drafting, with the support of the Attorney General's office and the Law Reform Commission, the body responsible for amendments to Kenyan legislation.

Known as the 'Iron Lady' of Kenyan politics, Karua enjoyed significant influence but her style – criticized by many in civil society as imperial and insufficiently consultative – led to criticisms of the bill for its perceived concessions to the executive, including, the power of presidential pardon.⁵⁶ Nevertheless, Karua was also considered to be a reform-minded politician, and notable features of her proposed legislation included its primacy over local courts for the crimes under its jurisdiction (not only crimes against humanity, but also genocide, gross human rights violations, and other crimes committed in relation to the 2007 elections); a significant effort to internationalize the court's judicial composition; and, borrowing heavily from the ICC Statute, attempts to incorporate the participation of victims within domestic proceedings.⁵⁷ Importantly, because such a tribunal would operate outside of the Kenyan High Court system, a constitutional two-thirds majority (rather than a simple majority) would be required to pass the legislation.

Significant pressure was subsequently placed on parliamentarians to approve a constitutional amendment establishing the STK. Both Kibaki and Odinga supported the legislation's passage in principle (though the degree of political leadership they provided is questionable), while opponents of the bill included then MP Ruto, who represented the district of Eldoret North.⁵⁸ The latter formed a bloc of parliamentarians who favoured the ICC in part because it was seen to be less of a threat: it would

⁵⁶ See Godfrey M. Musila, "Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions", in *International Journal of Transitional Justice*, vol. 3, no. 3, 2009, p. 452. This description of Karua as the "Iron Lady" was made by several interlocutors in the course of my 2011 trip to Nairobi (on file with author).

⁵⁷ See Special Tribunal for Kenya Bill, 2009, 28 January 2009 (<http://www.legal-tools.org/doc/cccc58/>). The provisions on victim participation in the proposed Bill are found in Article 50 ("Rights of Victims") and are nearly identical to Article 68(3) of the Rome Statute. Notably, victim participation is not a feature otherwise available in Kenya's judicial system.

⁵⁸ Several Kenyan politicians have since gone on record as critical of Kibaki and Odinga's leadership: MP Mutula Kilonzo stated that they were "failing in leadership", and Karua later said they had provided "little or no support" during the parliamentary debates. See Lionel Nichols, *The International Criminal Court and The End of Impunity in Kenya*, Springer International Publishing, 2015, p. 105.

prosecute fewer suspects and take more time.⁵⁹ Thus, the failure of Karua's bill was largely the product of an "unholy alliance" between those MPs who opposed it because they feared being implicated and those parliamentarians – primarily reform-minded backbenchers – who favoured accountability in principle, but lacked faith in the idea of a national judicial process, particularly one that would displace the ICC.⁶⁰

The February 2009 debate in the National Assembly on the STK was predictably contentious, particularly as compared to the warm debate on domestication of the Rome Statute, which had had taken place only several months before.⁶¹ The protection of Kenyan sovereignty loomed large in the discussions: supporters and opponents of a domestic tribunal alike summoned it. As the Bill's sponsor, Karua presented the amendment as recognition that Kenya had "not been able, up to now, to deal with the issues arising from the post election violence", but also as an opportunity for domestic ownership and agency.⁶² MP James Orengo, who seconded the Bill, likewise cast the STK as an affirmation of Kenya's sovereign powers.⁶³ Other MPs, however, notably cast doubt on both the gravity of

⁵⁹ This view was expressed by several interlocutors in Kenya. For a similar analysis, see Lydia Kemunto Bosire, "Misconceptions II – Domestic Prosecutions and the International Criminal Court", in *African Arguments*, 18 September 2009 (<http://www.legal-tools.org/doc/667263/>).

⁶⁰ See Wanyeki, 2012, pp. 9-10, see *supra* note 55; Stephen Brown and Chandra Lekha Sri-ram, "The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya", in *African Affairs*, 2012, vol. 111, no. 443, pp. 244–60; Sosteness Francis Materu, *The Post-Election Violence in Kenya: Domestic and International Legal Responses*, Springer International Publishing, 2015, pp. 72–73.

⁶¹ Unlike the narrowly defeated STK Bill, the parliamentary debate on the International Crimes Act ('ICA') records no opposition to its passage. The Attorney General's proposal was supported by Karua as well as MP Danson Mungatana (an STK opponent), who "[took] the opportunity to thank the Attorney-General for, once again, rising to the occasion and bringing our country's laws in line with the international community, especially in criminal jurisprudence". See Bill: Second Reading: The International Crimes Bill, in *Kenya National Assembly Official Record (Hansard)*, 7 May 2008. The ICA was tabled and passed in a matter of months; it came into effect on 1 January 2009.

⁶² Bill: Second Reading: The Constitution of Kenya (Amendment) Bill, 2009, in *Kenya National Assembly Official Record (Hansard)*, 3 February 2009 ('STK Amendment Bill'), p. 36.

⁶³ *Ibid.*, p. 38. MP Kilonzo invoked a similar call to sovereignty, noting, "I want as a country, to respect our sovereignty by acknowledging that we are signatories to the International Criminal Court Charter [sic]. [...] Let the citizens of other failed states go to the Hague". *Ibid.*, p. 46.

the violence and the imminence of the ICC threat when voicing their opposition. In their words:

If you look at the history of [conflicts in Sudan, Uganda, and the Democratic Republic of Congo] and the matters which have been taken before The Hague, it is not more than some people who have gone to the International Criminal Court because the threshold is so high for it to act.⁶⁴

I want to caution this House, that it is not a given; it is not guaranteed that if we do not act domestically, one Moreno-Ocampo, the Chief Prosecutor of the ICC will be on the next flight to Nairobi.⁶⁵

What happened in Kenya in 2007 was tragic and really tragic. But it is not sufficient to call for the intervention of the ICC.⁶⁶

Still other parliamentarians argued that the tribunal was itself a concession to foreign interference, characterizing it as a “house we want to build with foreign materials”.⁶⁷

Ultimately, the legislation that Karua proposed was the only one that would ever come close to receiving parliamentary assent.⁶⁸ In continued exercise of the ICC’s oversight function, the Prosecutor publicly reaffirmed on the eve of Parliament’s vote that the OTP was monitoring the situation in Kenya, but that proved insufficient to alter the votes. Ultimately, the STK amendment failed to command a constitutional majority: on 12 February 2009, it was defeated in a vote of 101 (in favour) to 93 (opposed).⁶⁹

⁶⁴ *Ibid.*, p. 31 (MP Orengo).

⁶⁵ *Ibid.*, p. 35 (MP Namwamba).

⁶⁶ *Ibid.*, p. 34 (MP Baiya).

⁶⁷ *Ibid.*, p. 43 (MP Danson Mungatana).

⁶⁸ Musila, 2009, p. 452, see *supra* note 56.

⁶⁹ While a majority of parliamentarians in fact voted in favour of the tribunal, passage of the Bill required a two-thirds majority given that it required a constitutional amendment. See Francis Mureithi, “How MPs rejected the Proposed Special Tribunal for Kenya Bill”, in *The Star*, 12 March 2011. A full breakdown of the votes is recorded at Bill: Second Reading: The Constitution of Kenya (Amendment) Bill, in *Kenya National Assembly Official Record (Hansard)*, 12 February 2009, pp. 30-34.

10.3.3. Subsequent Efforts: March–November 2009

Following the government’s failure to establish the STK, more direct and frequent contact between the OTP and national-level actors took shape; however, as Lionel Nichols has noted in his study of the ICC’s experience in Kenya, the Office’s public engagement was largely conducted “through press statements and media interviews, rather than through face-to-face meetings”.⁷⁰ The Kenyan government subsequently promised to reintroduce improved legislation but a second attempt to do so was rejected in June 2009.⁷¹ After two successive extensions lapsed, Annan forwarded the Waki envelope and evidence to the OTP in July 2009. Thereafter, the Prosecutor met with a formal delegation from Kenya (including then Minister of Justice and Constitutional Affairs, Mutula Kilonzo), which resulted in an agreement stating that the government would provide him, by the end of September, with a report on the current status of investigations and prosecutions. Furthermore, if no “modalities for conducting national investigations and prosecutions” were put in place within a year’s time, it was agreed that the government would refer the matter to the ICC in accordance with Article 14.⁷²

Following Annan’s handover of the envelope and more frequent interactions with the OTP, the government made renewed efforts at establishing domestic accountability process, but to no avail. Kilonzo, for instance, reintroduced an STK bill that sought to ameliorate some of the criticisms of the first draft; however, the Cabinet was unable to come to a political agreement and eventually opted to abandon the idea of a hybrid tribunal entirely. Ultimately, after a series of meetings, Kibaki announced at a press conference in late July that all suspects would be dealt with through regular national courts as well as the Truth, Justice and Reconciliation Commission (even though the latter had no prosecutorial authority), and that the government would first focus its efforts on reforming the ju-

⁷⁰ Nichols, 2015, pp. 80-81, see *supra* note 58. See, for example, OTP, “ICC Prosecutor receives Sealed Envelope from Kofi Annan on Post-Election Violence in Kenya”, 9 July 2009; *idem*, “ICC Prosecutor receives materials on post-election violence in Kenya”, 16 July 2009; *idem*, “ICC Prosecutor: Kenya Can Be an Example to the World”, 18 September 2009. See also Kenya Article 15 Request, paras. 13-14, 16 and 18-20.

⁷¹ This bill was introduced by Karua’s successor, Justice Minister Mutula Kilonzo. It never reached Parliament as it was rejected at the cabinet level.

⁷² OTP, Agreed Minutes of Meeting of 3 July 2009 between the ICC Prosecutor and Delegation of the Kenyan Government, The Hague, 3 July 2009 (<http://www.legal-tools.org/doc/27d6b9/>).

diciary and the police.⁷³ MP Gitobu Imanyara also sought to introduce a private member's bill, but it did not advance on formal grounds as parliamentary quorum was not met. Indeed, as two commentators have noted, "a boycott by MPs, allegedly with support from their party leaders, prevented the Assembly from reaching quorum whenever the bill was due to be discussed".⁷⁴

During this time, the OTP maintained an increasingly public profile. Staff from the JCCD made several visits to Kenya and "unofficial meetings were held" with human rights NGOs.⁷⁵ The Office also held a roundtable discussion in The Hague in September 2009 with Kenyan civil society representatives and, in October, Moreno-Ocampo requested another meeting with national authorities. A letter was also sent to the Kenyan authorities later that month, informing them that the Office's preliminary examination was complete and reiterating that two options were available: either an Article 14 referral by the government, or an independent decision of the Prosecutor to request judicial authorization to start an investigation. On 5 November 2009, the Prosecutor met with Kibaki and Odinga in Nairobi, and announced in a joint press conference his intention to request such authorization. Six months later, in a divided opinion of Pre-Trial Chamber II, it was granted.⁷⁶

⁷³ "President Kibaki's Statement", in *The Standard* (Kenya), 31 July 2009.

⁷⁴ Brown and Sriram, 2012, p. 254, see *supra* note 60. See further Bill: Second Reading: The Constitution of Kenya (Amendment) Bill, in *Kenya National Assembly Official Record (Hansard)*, 2 December 2009.

⁷⁵ The meeting in The Hague was sponsored by the International Center for Transitional Justice; Kofi Annan also organized a conference in March 2009 to discuss possible ICC involvement in Kenya, at which civil society organizations were present. Interview with Kenyan human rights advocates, January 2012; see also Thomas Obel Hansen and Chandra Lekha Sriram, "Fighting for Justice (and Survival): Kenyan Civil Society Accountability Strategies and Their Enemies", in *International Journal of Transitional Justice*, 2015, vol. 9, no. 3, pp. 407-27.

⁷⁶ Kenya Article 15 Decision; see, however, ICC, Situation in the Republic of Kenya, *The Prosecutor v. William Samoei Ruto and Joshua Arap Sang*, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's "Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang", 15 March 2011, ICC-01/09-01/11-2 (<http://www.legal-tools.org/doc/9da8a0/>); and ICC, Situation in the Republic of Kenya, *The Prosecutor v. Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Dissenting Opinion by Judge Hans-Peter Kaul to Pre-Trial Chamber II's "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", 15 March 2011, ICC-01/09-02/11-3 (<http://www.legal-tools.org/doc/521d6d/>).

10.4. The Kenyan Examination Reconsidered

The Waki Commission's report and its unique use of the ICC as a self-enforcement mechanism "brought Kenya closer than it had ever been before to achieving any judicial accountability for the abhorrent election-related violent crimes".⁷⁷ But while the current historical narrative may tend to overlook how close Kenya came to establishing a special tribunal in February 2009, the history and conduct of the OTP's preliminary examination illustrates several ways in which it failed to sufficiently appreciate or engage with the country's complex political and social contexts. These failings also left the Office ill-prepared for the investigations that would follow.

10.4.1. Understanding of Domestic Political Context

Fundamentally, the OTP's examination did not succeed in producing its desired outcome: the establishment of a domestic tribunal for the prosecution of election-related violence. While the difficulty of such a task should not be overlooked – such a tribunal would have effectively functioned outside of the Kenya's ordinary criminal justice system and would have, by design, been insulated from a judiciary that had long been criticized for its susceptibility to executive influence – its failure to pass should have been foreseen.⁷⁸ The presumption that Kenyan parliamentarians would prefer the prospect of a domestic accountability mechanism – and that the ICC was itself a sufficient threat to create such a mechanism – appear to be the premise upon which both the Waki Commission and Prosecutor Moreno-Ocampo were operating in late 2008 and early 2009. However, as noted above, the defeat of the Special Tribunal Bill was largely the product of an 'unholy alliance' between those MPs who opposed it because they feared being implicated in the violence, and those who favoured accountability in principle but lacked faith in the idea of a domestic process.

Thus, while the phrase "Don't be vague, go to The Hague" emerged as part of Kenya's political lexicon to ostensibly indicate a preference for the ICC's involvement, it also signaled that many political actors saw the Court as a more limited threat. The ICC, by its own admission, could only pursue a handful of perpetrators at the highest level, while an STK would

⁷⁷ Brown and Sriram, 2012, p. 257, see *supra* note 60.

⁷⁸ See, for example, Makau Mutua, "Justice Under Siege: The Rule of Law and Judicial Subsistence in Kenya", in *Human Rights Quarterly*, 2001, vol. 23, no. 1, pp. 96-118.

likely have pursued a significantly greater number of individuals; therefore, MPs “who were implicated but who were not among the ‘big fish’ had little to fear from the ICC”.⁷⁹ Proceedings in The Hague, it was thought, would also undoubtedly last longer than the next Kenyan election cycle. Indeed, some may have had much to gain if the Court proved successful in removing senior political rivals from the domestic electoral arena. As one MP noted during parliamentary debate, “There are those who will come to this floor to debate this law with the determination to ensure that this law does not pass; with the determination that, that [this] tribunal will not be set up, because their political rivals will be added to The Hague”.⁸⁰ In short, although key factions of the Kenyan political elite feared the ICC, it was not feared enough.

The failure of the first STK bill – which was the only piece of legislation to ever meaningfully advance – should also have signaled far sooner to the ICC Prosecutor than it apparently did that a genuine domestic accountability process in Kenya would not be forthcoming. Based on the political logic of the ‘unholy alliance’ that doomed Karua’s legislation, there was little reason to think that subsequent efforts would bear any fruit. Yet rather than moving to open an investigation shortly after the bill’s defeat in early February 2009, the ICC’s preliminary examination continued for another nine months, even as the government’s subsequent proposals grew increasingly incoherent. The OTP’s own language as to what would constitute a satisfactory domestic process for Kenya tracks these diminishing returns: the July 2009 agreement between the government and the OTP, for instance, referred obliquely to “modalities for conducting national investigations and prosecutions”, rather than a domestic tribunal as such.⁸¹

This dynamic continued and deepened over the course of the year, casting doubt on the wisdom of continuing to engage with the government

⁷⁹ Brown and Sriram, 2012, p. 253, see *supra* note 60. For a similar analysis, see Yvonne Dutton and Tessa Alleblas, “Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya”, in *St. John’s Law Review*, 2017, vol. 91, no. 1, pp. 148-55.

⁸⁰ STK Amendment Bill, pp. 33-34 (MP Namwamba). Indeed, Raila and Odinga – who had politically allied themselves in the 2007 election – were amongst those who took opposing views of the STK. Odinga supported the tribunal largely because he believed it would sideline political opponents, while Ruto opposed the idea. Interview with a Kenyan academic, 18 June 2011 (on file with author).

⁸¹ OTP, Agreed Minutes of Meeting of 3 July 2009 between the ICC Prosecutor and Delegation of the Kenyan Government, The Hague, 3 July 2009, see *supra* note 72.

in the hope that domestic politics would somehow yield to the ICC's threatened intervention. As Wanyeki, writing in late 2009, noted, "The state has done just enough, the bare minimum, to maintain the masquerade that it intends to pursue criminal justice for the organised violence on both sides of the political divide as well as the state violence last year".⁸² The length of the ICC's examination may well have prolonged this masquerade.

10.4.2. Overconfident and Underprepared

Complementarity's coercive dimension was the dominant logic behind the Waki Commission's threat to disclose the envelope of suspects to the ICC – this was a role that Prosecutor Moreno-Ocampo appeared to welcome, if not relish. Yet, just as the excessive length of the preliminary examination raises the question of whether there was a proper appreciation for Kenyan domestic politics, it is important to ask how wisely the OTP made use of this two-year period of time. The CIPEV report was released in October 2008 (ten months after the Office's examination had allegedly begun); yet, prior to and during the period leading up to the February 2009 parliamentary vote, there is little evidence that the OTP undertook a significant field mission to Kenya, or that there was any serious attempt to engage with Kenyan victims and affected communities. Informal communications channels may have existed between State actors and the OTP but, as noted, face-to-face meetings with government officials and members of civil society were relatively rare until much later in the examination. Moreno-Ocampo himself only made his first visit to Kenya in May 2010, while the first formal meeting between Kenyan civil society groups and the OTP took place not in Nairobi but in The Hague, more than 18 months after the examination had begun.⁸³ Given this, it is unsur-

⁸² L. Muthoni Wanyeki, "Kenya: We Remember, and Have Evidence", in *The East African*, 9 November 2009. Other scholars of the Kenyan examination have endorsed this analysis: Brown and Sriram, for instance, conclude that, "While performing sham compliance, the government dragged its feet and delayed and undermined the process as much as it could, without repudiating it", *idem*, 2012, p. 258, see *supra* note 60. Similarly, Lionel Nichols calls the government's representations a "foreign affairs façade": in his view, one that "sought to give the impression that progress was being made". See Nichols, 2015, p. 104, see *supra* note 58.

⁸³ Anne Perrot, "Kenyan victims consulted on opening of Prosecutor's investigation", in *Victims' Rights Working Group Bulletin*, Victims' Rights Working Group, Summer 2010, no. 16, p. 2. ("The Prosecutor of the ICC made his first visit to Kenya in mid-May 2010 to carry out investigations and meet with the victims' communities."). Notably, this lack of

prising to note (as other Kenyan scholars have) that almost no one in Kenya even knew that the ICC had opened a preliminary examination, much less what that meant.⁸⁴

Moreover, it is doubtful how appropriately staffed the OTP's JCCD division was to ensure that it could undertake the kind of situational analysis that was needed at the time in Kenya. As elsewhere at the time, the Office had hired no country experts (much less country nationals) as either permanent or temporary staff.⁸⁵ Several interlocutors in Kenya also expressed frustration that the Office had not done more to identify witnesses or secure testimony and documents at this early stage of the Court's examination, before government obstruction to its intervention had consolidated.⁸⁶ As a report by Kenyans for Peace, Truth, and Justice

field engagement appeared little changed, even after the OTP had initiated its investigation. A November 2011 filing from victims' representative in the case against Ruto and Sang alleged, for instance, that the OTP had not conducted a "meaningful investigation into eyewitness experiences" in Kenya and that the participating victims (who numbered nearly 300 at the time) had reportedly not been interviewed by the OTP, were not aware of anyone in their locality having been interviewed, nor were they aware of the Prosecutor having ever come to their localities to conduct on-site investigations. See ICC, Situation in the Republic of Kenya, *The Prosecutor v. William Samoei Ruto et al.*, Pre-Trial Chamber, Request by the Victims' Representatives for Authorisation to Make a Further Written Submission on the Views and Concerns of the Victims, 9 November 2011, ICC-01/09-01/11-367, paras. 10-12 (<http://www.legal-tools.org/doc/a00d6c/>).

⁸⁴ See, for example, Evelynne Asaala, "The Deterrence Effect of the International Criminal Court: A Kenyan Perspective", in Jennifer Schense and Linda Carter (eds.), *Two Steps Forward, One Step Back: The Deterrent Effect of International Criminal Tribunals*, Torkel Opsahl Academic EPublisher, Brussels, 2017, p. 329.

⁸⁵ See Christian M. De Vos, "Investigating From Afar: The ICC's Evidence Problem", in *Leiden Journal of International Law*, 2013, vol. 26, no. 4, p. 1020. Xabier Aguirre, a senior analyst with the OTP, has elsewhere noted that there "are security implications in integrating persons from the region where the crime was committed", but argues that, "These security issues need to be addressed on a case-by-case basis, with proper procedures and guarantees, instead [of] excluding valuable local resources on [the] basis of general categorisations". See Xabier Aguirre, "The Role of Analysis Capacity", in Morten Bergsmo, Klaus Rackwitz and SONG Tianying (eds.), *Historical Origins of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublisher, 2017, p. 63.

⁸⁶ Interviews with Kenyan human rights advocates, 16 June 2011 (on file with author). For a stinging critique of the OTP's investigative methodology in Kenya, see also ICC, Situation in the Republic of Kenya, *The Prosecutor v. Uhuru Muigai Kenyatta*, Trial Chamber, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, 26 April 2013, ICC-01/09-02/11-728, Concurring Opinion of Judge Christine Van den Wyngaert, paras. 1, 4-5 (<http://www.legal-tools.org/doc/da5089/>). Judge Van den Wyngaert specifically chastised the OTP for its "failure to investigate properly" prior to bringing charges against

(a coalition of leading Kenyan NGOs formed in the wake of the violence, known as KPTJ) later noted, “long before Uhuru [Kenyatta] became president it should have been obvious that the Kenyan government was always going to be ambivalent in its dealings with the ICC and that it would do everything it could to shield those of supporters indicted by the ICC”.⁸⁷ Indeed, it was partly the failure to independently identify and gather information that led the Office to later rely so heavily on witness testimony in the Kenyan cases, with all of the attendant risks that entailed.⁸⁸

In retrospect, this deployment of resources – wherein communication with the government was largely Hague-based – makes little sense. The power of the Kenyan examination procedure was arguably at its peak during the January 2008–February 2009 period, buttressed as it was by the ongoing CIPEV investigation and the active role of Annan, who had yet to hand the Commission’s envelope over to The Hague. Yet the OTP only became more publicly active and engaged in the examination procedure following the STK Bill’s defeat, by which point the Court’s coercive power had diminished considerably. And by the time the Prosecutor formally sought permission to investigate, the government had already begun what would prove to be a ruthless campaign of obfuscation and witness intimidation. Both of these factors would prove fatal to the outcome of the OTP’s cases.

10.4.3. A Complementarity Conundrum

Finally, a paradox appears to have lain at the heart of the Kenyan preliminary examination. Whereas the Waki Commission and Moreno-Ocampo both sought to use the threat of the ICC’s intervention as leverage for the establishment of a domestic process, many victims and advocates in Kenya, in fact, saw the Court’s involvement as a necessary condition of such a process. Kenyan civil society, in particular, while not a monolith, took an exceedingly dim view of the government’s willingness to pursue accountability absent the assurance of external proceedings, one that political

Kenyatta, revealing, in her words, “grave problems in the Prosecution’s system of evidence review, as well as a serious lack of proper oversight by senior Prosecution staff”.

⁸⁷ Kenyans for Peace with Truth and Justice, *Impunity Restored? Lessons learned from the failure of the Kenyan cases at the International Criminal Court*, 2016, pp. 14-19.

⁸⁸ See *ibid.* One interlocutor remarked to me in June 2011 his disappointment with the ICC’s witness protection program, predicting – accurately – that people were “going to get [...] killed” as a result of “incompetence” in the Court’s protection operations. Interview of 16 June 2011 (on file with author).

leaders could not control. It is precisely because of this distrust in a judicial system that was “heavily compromised and ‘beholden to the executive’”⁸⁹ that the core features of the proposed tribunal – located outside of the domestic justice system, with international judicial participation – were seen as non-negotiable, and why the perceived compromises in Karua’s legislation (for instance, with respect to presidential immunity) were viewed with suspicion even amongst those who supported a domestic process in principle.

Put differently, civil society’s trust in the Kenyan government and faith in its institutions was so low that most were reluctant to support any domestic legal reform efforts until *after* the ICC intervened. In the words of two prominent Kenyan advocates:

In tandem with the ICC’s intervention, civil society groups have been at the forefront of advocating for [a judicial mechanism], *though such advocacy had to take place after the commencement of the Kenyan cases*. Given the pervasive climate of impunity, many organisations feared that any domestic accountability processes might be hijacked to justify an admissibility challenge before the ICC.⁹⁰

Similarly, in their study of the advocacy strategies of Kenyan NGOs during the ICC’s preliminary examination, Christine Bjork and Juanita Goebertus conclude that, “in most cases, even the NGOs that actually had the power to impact national criminal justice system reform were inclined, instead, to encourage ICC intervention at the time that the preliminary examination was being conducted”.⁹¹ This was because they “feared that improvements of the criminal justice system or installment of transitional justice mechanisms would avert ICC intervention and create impunity for the main perpetrators”.⁹² Given the pervasive distrust in Kenya’s institutions, most supporters of accountability were unwilling to accept com-

⁸⁹ Musila, 2009, p. 456, see *supra* note 56.

⁹⁰ Njonjo Mue and Judy Gitau, “The Justice Vanguard: Kenyan Civil Society and the Pursuit of Accountability”, in Christian De Vos, Sara Kendall and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions*, Cambridge University Press, 2015, p. 216 (emphasis added).

⁹¹ Christine Björk and Juanita Goebertus, “Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya”, in *Yale Human Rights and Development Journal*, 2011, vol. 14, no. 1, p. 218.

⁹² *Ibid.*, p. 223.

plementarity's catalytic potential without the engagement of the very institution the preliminary examination sought to avoid: the ICC itself.

10.5. Conclusion

This chapter has argued that a series of fatal presumptions drove the design and duration of the OTP's preliminary examination in Kenya. These presumptions were at least three-fold: (1) that Kenyan politicians (specifically, parliamentarians) would necessarily prefer the prospect of a domestic accountability mechanism to ICC intervention; (2) that the latter would be a sufficient threat to create such a mechanism, and that deeper, field-based engagement by the OTP was not necessary or possible in the interim; and (3) that Kenyan civil society – on which the success of the Court's mission crucially rested – would support a domestic process in lieu of the ICC. On the contrary, given the pervasive distrust in Kenya's judicial and security sectors, most accountability advocates were unwilling to support domestic complementarity without accompanying trials in The Hague.

These presumptions offer a number of instructive lessons for improving the 'quality control' of ICC preliminary examinations, including their timing, duration, and modalities. They include, as I have elsewhere argued, a more co-operative, place-based approach to examinations and investigations (where circumstances permit, as they arguably did during the early period of the Kenyan preliminary examination). Crucially, such an approach would better ensure that the Office not only has a firmer grasp on the complex social and political realities that unfold in the context of ICC engagement, but also better access to affected communities, domestic political allies, potential witnesses, and other sources of evidence. Seils has advocated such an approach as well, noting that "A longer presence on the ground should allow analysts to improve their understanding of the institutions that are of interest, both in terms of those providing information and those conducting national proceedings".⁹³

Judging by changes to the OTP's investigative strategies and methodologies developed under Prosecutor Bensouda's tenure, it appears that the Office has moved gradually, if partially, in this direction, while also seeking out additional resources to support its preliminary examination

⁹³ Seils, 2011, p. 1000, see *supra* note 26.

work.⁹⁴ These are welcome developments, although they remain limited by budget constraints imposed by the Assembly of States Parties. These constraints, as Prosecutor Bensouda noted in an earlier address, have cut the Office's budget "as near as possible to the bone".⁹⁵ She added:

[L]et's say with investigations, we try to do maybe two missions where we should have done three missions. We try to cut down on people, investigators, who should go on the missions. If we can have two instead of four, that is what we will do to be able to cut corners. But what that is directly doing is having a consequence on the quality of our investigations and prosecutions. If we want to improve on the quality of investigations and prosecutions, we must have the means to do that.

Such limits will continue to inhibit the OTP's ability to address not only investigations with sufficient depth and rigor, but preliminary examinations as well.

Second, and relatedly, the Kenyan experience calls for a more calculated and rigorous effort to gather information (information that may become lead evidence) in the preliminary examination phase, rather than waiting for an investigation to formally begin. As Carsten Stahn notes, the Statute "seems to imply that there is a clear-cut distinction" between examinations and investigations, but there is "a need to draw connections between incidents and suspects, even before the formal start of investigations".⁹⁶ The Kenyan experience, where the failed prosecutions have done great damage to the Court's credibility, illustrates the important link between these stages.

For instance, it would appear that the OTP did not use the extended examination period to conduct more thorough inquiries of its own, or to develop a meaningful presence within the country or amongst affected communities. Indeed, the Prosecutor's Article 15 request makes no mention of any such inquiries, relying instead entirely on the previous CIPEV

⁹⁴ See, for example, OTP, Strategic Plan 2016-2018, 6 July 2015 (<http://www.legal-tools.org/doc/7ae957/>). (<http://www.legal-tools.org/doc/dc1a25/>).

⁹⁵ Fatou Bensouda, "The International Criminal Court: A New Approach to International Relations", Council on Foreign Relations David Rockefeller Lecture, 21 September 2012 (<http://www.legal-tools.org/doc/100ce0-1/>). See also Mercy Eze, "Interview with Fatou Bensouda", in *New African Magazine*, 28 January 2014 (<http://www.legal-tools.org/doc/dc1a25/>).

⁹⁶ Stahn, 2017, p. 434, see *supra* note 12.

and KNHRC reports, as well as those of other UN and NGO offices. The relative length of the Kenyan examination and its continuation in spite of the domestic political retreat from accountability also suggests that, while hard time limits on the length of examinations may be inadvisable, the domestic political leverage they are able to exert is likely to diminish over time, particularly when the establishment of precise benchmarks (like the STK) goes unmet.⁹⁷

Third, there should be greater attunement to the *sui generis* contexts of ICC interventions, and to the shifting political dynamics in which they unfold. This requires greater, savvier national political acumen at the OTP's disposal (often best provided by country nationals and experts) and within the JCCD in particular, as well as a more modest conception of what the threat of ICC prosecutions is likely to achieve in a particular situation. Kenya's history of "ever-changing political alliances", as Lynch describes them – and the Prosecutor's failure to "grasp the incestuous links, and the mendacity, of Kenya's political elite", as the KPTJ report aptly puts it – illustrate well the need to ensure that legal decisions are made with a deeply informed assessment of a situation's domestic and local politics.⁹⁸ Indeed, few foresaw that one perverse outcome of the ICC's attempted prosecutions would be to bring Kenyatta and Ruto, former political enemies, together in political victory. As Moreno-Ocampo later confessed, "I never suspected [Kenyatta and Ruto] were so smart to create the ticket".⁹⁹

These words underscore, finally, the importance of appreciating the possibilities that legalism can afford, but also of its limits. Such a (re)orientation need not entail a retreat from the pursuit of criminal accountability, but rather a more politically informed and nuanced understanding of where and when the threat of prosecution is likely to shape or

⁹⁷ See, for example, Anni Pues, "Towards the 'Golden Hour'? A Critical Exploration of the Length of Preliminary Examinations", in *Journal of International Criminal Justice*, 2017, vol. 15, no. 3, pp. 435-53. Going further, Hector Olasolo has argued that the Office is required to close preliminary examinations within a reasonable period of time, and is obliged to inform information providers if it decides not to initiate an investigation. Hector Olasolo, *The Triggering Procedure of the International Criminal Court*, Martinus Nijhoff, Leiden, 2005, p. 62.

⁹⁸ Lynch, 2011, chap. 6, text before fn. 6, see *supra* note 41; Kenyans for Peace with Truth and Justice, 2016, p. 19, see *supra* note 87.

⁹⁹ James Verini, "The Prosecutor and the President", in *New York Times*, 22 June 2016 (<http://www.legal-tools.org/doc/1a696c/>).

alter the commitments and priorities of domestic political actors and, crucially, when it is unlikely to do so.¹⁰⁰ As McEvoy argues, “‘Letting go’ of legalism [...] means being open to the insights of disciplines and forms of knowledge other than law in better understanding the meaning of justice in transition”.¹⁰¹ The ICC and its supporters both must acknowledge and adapt to this fact if the Court is to become a more responsive, politically astute actor. At the same time, the ICC must enjoy the necessary financial resources to ensure that it can meet its core function: to competently investigate and prosecute international crimes.

¹⁰⁰ There is a rich and growing social science literature on the relationship between international law and its ability to influence domestic political commitments and priorities. See, for example, Karen Alter, *The New Terrain of International Law: Courts, Politics, and Rights*, Princeton University Press, 2014; Ryan Goodman and Derek Jinks, *Socializing States: Promoting Human Rights Through International Law*, Oxford University Press, Oxford, 2013; Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*, Cambridge University Press, Cambridge, 2009.

¹⁰¹ McEvoy, 2008, p. 44, see *supra* note 8.

Challenges in the Relationship Between the ICC and African States: The Role of Preliminary Examinations under the First ICC Prosecutor

Benson Chinedu Olugbuo*

The exercise of prosecutorial discretion during preliminary examinations has become a critical factor in the relationship between African States Parties to the Rome Statute and the International Criminal Court ('ICC'). Noting some of the challenges between the former ICC Prosecutor and African States as a result of the decisions on the preliminary examinations, this chapter argues that the lack of transparency and objectivity, as well as the inability to adhere to the principles under the Rome Statute and policies of the Office of the Prosecutor ('OTP') may have been contributory to the current frosty relationship. The chapter concludes with several recommendations aimed at improving the quality of preliminary examinations at the ICC.

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11.1. Introduction

Since the inception of the Court in July 2002, the discretion exercised by the ICC Prosecutor in the investigation and prosecution of crimes has been under intense scrutiny for various reasons, and the debate generated is not likely to abate anytime soon. Nevertheless, the exercise of discretion during preliminary examinations has received very little attention, although it plays a crucial role in the overall architecture of the Court and in international criminal justice generally. In this regard, a key question that this chapter seeks to answer is: what guides the Prosecutor in the exercise of discretion to ensure that he or she operates within the ambit of the law?

The Prosecutor has the sole discretion to decide whether or not to conduct a preliminary examination. This discretion, however, is subject to the oversight functions of the Pre-Trial Chamber once the Prosecutor decides to open an investigation *proprio motu* (of his own accord). Although the Rome Statute provides some principles governing the conduct of preliminary examinations, other provisions of the treaty in relation to the exercise of discretion are subject to different interpretations.

The first Prosecutor, Luis Moreno-Ocampo, has been accused by some scholars of making political, rather than legal, decisions in conducting some preliminary investigations. Some observers argue that he has made some inconsistent or biased decisions regarding the outcome of preliminary examinations.¹ For example, the Prosecutor was criticized regarding the manner in which preliminary examinations were carried out in the situations of Sudan, Libya, Uganda, Central African Republic, Kenya and Côte d'Ivoire. He was also accused of not showing a clear

¹ William Schabas, "Prosecutorial Discretion v. Judicial Atavism at the International Criminal Court", in *Journal of International Criminal Justice*, 2008, vol. 6, no. 4, pp. 731–61; William Schabas, "Complicity before the International Criminal Tribunals and Jurisdiction over Iraq", in Phil Shiner and Andrews Williams (eds.), *The Iraq War and International Law*, Hart Publishing, Oxford and Portland, Oregon, 2008, p. 157; William A. Schabas, "Gravity and the International Criminal Court", in Chile Eboe-Osuji (ed.), *Protecting Humanity: Essays in International Law and Policy in Honour of Navanethem Pillay*, Martinus Nijhoff, The Hague, 2010, p. 702; William Schabas, "Victor's Justice: Selecting "Situations" at the International Criminal Court", in *John Marshall Law Review*, 2010, vol. 43, no. 3, pp. 535–22; Kamari Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa*, Cambridge University Press, New York, 2009, p. 237; Sarah Nouwen and Wouter Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan", in *European Journal of International Criminal Law*, 2010, vol. 21, no. 4, pp. 941–65.

procedure regarding his decision not to open an investigation in the Gaza Strip, Palestine. His conduct of on-going preliminary examination in Columbia had also attracted some criticisms.

As alluded above, the exercise of prosecutorial discretion has been a major source of the tension between the African Union ('AU') and the ICC concerning investigations, prosecutions of crimes, and the indictment of (mostly) Africans by the Court. In fact, there is a popular perception, especially among African politicians, that the former ICC Prosecutor had targeted African leaders while turning a blind eye to crimes committed in other parts of the world. Hence, the AU, during a Summit of Heads of States and Governments meeting in July 2009, decided not to co-operate with the ICC in the arrest and surrender of President Al-Bashir of Sudan. Furthermore, the continental body contemplated a mass withdrawal from the ICC aimed at weakening its global reach.

At a decision taken at the twenty-sixth Ordinary Session held in Addis Ababa in January 2016, the AU Heads of States and Governments gave the Open-ended Ministerial Committee a mandate to urgently develop a comprehensive strategy, including a collective withdrawal from the ICC, to inform the next action of AU Member States that are also States Parties to the Rome Statute.² The Ministerial Committee was required to submit this strategy to an Extraordinary Session of the Executive Council. Despite opposition from different African countries, the strategy was adopted in January 2017 by the AU's highest decision-making body.³ Although it does not seem as if there will be a collective mass withdrawal in the near future, the symbolic act sends a strong message to the ICC and the international community at large.

The problem with prosecutorial discretion, however, goes beyond the perception of bias against Africa. Some of these criticisms have arisen from the apparent contradictions in the legal criteria, policies, principles and practices adopted by the Prosecutor in conducting preliminary examinations. These criticisms hint at a major legal problem concerning the nature of the discretion of the Prosecutor, and the principles that should

² AU, Decision on the International Criminal Court, adopted 31 January 2016, Assembly/AU/Dec.590 (XXVI), doc. EX.CL/952(XXVIII).

³ AU, Decision on the International Criminal Court, adopted 31 January 2016, Assembly/AU/Dec.622 (XXVIII), doc. EX.CL/1006(XXX). Benin, Botswana, Burkina Faso, Cabo Verde, Côte d'Ivoire, The Gambia, Lesotho, Liberia, Madagascar, Malawi, Mozambique, Nigeria, Senegal, Tanzania, Tunisia and Zambia entered reservations.

govern how that discretion is exercised. For the ICC to operate effectively and command the respect of States and the international community, the Prosecutor has to act independently, and be totally free from any external control. Perceptions of bias, inconsistent application of the Rome Statute, and political manipulation would undermine the credibility of the Court and jeopardize its capability to administer international justice.

Accordingly, the exercise of prosecutorial discretion during preliminary examinations is an important building block of an independent and credible ICC. As the Prosecutor is the face of the ICC, the failure to discharge the responsibilities of the office effectively, as provided for in the Statute, weakens the pursuit of international justice by this global institution.

The power of the Prosecutor to conduct preliminary examinations is important for the effective functioning of the ICC. This power, however, remains poorly understood or developed. Therefore, this chapter explores the extent and scope of prosecutorial discretion, regarding the conduct of preliminary examinations conducted mostly under Moreno-Ocampo.

Responses to these questions will go a long way towards clarifying the role of the Prosecutor in the dispensation of international criminal justice. A legal analysis of the exercise of prosecutorial discretion during preliminary examinations is needed to find out whether ICC Prosecutors have developed a defensible approach to the exercise of this power, as well as whether they have adhered to, or deviated from, a standard approach. Much of this chapter therefore analyses and criticizes the provisions of the Rome Statute, its policy objectives, general principles and practices adopted by the Prosecutors during the conduct of preliminary examinations.

In order to carry out such a critical analysis, a discussion of the theoretical framework adopted for the chapter – prosecutorial neutrality, as well as principles and policies regulating the exercise of prosecutorial discretion – is necessary. The chapter aims to reveal whether the Prosecutor has developed appropriate procedures, principles and practices so that the exercise of discretion can inspire public confidence. To the extent that it has not done so, this chapter will consider how to ensure that the Prosecutor's discretion is exercised as envisaged by the Rome Statute.

To summarize, a critical aim of this chapter is to understand how the ICC Prosecutor exercises prosecutorial discretion during preliminary

examinations and whether the policies and principles adopted by the Prosecutor in carrying out the task are consonant with the provisions of the Rome Statute. It is based on the premise that a lack of neutrality and objectivity in the process of conducting preliminary examination by the ICC Prosecutor has partly contributed to the criticisms currently trailing the activities of the Court. This has also diminished the effectiveness of the ICC as a Court of last resort, whose judicial activities are expected to complement those of national judicial systems. The chapter will involve the analysis of various primary and secondary sources of law regulating the exercise of prosecutorial discretion. It will consider the theory of prosecutorial neutrality as it applies to the ICC Prosecutor using provisions of the Rome Statute as a starting point, asking whether the first Prosecutor was neutral. It will also review the policy paper on preliminary examination adopted by the ICC in 2013.

Irrespective of who triggers the jurisdiction of the ICC, the Prosecutor has a mandate to conduct a preliminary examination to decide whether there is a reasonable basis to proceed with an investigation.⁴ The UNSC may suspend the decision to open an investigation after a preliminary examination, acting under Chapter VII of the UN Charter.⁵ The power of the UNSC to suspend an investigation or prosecution does not, however, interfere with the discretion granted to the Prosecutor to conduct preliminary examinations.⁶ The Chambers of the ICC are the Appeal, Trial and Pre-Trial Divisions.⁷ However, it is only the Pre-Trial Chamber of the ICC that may intervene during preliminary examinations.

⁴ Article 53(1) provides that “[t]he Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute”. Rome Statute of the International Criminal Court, 17 July 1998, Article 53(1) (‘ICC Statute’) (<http://www.legal-tools.org/doc/7b9af9/>). See also ICC, Situation in the Republic of Côte d’Ivoire, Pre-Trial Chamber, Judge Fernández de Gurmendi’s separate and partially dissenting opinion to the 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-02/11-15, para. 24 (<http://www.legal-tools.org/doc/ea2793/>).

⁵ Article 16 of the ICC Statute provides, “[n]o investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions”.

⁶ *Ibid.*

⁷ See ICC Statute, Article 34.

Primarily, this chapter looks at the preliminary examinations concluded by the Prosecutor in the Central African Republic, Côte d'Ivoire, Kenya, Libya, Sudan and Uganda and these examinations resulted in the current challenges between the Court and African governments. These case studies reflect different means through which cases are referred to the ICC Prosecutor. The cases of Uganda and Central African Republic were self-referrals; those of Sudan and Libya were UNSC referrals, while those of Kenya and Côte d'Ivoire were initiated through *proprio motu* powers of the Prosecutor.⁸

11.1.1. The Prosecutor of the ICC

The OTP is established under Article 42 of the ICC Statute. The Prosecutor is elected by secret ballot and needs an absolute majority of the States Parties.⁹ Although the Statute provides limited information on the procedure for nominating and electing the Prosecutor, the States Parties have adopted a procedure for the nomination of judges, the Prosecutor and the Deputy Prosecutors of the Court.¹⁰

These procedures attempt to ensure that the person appointed as Prosecutor is independent in law and practice. For example, they state that nominations for the Prosecutor should be made by several States Parties.¹¹ In addition, they urge States Parties to make every effort to elect the Prosecutor by consensus.¹² If consensus does not emerge, then the candidates have to be put up for election. The absolute majority required for election was intended to ensure that the Prosecutor garners widespread support from States. Such level of support would militate against partiality. In addition to these requirements, candidates are expected to be persons of

⁸ *Proprio motu* refers to the inherent power of the Prosecutor to initiate proceedings without a referral from a State party to the Statute or from the UNSC. See ICC Statute, Article 15 for the steps to be taken by the Prosecutor during *proprio motu* proceedings. The Prosecutor will only proceed with the approval of the Pre-Trial Chamber of the ICC. See ICC Statute, Articles 13(c) and 15.

⁹ ICC Statute, Article 42(4). The Assembly of States Parties of the Rome Statute consists of all States that have ratified the treaty. Though non-state parties can participate in the meetings, they do not have a right to vote.

¹⁰ ICC Assembly of States Parties ('ASP'), Resolution on the Procedure for the nomination and election of judges, the Prosecutor and Deputy Prosecutors of the International Criminal Court, adopted at the 3rd Session of the ASP, 6th plenary meeting, on 10 September 2004, ICC-ASP/3/Res.6 (<http://www.legal-tools.org/doc/fd0324/>).

¹¹ *Ibid.*, para. 29.

¹² *Ibid.*, para. 33.

high moral character and competence, and to have extensive practical experience in the prosecution or trial of criminal cases.¹³

The Prosecutor enjoys a relatively secure tenure. She is appointed to an uninterrupted single term of nine years.¹⁴ During this period, the Prosecutor is expected not to engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence.¹⁵ Furthermore, the Prosecutor is prohibited from engaging in any other occupation of a professional nature while in office.¹⁶ If there is any likelihood of conflict of interest, the Prosecutor may request to be excused from a particular situation or case.¹⁷

The Prosecutor can be removed from office on two grounds only. The first is when the Prosecutor is found to have committed “serious misconduct” or a “serious breach” of his or her duties under the Statute, as provided for in the Rules of Procedure and Evidence (‘RPE’) or displays inability in exercising the functions required by the Statute.¹⁸ The second is when the Prosecutor is unable to exercise the functions required by the Rome Statute.¹⁹ A serious misconduct is conduct that is incompatible with official functions, and causes or is likely to cause serious harm to the proper administration of justice before the Court or the proper internal functioning of the Court.²⁰ Serious breach of duty occurs where a person has been grossly negligent in the performance of his or her duties or has knowingly acted in contravention of those duties.²¹ Inability to exercise the functions of the office can be due to sickness or any other factor that could militate against the effective functioning of the Prosecutor.

The security of tenure of the Prosecutor is not only guaranteed by the prescription of grounds of removal. It is also guaranteed by a specific procedure by which such removal can happen. Article 46(2) of the Rome Statute provides that a decision to remove the Prosecutor from office is

¹³ ICC Statute, Article 42(3).

¹⁴ *Ibid.*, Article 42(4).

¹⁵ *Ibid.*, Article 42(5).

¹⁶ *Ibid.*

¹⁷ *Ibid.*, Article 42(6).

¹⁸ *Ibid.*, Article 46(1)(a).

¹⁹ *Ibid.*, Article 46(1)(b).

²⁰ ICC, Rules of Procedure and Evidence, 9 September 2002, Rule 24(1) (‘ICC RPE’) (<http://www.legal-tools.org/doc/8bcf6f/>).

²¹ *Ibid.*, Rule 24(2).

made by the Assembly of States Parties through a secret ballot by an absolute majority of States Parties to the Rome Statute.²² This means that the Prosecutor can be removed for gross misconduct only during the annual sessions of the Assembly of States Parties, unless a special session is convened for that purpose.²³ Where the Prosecutor has committed misconduct of less serious nature, he or she shall be subject to disciplinary measures, in accordance with the RPE.²⁴

For the Prosecutor to be independent, it is important that his or her powers are clearly laid down by law. The Rome Statute does this in Article 42 which provides that the “Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof”.²⁵ The Rome Statute also provides that the Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. In addition, it states that the Prosecutor and the Deputy Prosecutors shall be of different nationalities and shall both serve on a full-time basis.²⁶

The Rome Statute sets a high standard for the ICC Prosecutors with regard to character and competence. It provides that the Prosecutor and the Deputy Prosecutors “shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases”.²⁷ In addition, the Prosecutor and Deputy Prosecutors shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.²⁸

The Rome Statute provides expressly that the ICC Prosecutor shall act independently as a separate organ of the Court. As such, it has a re-

²² ICC Statute, Article 46(2)(b).

²³ Annual Sessions of the ASP meeting are alternated between The Hague, Netherlands and the United Nations Headquarters in New York. See ICC Statute, Article 112(6); S. Rama Rao, “Assembly of States Parties”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd edition, C.H. Beck Publishers, Munchen, 2008, p. 1695.

²⁴ ICC Statute, Article 47.

²⁵ *Ibid.*, Article 42(1).

²⁶ *Ibid.*

²⁷ *Ibid.*, Article 43(3).

²⁸ *Ibid.* The Working Languages of the Court are French and English. However, the Official Languages of the Court are Arabic, Chinese, English, French, Russian and Spanish. See *ibid.*, Article 50.

sponsibility to receive referrals on crimes within the jurisdiction of the Court, examine evidence and conducting investigations and prosecutions before ICC judges. The OTP is prohibited from seeking or acting on instructions from any external source.²⁹

This discussion shows that at the formal level, the Rome Statute has provisions aimed at ensuring that the Prosecutor is independent and exercises prosecutorial discretion without any interference or favour. Like the prosecutors at the national level and in other international criminal tribunals, the ICC Prosecutor derives his or her powers from the empowering law. Such guarantee of formal independence is bolstered by other specific provisions of the Rome Statute and its accompanying subsidiary laws that define the powers of the Prosecutor, make provision for a relatively credible appointment process of the Prosecutor, protect the tenure of the incumbent and provide the legal framework for the exercise of prosecutorial discretion.

The Prosecutor of the ICC also enjoys a longer tenure of nine years compared to the prosecutors of the Special Court for Sierra Leone and the Special Tribunal for Lebanon referred to as hybrid tribunals and appointed into office by the UN Secretary-General for three renewable years, and the prosecutors of the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR'), who enjoy four-year renewable terms.

11.2. The Theory of Prosecutorial Neutrality

An important framework to discuss the exercise of prosecutorial discretion during preliminary examinations at the ICC is the theory of prosecutorial neutrality as espoused by Bruce Green and Fred Zacharias in 2004.³⁰ The theory does not assume a single definition of the term neutrality. This is because the word 'neutrality' has different meanings and under the administration of criminal justice assumes an entirely different concept. For example, neutrality has been defined as "the state of not supporting or helping either side in a conflict or disagreement".³¹ In addition, it is also defined as the "absence of decided views, expression, or strong feel-

²⁹ *Ibid.*, Article 42.

³⁰ Bruce Green and Fred Zacharias, "Prosecutorial Neutrality", in *Wisconsin Law Review*, 2004, vol. 7, no. 3, p. 840.

³¹ Angus Stevenson (ed.), *Oxford Dictionary of English*, 3rd edition, Oxford University Press, 2010, p. 1194.

ing”.³² A synonym of neutrality is impartiality which involves the lack of prejudice towards or against any particular side or party, the quality of fairness or being unbiased. However, looking closely at these words, they may mean different things at different times. In the context of criminal justice, neutrality and impartiality may mean different things depending on the context. The same variation is applicable to bias and fairness.

Neutrality was initially attributed to judges and as a concept was seen as a dividing line between judges and lawyers.³³ This means judges were originally meant to be neutral, while discharging their responsibilities, whereas most lawyers, as discussed earlier, were involved in private practice, and had to fight the cause of their clients. However, the concept has evolved into including those lawyers who are seen as officers of the court serving in the temple of justice.³⁴ Therefore in a sense, neutrality is a concept shared by prosecutors and judges as officers of the court.

In the context of our discussion, there are three broad dimensions of neutrality which are closely linked to each other and will be discussed as proposed by Green and Zacharias. These are non-bias, non-partisanship and adherence to readily identifiable and consistently applied criteria in decision making. The theory of prosecutorial neutrality calls for the emergence of a three-dimensional neutral prosecutor. The central argument made by the authors is that:

A three-dimensional “neutral prosecutor” simply would need to remain non-biased, non-partisan, and principled. This prosecutor would ignore impermissible considerations such as race, gender and religion, self-interest, personal beliefs, and party politics. Her frame of mind would be independent, objective, and non-political. She would need to act in a non-arbitrary fashion, consistently applying decision-making criteria derived from societally acceptable sources.³⁵

³² *Ibid.*

³³ Green and Zacharias, 2004, p. 839, see *supra* note 30.

³⁴ *Ibid.*

³⁵ Green and Zacharias, 2004, p. 886, see *supra* note 30. See also Robert Jackson, “The Federal Prosecutor”, in *Journal of Criminal Law and Criminology*, 1940, vol. 31, no. 3, p. 6, who argues that a good prosecutor is one “who tempers zeal with human kindness, who seeks truth and not victims, who serves the law and not factional purposes, and who approaches his task with humility”.

The authors argue that a three-dimensional neutral prosecutor is expected to take decisions that are depersonalized. In this instance, the decisions of the prosecutor should not be based on personal idiosyncrasies, but rather should be based on the pursuit of public interest. In addition, this prosecutor will consistently make decisions by reference to a set of generalized, deeply-rooted decision-making norms. These norms can be administrative laws set up to guide the operations of the office or administrative laws set out to guide prosecutors generally.³⁶ Furthermore, the neutral prosecutor must be accountable to the public, in the broadest sense. In this instance, accountability refers to the fact that the primary responsibility of the prosecutor is to ensure that the public is the primary constituency of the prosecutor and not the police, the victims or the even the politicians whose interests at times may run contrary to those of the general public.

This chapter adopts the theory of prosecutorial neutrality and the concept of three-dimensional neutral prosecutor proposed by Green and Zacharias. Although the theory and concept are based on an expansive study of the American criminal law system, the issues discussed are applicable to the ICC. The framework proposed by the authors clearly mirrors some of the approaches adopted by the former and current Prosecutors of the ICC. In addition, these policies have been made public in the policy paper on prosecutorial discretion during preliminary examinations which was released officially in November 2013.³⁷ These principles and policies in the policy paper on preliminary examinations will be applied in the case studies discussed later. In addition, ICC Prosecutors have consistently maintained that they only apply the provisions of the Rome Statute. Therefore, the policy papers ordinarily will reflect a progressive interpretation of the Rome Statute.

11.2.1. Prosecutorial Neutrality: Convergence of Domestic and International Criminal Law Systems

As noted earlier, this chapter adopts the theory of prosecutorial neutrality to examine the exercise of prosecutorial discretion during preliminary examinations at the ICC. However, since the ICC is an international justice institution and applies a hybrid legal system derived from national

³⁶ Rory K. Little, "Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role", in *Fordham Law Review*, 1999, vol. 68, no. 3, pp. 738.

³⁷ OTP, *Policy Paper on Preliminary Examinations*, 1 November 2013 ('*Policy Paper on Preliminary Examinations 2013*') (<http://www.legal-tools.org/doc/acb906/>).

judicial systems, it is also necessary to discuss the similarity and differences between the domestic and international criminal justice system and the applicability of the theory of prosecutorial neutrality at the ICC.

There is a nexus between the theory of prosecutorial neutrality as advanced by Green and Zacharias and the activities of the ICC Prosecutor. However, it has to be reiterated that the theory as propounded by Green and Zacharias standing alone does not answer the critical questions discussed in this chapter, which revolves around the powers of the first ICC Prosecutor during preliminary examinations and how this impacted on the relationship between Africa and the ICC. As the theory of prosecutorial neutrality was originally developed from the American legal system, there are notable differences between a domestic legal system and the international criminal justice system.

The prosecutor at the national level has more latitude to operate compared to the ICC Prosecutor in the exercise of the functions of the office. This is because the ICC Prosecutor is considerably restricted by the Pre-Trial Chamber that must approve a request by the Prosecutor to open an investigation.³⁸ However, at the national level and depending on the legal system in place, there is a distinction between general and specific control of the prosecutor. For example, the executive arm of the government can issue guidelines for the exercise of discretion but there is no direct control of the prosecutor in the discharge of daily activities. This includes the decision to charge or not charge a particular defendant.³⁹

Depending on the jurisdiction, national prosecutors conduct investigations with police or with investigative judges. For instance, in most commonwealth countries, the police conduct investigations and hand over the docket to the national prosecutor for decision whether to prosecute or not.⁴⁰ In civil law jurisdictions like France, an investigative judge is part of the decision to investigate and prosecute crimes. However, under the Rome Statute of the ICC, the responsibility to investigate and prosecute international crimes is the sole responsibility of the OTP. While the prosecutor at the national level is responsible for the prosecution of every crim-

³⁸ ICC Statute, Article 15(3).

³⁹ Kai Ambos, "The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports", in *European Journal of Crime, Criminal Law and Criminal Justice*, 2000, vol. 8, no. 2, p. 115.

⁴⁰ *Ibid.*, p. 116.

inal offence, the ICC Prosecutor is limited to the prosecution of “serious crimes of concern to the international community as a whole”.⁴¹

Although national prosecutors are independent, they are accountable to government institutions. For example, some national prosecutors are accountable to the Parliament through appropriate line Ministries which is directly under the control of the executive arm of government.⁴² However, the ICC Prosecutor is accountable to the Assembly of States Parties of the ICC who provides “management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration of the Court”.⁴³

Some national legal systems like the US employ the use of private prosecutors for the prosecution of crimes.⁴⁴ This has its historical roots in the emergence of the modern prosecutor as earlier discussed in this chapter. However, the use of private prosecutors is alien to the ICC. The Rome Statute provides that the Prosecutor is responsible for conducting investigations and prosecutions before the Court.⁴⁵ The Statute allows the ICC Prosecutor to appoint advisers with legal expertise on specific issues, including but not limited to sexual and gender violence and violence against children.⁴⁶ These experts only advise the Prosecutor on areas of their expertise but do not take over the investigation and prosecution roles of the Prosecutor which is obtainable in some national legal systems.

As the theory of prosecutorial neutrality was originally developed for the American criminal law system, it has to be adapted into the international criminal justice system, to accommodate some of the differences inherent in the two systems. The relationship between the domestic and international criminal law systems are discussed in subsequent chapters of the study. However, it is important at this stage to lay the foundation that will guide further discussions.

⁴¹ See ICC Statute, Article 5.

⁴² Daniel Nsereko, “Prosecutorial Discretion before National Courts and International Tribunals”, in *Journal of International Criminal Justice*, 2000, vol. 3, no. 1, p. 144.

⁴³ ICC Statute, Article 112(2)(b).

⁴⁴ Roger A. Fairfax, “Delegation of the Criminal Prosecution Function to Private Actors”, in *University of California, Davis Law Review*, 2009, vol. 43, no. 2, p. 415.

⁴⁵ ICC Statute, Article 42(1).

⁴⁶ *Ibid.*, Article 42(9).

What is generally known today as the international criminal justice system is a hybrid of different domestic criminal justice systems that evolved over time to give birth to procedures applied at the Nuremberg and Tokyo Tribunals in Germany and Japan respectively. The ICTY and the ICTR in The Hague and Tanzania respectively benefitted from developments in domestic legal systems. In addition, the Rome Statute itself is an amalgam of different legal systems that converged to form what is loosely termed the ‘Rome Statute system of justice’. Prosecutorial discretion, the subject matter of this study, also evolved from the national to international criminal justice systems. Lawyers in both systems train and practice at national levels. There is currently no special training for lawyers who practice in the international criminal justice system. Therefore, the major legal education received by lawyers and judges is first and foremost at the domestic level.

The Rome Statute is a treaty negotiated by sovereign States whose primary interest is to protect national interests.⁴⁷ In this regard, a key interest in establishing the ICC is for it to collaborate with national judicial institutions in investigating and prosecuting crimes within its jurisdiction. This is the reason why a key principle of the Rome Statute is complementarity.⁴⁸ It places primary obligation on States to investigate and prosecute those accused of international crimes at the domestic level. It is only when a State is unable, unwilling and inactive in doing so that the ICC will step in to ensure that there is justice and no impunity gap. The relationship between the domestic legal system and international criminal justice system is reinforced by the fact that national procedures are recognized as legitimate and effective, as long as they meet the threshold of justice and fairness and, in this instance, the principle of complementarity.

In addition, it will be recalled that that the highest decision-making organ of the ICC is the Assembly of States Parties, which appoints and elects officials of the Court, including the Prosecutor, Registrar, Judges and Board Members of the Victims’ Trust Fund.⁴⁹ In addition, the Assembly of States Parties to the Statute provides management oversight to the Presidency, the Prosecutor and the Registrar regarding the administration

⁴⁷ Robert Cryer, “International Criminal Law vs State Sovereignty: Another Round?”, in *European Journal of International Law*, 2006, vol. 16, no. 5, p. 995.

⁴⁸ ICC Statute, Preamble and Articles 1 and 17.

⁴⁹ See *ibid.*, Article 112.

of the Court.⁵⁰ Although composed mainly of sovereign States, its decisions are binding on the ICC.

11.3. Prosecutorial Discretion and Policy Paper on Preliminary Examinations

The policy paper adopted by the OTP describes the practice and policy of the OTP during the conduct of preliminary examinations. The main objective of such preliminary examinations is to assess whether the legal requirements for opening investigations are met. In other words, the Prosecutor weighs the facts and circumstances of a case to determine whether it meets the criteria set in the provisions of the Rome Statute.⁵¹

The policy paper on preliminary examination is a combination of several legal instruments of the ICC including the Rome Statute, RPE, Regulations of the ICC, Regulations of the OTP, prosecutorial strategies of ICC and other relevant policy documents. In addition, the practical experience gained by the Prosecutor and decisions of the ICC judges have proved beneficial in the process of developing the policy paper.⁵²

The policy paper is a document reflecting an internal policy of the OTP and therefore does not give rise to legal rights. Furthermore, it is subject to revisions based on experiences of the Prosecutor and decisions of the Judges of the ICC.⁵³ Although the policy paper is an internal document, the Prosecutor of the ICC has made it public in the “interest of promoting clarity and predictability regarding the manner in which it applies the legal criteria set out in the Statute”.⁵⁴ The Rome Statute does not require the Prosecutor to declare how prosecutorial discretion is exercised during preliminary examinations, however the need for “clarity and predictability” as stated by the Prosecutor is a key ingredient of the three-dimensional neutral prosecutor.

The policy paper affirms the fact that a major goal of the ICC is to put an end to impunity for the most serious crimes of concern to the international community by ensuring effective prosecution of international crimes at the national level. It therefore prioritises the primary responsi-

⁵⁰ See *ibid.*, Article 112(2).

⁵¹ *Policy Paper on Preliminary Examinations 2013*, para. 19.

⁵² *Ibid.*

⁵³ *Ibid.*, para. 20.

⁵⁴ *Ibid.*, para. 21.

bility of national judicial systems to hold accountable their citizens alleged to have committed international crimes. The activation of the jurisdiction of the Court is only possible in the absence of genuine national proceedings. The prosecutor has discretion to open investigations after conducting preliminary examination. However, the power is subject to the authorization of the Pre-Trial Chambers if it is a *proprio motu* investigation.⁵⁵

11.3.1. General Principles of Prosecutorial Discretion during Preliminary Examinations

Although the theory of neutrality identifies three distinct features, the OTP in the policy paper on preliminary examination has two main subdivisions. These are the general principles guiding the conduct of preliminary examinations and the statutory factors applied at the preliminary examination in order to determine whether there is a reasonable basis to proceed with an investigation based on the information available.⁵⁶

It is necessary at this stage to examine the applicability of the principle of neutrality to the exercise of prosecutorial discretion during preliminary examinations at the ICC. The principle against bias, an aspect of neutrality, is implicit in the general principle of non-discrimination recognized by the Rome Statute which provides that the application and interpretation of law must be consistent with internationally recognized human rights. This of course must be without any adverse distinction founded on grounds as gender, age, colour, language, religion, or belief, political opinion, national, ethnic or social origin, wealth, birth or other status.⁵⁷ There is a relationship between bias and discrimination. If a decision is based on discrimination, it can be impeached on the basis of bias.

11.3.1.1. Independence during Preliminary Examinations

The first principle of the policy paper on preliminary examination is the independence of the OTP.⁵⁸ According to the policy paper, independence means that “decisions shall not be influenced or altered by the presumed

⁵⁵ See ICC Statute, Articles 15(3), 42(1) and 53(1).

⁵⁶ *Policy Paper on Preliminary Examinations 2013*, para. 35.

⁵⁷ See ICC Statute, Article 21(3).

⁵⁸ ICC Statute, Article 42.

or known wishes of any party, or in connection with efforts to secure cooperation”.⁵⁹

The independence of the Prosecutor is crucial to the administration of justice. It is what differentiates the Prosecutor of the ICC from prosecutors at the Nuremberg and Tokyo tribunals. The Rome Statute guarantees the independence of the Prosecutor from external influences by forbidding the Prosecutor or any member of his or her staff from seeking or acting on instructions from any external source.

The policy paper states that during preliminary examinations, the Prosecutor has a duty to investigate all sides involved in a conflict and cannot be limited in a manner contrary to the provisions of the Statute.⁶⁰ For example, when the Ugandan government submitted a referral to the Prosecutor in December 2003, it was with respect to the activities of the Lord’s Resistance Army (‘LRA’).⁶¹ However, the former Prosecutor correctly expanded the referral to include investigations into acts committed by both the LRA and government soldiers in the Northern Uganda conflict.⁶²

The preliminary examination of the Darfur situation offered an opportunity for the Prosecutor to demonstrate independence. He consulted several publicly available materials, although he also requested information from those with expertise on the conflict. Even though a list of potential suspects was handed to the Prosecutor by an International Commission of Inquiry, his decision to proceed with an investigation was based on his independent assessment of the conflict situation.⁶³

Independence is the hallmark of the ICC Prosecutor. As mentioned, prosecutorial neutrality, related to non-partisanship, encompasses independence from actors within and outside the OTP. These actors would likely influence decisions, compromising objectivity in weighing every

⁵⁹ *Policy Paper on Preliminary Examinations 2013*, para. 26.

⁶⁰ *Ibid.*, para. 27; ICC RPE, Rule 44(2); ICC Statute, Articles 12, 13, 14, 15, 42(1) and 54(1)(a).

⁶¹ International Criminal Court, “President of Uganda Refers Situation Concerning the Lord’s Resistance Army (LRA) to the ICC”, 29 January 2004, ICC-20040129-44 (<http://www.legal-tools.org/doc/ff41c3/>).

⁶² OTP, “Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda”, 29 July 2004, ICC-OTP-20040729-65 (<http://www.legal-tools.org/doc/f9709e/>).

⁶³ OTP, *First Report of the Prosecutor of the ICC to the Security Council pursuant to UNSC 1593 (2005)*, 29 June 2005 (<http://www.legal-tools.org/doc/34abb8/>).

piece of evidence before a decision is made. In this instance, the Prosecutor of the ICC would deal with a variety of factors and actors, including the States under preliminary investigation, ASP members, and also the UNSC members with controlling influence over the activities of the ICC.

11.3.1.2. Impartiality during Preliminary Examinations

Impartiality is one of the core principles governing the work of the Prosecutor during preliminary examinations. It involves a fair-minded and objective treatment of persons and issues, free from any bias or influence.⁶⁴ The Statute provides that the Prosecutor and the Deputy Prosecutor shall not participate in any matter in which their impartiality might reasonably be doubted on any ground.⁶⁵ The Policy Paper states that the Prosecutor is expected to be impartial during preliminary examinations and that ‘impartiality’ requires the application of consistent methods and criteria, irrespective of the States or other parties involved.⁶⁶ Furthermore, geopolitical implications, or geographical balance between situations, are not relevant criteria for determining whether or not to open an investigation into a situation under the Statute.⁶⁷

11.3.1.3. Objectivity during Preliminary Examinations

Objectivity relates to the ability of the Prosecutor to investigate equally both incriminating and exonerating circumstances in order to establish the truth in a situation before the ICC.⁶⁸ Article 54(1) of the Rome Statute refers to the duties and powers of the prosecution during investigations, but the Prosecutor also maintains ‘objectivity’ as a self-regulating principle during preliminary examination.⁶⁹ However, deciding whether the Prosecutor has been objective or otherwise during preliminary examinations is subject to debate. The principle of objectivity requires the Prose-

⁶⁴ OTP, Code of Conduct for the Office of the Prosecutor, 5 September 2013, para. 29 (<http://www.legal-tools.org/doc/3e11eb/>).

⁶⁵ ICC Statute, Article 42(7); ICC RPE, Rule 34(1).

⁶⁶ *Policy Paper on Preliminary Examinations 2013*, para. 28.

⁶⁷ *Ibid.*, para. 29.

⁶⁸ ICC Statute, Article 54(1); OTP, Regulations of the Office of the Prosecutor, 23 April 2009, ICC-BD/05-01-09, Regulation 34(1) (‘OTP Regulations’) (<http://www.legal-tools.org/doc/a97226/>).

⁶⁹ *Policy Paper on Preliminary Examinations 2013*, para. 30.

cutor to ensure the reliability of the information received, as well as its source.⁷⁰

These three principles of independence, impartiality and objectivity reflect the theory of neutrality. In addition, a prosecutor that exhibits the above traits approximates the three-dimensional neutral prosecutor as presented by Green and Zacharias. It can also be added that a combination of independence, impartiality and objectivity should ordinarily lead to neutrality because these principles are the attributes of a plain reading of the word neutral. However, beyond these principles are the policy objectives of the Prosecutor during preliminary examinations, which are discussed in detail below.

11.3.2. Prosecutorial Discretion and Policy Objectives Guiding Preliminary Examinations

The policy objectives that guide the exercise of prosecutorial discretion are transparency, ending impunity through positive complementarity and the prevention of international crimes.

11.3.2.1. Transparency during Preliminary Examinations

One of the themes addressed in the policy paper is transparency during preliminary examinations. Transparency is a process through which the Prosecutor promotes a better understanding of preliminary examinations through regular public engagements. According to the policy paper, transparency involves making public the findings of each preliminary examination to all concerned stakeholders, the provision of reasoned decisions either to or not to proceed with an investigation, and the publication of periodic reports showing how decisions on preliminary examinations are made.⁷¹ The main goal of transparency during preliminary examinations is to ensure predictability in the activities of the Prosecutor without raising undue expectations that an investigation will be opened in every preliminary examination conducted by the Prosecutor.⁷²

These provisions represent a welcome departure from the previous policy of the Prosecutor, especially during the tenure of Moreno-Ocampo, where preliminary examinations were treated as confidential information

⁷⁰ *Ibid.*, para. 31.

⁷¹ *Ibid.*, para. 15.

⁷² *Ibid.*, para. 94.

with little or no information released to the public during the process.⁷³ The lack of transparency in the early years of the operation of the ICC weakened the possibility of using preliminary investigations to spur national proceedings to deter the commission of international crimes within the jurisdiction of the ICC.⁷⁴

11.3.2.2. Ending Impunity through Positive Complementarity during Preliminary Examinations

Positive complementarity is a key policy objective of the Prosecutor during preliminary examinations. Complementarity is a key factor in the determination of whether or not to proceed with an investigation during a preliminary examination. Under the Rome Statute, the Prosecutor has to ensure that a case is admissible using the legal criteria established in the Rome Statute under Article 17. However, during a preliminary examination, the Prosecutor is expected to use the proceedings to spur the national government to investigate and prosecute international crimes within the jurisdiction of the Court that occurred in the State concerned. However, when the State remains inactive, unwilling and unable to carry out investigations and prosecutions, the Prosecutor intervenes to ensure there is no impunity for international crimes at national level.⁷⁵

Positive complementarity has been defined by the Prosecutor as a proactive policy of co-operation aimed at promoting national proceedings.⁷⁶ It is regarded as a managerial concept that governs the relationship between the Court and domestic jurisdictions on the basis of three cardi-

⁷³ Human Right Watch argues that “[w]hile the OTP initially treated these preliminary examinations as confidential, it now routinely makes public the fact that it has initiated the examination and provides information on the different activities it is undertaking to further its analysis such as meetings with national authorities”. See Human Right Watch, ICC: Course Correction: Recommendations to the ICC Prosecutor for a More Effective Approach to “Situations under Analysis”, 16 June 2011.

⁷⁴ *Ibid.*

⁷⁵ *Policy Paper on Preliminary Examinations 2013*, para. 100.

⁷⁶ OTP, Prosecutorial Strategy 2009-2012, 1 February 2010 (<http://www.legal-tools.org/doc/6ed914/>). The ASP report of the Bureau on complementarity refers to positive complementarity as “all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and activities for States, to assist each other on a voluntary basis” See ASP, *Report of the Bureau on Stocktaking: Complementarity*, 18 March 2010, ICC-ASP/8/51, para. 16 (<http://www.legal-tools.org/doc/e508a8/>).

nal principles: (a) the idea of a shared burden of responsibility; (b) the management of effective investigations and prosecutions; and (c) the two-pronged nature of the cooperation regime.⁷⁷

According to Burke-White, positive complementarity is also defined as a process by which the Prosecutor “would actively encourage investigation and prosecution of international crimes within the court’s jurisdiction by States where there is reason to believe that such States may be able or willing to undertake genuine investigations and prosecutions and where the active encouragement of national proceedings offers a resource-effective means of ending impunity”.⁷⁸ However, that this policy has not been pursued effectively is evident in the manner the ICC Prosecutors have interpreted and applied the principle.

According to Human Rights Watch, the Prosecutor has not used positive complementarity very effectively and its potentials are yet to be fully explored.⁷⁹ This is because the time that it takes to carry out a preliminary examination provides the ICC Prosecutor with opportunities to catalyse national proceedings. This can be understood as a component of ‘positive complementarity’, that is, active efforts to see the complementarity principle put into practice through national prosecutions of ICC crimes.

11.3.2.3. Prevention of International Crimes during Preliminary Examinations

The third and final policy paper on preliminary examinations deals with the prevention of international crimes. According to it, the Prosecutor performs an early warning function through public service announcements regarding crimes that appear to fall within the jurisdiction of the ICC.⁸⁰ The Prosecutor argues that publicizing ICC activities will help in breaking the circle of impunity by deterring international criminals.⁸¹ For example, the Prosecutor has intervened in several situations currently under analy-

⁷⁷ Carsten Stahn, “Complementarity: A Tale of Two Notions”, in *Criminal Law Forum*, 2008, vol. 19, no. 1, p. 113.

⁷⁸ William Burke-White, “Implementing a Policy of Positive Complementarity in the Rome System of Justice”, in *Criminal Law Forum*, 2008, vol. 19, no. 1, p. 62.

⁷⁹ Human Right Watch, 2011, see *supra* note 73.

⁸⁰ *Policy Paper on Preliminary Examinations 2013*, para. 104.

⁸¹ *Ibid.*, para. 106.

sis by releasing reports that condemn crimes committed against civilians and threatening prosecution for alleged perpetrators of these crimes.

In the Central African Republic, the Prosecutor argued that “deteriorating security situation [...] has contributed to the escalation of unlawful killings, sexual violence, recruitment of child soldiers and other grave crimes, across the country”.⁸² In furtherance of the policy of preventing international crimes, the Prosecutor has issued statements in relation to situations in Georgia,⁸³ Kenya,⁸⁴ Guinea,⁸⁵ South Korea,⁸⁶ Nigeria,⁸⁷ Côte d’Ivoire⁸⁸ and Mali.⁸⁹ The preventive effects of these statements are, however, subject to debate. This is because the use of international criminal courts to deter future criminals is a highly contested issue.⁹⁰ There is no general agreement on whether the ICC has had any deterrent or preventive effect on future criminals and their collaborators. Payam Akhavan has argued that the ICC’s preventive effect is visible in Northern Uganda where the ICC helped to isolate the LRA thereby ending the conflict.⁹¹ The assertion is disputable to the extent that the ICC has been accused of derailing the proposed peace deal between the LRA and the government

⁸² OTP, “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, in relation to the escalating violence in the Central African Republic”, 9 December 2013 (<http://www.legal-tools.org/doc/dbdc24/>).

⁸³ OTP, “Prosecutor’s statement on Georgia”, 14 August 2008 (<http://www.legal-tools.org/doc/5bcdc2/>).

⁸⁴ OTP, “OTP statement in relation to events in Kenya”, 5 February 2008 (<http://www.legal-tools.org/doc/765584/>).

⁸⁵ OTP, “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the occasion of the 28 September 2013 elections in Guinea”, 27 September 2013 (<http://www.legal-tools.org/doc/96982f/>).

⁸⁶ OTP, “ICC Prosecutor: Alleged war crimes in the territory of the Republic of Korea under preliminary examination”, 6 December 2010 (<http://www.legal-tools.org/doc/d7a9fb/>).

⁸⁷ OTP, “Statement by the Prosecutor of the International Criminal Court, Fatou Bensouda, ahead of elections in Nigeria: “I reiterate my call to refrain from violence””, 16 March 2015 (<http://www.legal-tools.org/doc/db08e6/>).

⁸⁸ OTP, “Statement by ICC Prosecutor Luis Moreno-Ocampo on official visit to Côte d’Ivoire”, 14 October 2011 (<http://www.legal-tools.org/doc/49e48a/>).

⁸⁹ OTP, “Statement by ICC Prosecutor concerning Mali”, 28 January 2013 (<http://www.legal-tools.org/doc/da05fb/>).

⁹⁰ Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?”, in *American Journal of International Law*, 2001, vol. 95, no. 1, pp. 7–31.

⁹¹ Payam Akhavan, “The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court”, in *American Journal of International Law*, 2005, vol. 99, no. 2, pp. 403–21.

of Uganda. For example, regarding the involvement of the ICC in the Juba peace process, Kamari Clarke argues that the arrest warrants issued against the LRA were responsible for the failure of the Juba peace process.⁹²

From the foregoing discussion, it can be argued that the publication of the policy paper on preliminary examination is a positive development for the OTP as it was a significant shift for the office in the way preliminary examinations were carried out. In addition, the policy paper on preliminary examination recognized the fact that there was a need for public scrutiny of the activities of the Office leading to greater predictability of its actions. The policy paper also supports the argument for guidelines regulating the conduct of preliminary examinations.

However, as has been noted in this chapter, the publication of the policy paper on preliminary examination has not totally removed the criticisms against the ICC for the conduct of preliminary examinations and what informs the decision to proceed. In addition, some of the reports produced under the policy paper on preliminary examination are yet to define clearly how the Prosecutor evaluates the decision whether to open an investigation or not.

11.4. Preliminary Examinations and Referral of Situations to the Court

There are three main procedures through which situations can be referred to the ICC Judges. These include self-referral by States, referral by the UNSC and that by the ICC Prosecutor using *proprio motu* powers. In addition, a State that is not a party to the Statute can accept the jurisdiction of the Court.

11.4.1. Referral of a Situation by a State Party

A situation that is within the jurisdiction of the ICC can be referred to the Prosecutor by a State Party to the Rome Statute. The ICC Prosecutor encourages States to self-refer cases within the jurisdiction of the Court to

⁹² The Juba peace process was initiated by the former Vice-President of South Sudan, Riek Machar between the Government of Uganda and the LRA. The deliberations were inconclusive as the leader of the Lord's Resistant Army, Joseph Kony refused to sign the final peace deal. See Kamari Clarke, "Kony 2012, the ICC, and the Problem with the Peace-and-Justice Divide", in *Proceedings of the Annual Meeting of the American Society of International Law*, 2012, vol. 106, p. 312.

the ICC for adjudication.⁹³ This means that States Parties to the Rome Statute refer potential situations within their jurisdiction to the ICC Prosecutor to commence preliminary examinations.⁹⁴

This procedure has given rise to self-referral or auto-referral which is consistent with the provisions of the Statute regarding the principle of complementarity.⁹⁵ For example, a State Party that fails to investigate and prosecute crimes committed in its territory and also falling within the jurisdiction of the ICC can refer the situation to the Prosecutor using the legal framework established by the Statute.⁹⁶ However, the encouragement of self-referrals by the Prosecutor has proved to be counter-productive and continues to be a source of concern in the activities of the ICC.⁹⁷

⁹³ *Policy Paper on Preliminary Examinations 2013*, para. 98.

⁹⁴ Non-States Parties can accept the jurisdiction of the ICC under Article 12(3) of the Rome Statute to refer situations to the Prosecutor. Carsten Stahn, “Why Some Doors May Be Closed Already: Second Thoughts on a ‘Case-by-Case’ Treatment of Article 12(3) Declarations”, in *Nordic Journal of International Law*, 2006, vol. 75, no. 2 pp. 243–48; Steven Freeland, “How Open Should the Door Be? Declarations by Non States Parties under Article 12(3) of the Statute of the International Criminal Court”, in *Nordic Journal of International Law*, 2006, vol. 75, no. 2, pp. 211–41.

⁹⁵ Andreas Muller and Ignaz Stegmiller, “Self-Referrals on Trial: From Panacea to Patient”, in *Journal of International Criminal Justice*, 2010, vol. 8, no. 5, pp. 1267–94; Jann Kleffner, “Auto-referrals and the Complementarity Nature of the ICC”, in Carsten Stahn and Goran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, 2009, Martinus Nijhoff Publishers, The Hague, p. 42; Claus Kress, “‘Self-Referrals’ and ‘Waivers of Complementarity’: Some Considerations in Law and Policy”, in *Journal of International Criminal Justice*, 2006, vol. 4, no. 4, pp. 944–48. However, see William Schabas, *An Introduction to the International Criminal Court*, 4th edition, Cambridge University Press, 2011, p. 167, who argues that “[t]he self-referral sends the troubling message that States may decline to assume their duty to prosecute, despite the terms of the preamble to the Statute, not to mention obligations imposed by international human rights law, by invoking the provisions of Article 14 and referring the ‘situation’ to The Hague”.

⁹⁶ ICC, Situation in the Democratic Republic of the Congo, *The Prosecutor v. Thomas Lubanga Dyilo*, Pre-Trial Chamber, Public Redacted Version of Corrigendum of Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58, 10 February 2006, ICC-01/04-01/06-1-Corr-Red, para. 35 (<http://www.legal-tools.org/doc/af6679/>); see also Ignaz Stegmiller, “The International Criminal Court and Mali: Towards More Transparency in International Criminal Law Investigations?”, in *Criminal Law Forum*, 2013, vol. 24, no. 4, pp. 475–99.

⁹⁷ Human Rights Watch, *The Selection of Situations and Cases for Trial before the International Criminal Court*, 26 October 2006, p. 3.

11.4.2. Initiation of an Investigation by the Prosecutor

The exercise of prosecutorial discretion at the ICC begins with the Prosecutor's initiation of preliminary examinations. The Prosecutor exercises various types of discretion until the accused person is either convicted or acquitted of the alleged crimes. The Prosecutor receives information from individuals or groups, States, intergovernmental or non-governmental organizations, or a referral from a State Party or the Security Council, or a declaration issued pursuant to Article 12(3) of the Statute by a State that is not a State Party to the Statute, but which accepts the jurisdiction of the Court.⁹⁸ Subsequently, the Prosecutor embarks upon a four-phased process to evaluate whether the case complies with the requirements provided in the Statute. These factors are jurisdiction, admissibility (complementarity and gravity) and interests of justice.⁹⁹

According to the policy paper on preliminary examinations, the information received is assessed to identify matters that fall within the jurisdiction of the ICC and those that do not. The initial assessment distinguishes between communications relating to matters that are manifestly outside the jurisdiction of the Court, situations that are already under preliminary examination, situations that are already under investigation or that form the basis of a prosecution, and lastly, matters that are neither manifestly outside the jurisdiction of the Court nor related to situations already under preliminary examination or that form the basis of a prosecution.¹⁰⁰

The second phase relates to the preliminary examination, and is focused on all petitions that have scaled through the first phase.¹⁰¹ It involves factual and legal assessments of the crimes committed in the re-

⁹⁸ ICC Statute, Article 12; OTP Regulations, Regulation 25; *Policy Paper on Preliminary Examinations 2013*, paras. 4 and 73.

⁹⁹ ICC Statute, Article 53(1)(a)–(c); Morten Bergsmo and Pieter Kruger, “Article 53”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd edition, C.H. Beck Publishers, 2008, pp. 1065–76; Giuliano Turone, “Powers and Duties of the Prosecutor”, in Anthonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, vol. II, Oxford University Press, Oxford, 2002, pp. 1138–80.

¹⁰⁰ *Policy Paper on Preliminary Examinations 2013*, para. 78.

¹⁰¹ *Ibid.*, para. 80.

ferred situation. The Prosecutor pays particular attention to “crimes committed on a large scale, as part of a plan or pursuant to a policy”.¹⁰²

After this phase, an ‘Article 5 report’ is published, which includes a decision on whether the alleged crimes fall within the material jurisdiction of the ICC in relation to Article 5 of the Statute.¹⁰³ The next phase is an assessment that leads to the publication of ‘Article 17 report’ detailing how admissibility issues have been resolved by the Prosecutor.¹⁰⁴ This involves the evaluation of whether the threshold of complementarity and gravity provided in Article 17 of the Statute has been met.¹⁰⁵ The final phase considers whether a decision to initiate an investigation would be in the interests of justice.¹⁰⁶ A report titled ‘Article 53 report’ is published discussing the reasons for the Prosecutor’s decision to proceed or not to proceed with an investigation.¹⁰⁷

For the Prosecutor to commence any preliminary examination, the above factors must be considered in detail. The Prosecutor cannot commence an investigation and prosecution of crimes within the jurisdiction of the ICC without conducting a preliminary examination. There is a difference between a preliminary examination conducted before the initiation of an investigation and the examination conducted before the initiation of a prosecution.¹⁰⁸ If the Prosecutor decides that there is a reasonable basis to open an investigation, the Statute mandates that a preliminary examination be conducted following the criteria laid down in Article 53 of the Rome Statute to determine whether there is reasonable basis to proceed with a prosecution.

Before the Prosecutor can decide that there is a reasonable basis to proceed with an investigation, there must be a determination that the ICC has jurisdiction over the case. The Prosecutor regards this decision to be a core element of the preliminary examination. Indeed, the policy paper on preliminary examinations states that “[t]he establishment of the Court’s jurisdictional scope in accordance with Article 53(1)(a) defines in objec-

¹⁰² *Ibid.*, para. 81.

¹⁰³ *Ibid.*

¹⁰⁴ *Ibid.*, para 82.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*, para. 83.

¹⁰⁷ *Ibid.*

¹⁰⁸ ICC Statute, Article 53(1)(a)–(c) and (2)(a)–(c).

tive terms the parameters within which the Office conducts its investigative activities, that is, the ‘situation’”.¹⁰⁹

As already mentioned, irrespective of how a preliminary examination is initiated, the Prosecutor must analyse the seriousness of any information received,¹¹⁰ and may seek additional information from States, organs of the UN, intergovernmental organizations, NGOs or other reliable sources through written or oral testimonies.¹¹¹ At this stage, victims of the alleged crimes may make representations to the Pre-Trial Chamber, in accordance with the provisions of the RPE that govern such submissions.¹¹² A preliminary examination must conclude with a decision whether or not to proceed with an investigation.

11.4.3. Referral by the UNSC

The UN Charter provides a significant role for the UNSC in promoting international peace and security and the creation of the ICC was seen as an extension of that role.¹¹³ The 1994 version of the Draft Code of Crimes against the Peace and Security of Mankind prepared by the ILC made the jurisdiction of the ICC subject to the approval of the UNSC.¹¹⁴ If the provision had been adopted, it would have given the UNSC a considerable influence over the activities of the ICC.¹¹⁵ During the Preparatory Committee meeting in August 1997, Singapore proposed an amendment re-

¹⁰⁹ *Policy Paper on Preliminary Examinations 2013*, para. 41.

¹¹⁰ ICC Statute, Article 15(2); Geert-Jan Alexander Knoops, “Challenging the Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective”, in *Criminal Law Forum*, 2004, vol. 15, no. 4, pp. 365–90.

¹¹¹ ICC Statute, Article 15(2).

¹¹² *Ibid.*

¹¹³ United Nations Charter, adopted 26 June 1945, Article 39 (<http://www.legal-tools.org/doc/6b3cd5/>).

¹¹⁴ International Law Commission, Draft Statute for an International Criminal Court 1994, Article 23(3) (<http://www.legal-tools.org/doc/17ad09/>). The Article provides that “[n]o prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides”.

¹¹⁵ Elizabeth Wilmhurst, “The International Criminal Court: The Role of the Security Council”, in Mauro Politi and Giuseppe Nesi (eds.), *The Rome Statute of the International Criminal Court: A Challenge to Impunity*, Aldershot and Burlington, Ashgate, 2001, p. 40.

versing the structure of the ICC-Security Council relationship as initially provided for in the 1994 ILC Draft Statute.¹¹⁶

The adoption of Article 16 has several implications for the work of the ICC. According to some scholars:

the drafting history of article 16 gives rise to at least three comments. First, political considerations were not surprisingly given more weight than legal arguments in the determination of the appropriate role for the [UNSC] in ICC proceedings. Second, the [UNSC]'s deferral power confirms its decisive role in dealing with situations where the requirements of peace and justice seem to be in conflict. Third, article 16 provides an unprecedented opportunity for the [UNSC] to influence the work of a judicial body.¹¹⁷

The UNSC is empowered by the Rome Statute to trigger the jurisdiction of the Court when crimes within the jurisdiction of the court have been committed in the territory of both States Parties and non-States Parties to the treaty.¹¹⁸ The UNSC has made use of this provision in the cases of Sudan and Libya which were referred to the ICC pursuant to the Chapter VII powers of the UNSC. Article 16 of the Statute grants the UNSC the power to defer cases before the ICC. In deferring cases, the UNSC acts under Chapter VII of the UN Charter which means that there has to be evidence that there is a threat to international peace and security.

11.4.4. Referrals and Prosecutorial Discretion during Preliminary Examinations

When a situation is referred by a State Party or the UNSC acting under Chapter VII of the UN Charter, the Prosecutor opens an investigation after reaching a decision that there is reasonable basis to proceed. However, if the preliminary investigation is initiated through Article 15 of the Rome Statute, the Prosecutor has to apply to the Pre-Trial Chamber for an au-

¹¹⁶ Morten Bergsmo and Jelena Pejić, “Article 16: Deferral of investigation or prosecution”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd edition, 2008, C.H. Beck Publishers, Munich, p. 597.

¹¹⁷ *Ibid.*, p. 598.

¹¹⁸ ICC Statute, Article 13(b); Sharon Williams and William Schabas, “Article 13: Exercise of Jurisdiction”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd edition, 2008, C.H. Beck Publishers, Muchen, p. 569.

thorization to initiate an investigation.¹¹⁹ The reason for this difference is that States Parties were not comfortable with an unaccountable Prosecutor exercising unfettered discretion. The Pre-Trial Chamber is expected to authorize the commencement of investigations if it appears to it that the case falls within the jurisdiction of the ICC.¹²⁰ However, the decision is without prejudice to subsequent determinations regarding jurisdiction and admissibility.¹²¹ If the Pre-Trial Chamber refuses to authorize the investigation of crimes, the decision does not preclude the Prosecutor from making subsequent representation based on new facts or evidence regarding the same situation.¹²²

Jurisdiction is not the only factor that the Prosecutor has to consider. However, jurisdiction is so fundamental that the judges of the ICC are mandated to inquire if they have jurisdiction to handle a particular situation irrespective of the determination of the Prosecutor to proceed with an investigation. Another important factor is admissibility, which is divided into complementarity and gravity as discussed below.

11.4.5. Admissibility and Prosecutorial Discretion

Article 53(1)(c) of the Statute provides that in deciding whether to initiate an investigation, the Prosecutor shall consider whether the case is or would be admissible under Article 17 of the Statute. Article 17 of the Statute provides for issues of complementarity¹²³ and gravity.¹²⁴

¹¹⁹ ICC Statute, Article 15(4); Lakshman Marasinghe, “*Proprio Motu* Powers – The Prosecutor of the International Criminal Court: Article 15 of the Rome Statute”, in *Sri Lanka Journal of International Law*, 2010, vol. 22, no. 1, pp. 195–213.

¹²⁰ ICC Statute, Article 15(4). At the stage of preliminary examination, it is still a “situation” that is before the Prosecutor and not a “case” *stricto sensu*. This is the conclusion reached by the Prosecutor and accepted by the Chambers of the ICC. Hector Olasolo, “The Prosecutor of the ICC before the Initiation of Investigations: A Quasi-Judicial or a Political Body?”, in *International Criminal Law Review*, vol. 3, no. 2, pp. 87–150.

¹²¹ ICC Statute, Article 15(4).

¹²² *Ibid.*, Article 15(5). The prosecutor has used the *proprio motu* power to initiate investigations in Kenya and Côte d’Ivoire. See International Criminal Court, Situation in the Republic of Côte d’Ivoire, *The Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/11; Situation in the Republic of Côte d’Ivoire, *The Prosecutor v. Simone Gbagbo*, ICC-02/11-01/12; Situation in the Republic of Kenya, *The Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/09-01/11 and Situation in the Republic of Kenya, *The Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, ICC-01/09-02/11.

¹²³ ICC Statute, Article 17(1)(a)–(c).

The Statute does not provide a particular sequence on the examination of complementarity and gravity.¹²⁵ However, the Prosecutor must be satisfied as to admissibility on both aspects before deciding whether there is sufficient basis to proceed with an investigation.¹²⁶ An assessment of complementarity is in relation to serious crimes allegedly committed by those who bear the greatest responsibilities for international crimes within the jurisdiction of the ICC.¹²⁷ A determination on admissibility conducted by the Prosecutor during a preliminary examination is not binding on the Prosecutor when taking the decision whether to proceed with a prosecution. In addition, legal assessments conducted during preliminary examinations are not binding for the purpose of future admissibility determinations that may be made by ICC judges for a situation or case.¹²⁸ The relevance of the discussion above is that the conduct of preliminary examination relates to situations and circumstances in existence during the process. It does not bind the judges of the ICC or the Prosecutor in future determinations regarding the admissibility of a situation.

¹²⁴ *Ibid.*, Article 17(1)(d).

¹²⁵ *Policy Paper on Preliminary Examinations 2013*, para. 42.

¹²⁶ *Ibid.*

¹²⁷ International Criminal Court, Situation in the Republic of Kenya, Pre-Trial Chamber, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19, 31 March 2010, para. 50 ('Kenya Article 15 Decision') (<http://www.legal-tools.org/doc/338a6f/>).

¹²⁸ International Criminal Court, Situation in Mali: Article 53(1) Report, 16 January 2013, p. 28 (<http://www.legal-tools.org/doc/abb70f/>); ICC, Situation in the Democratic Republic of the Congo, *The Katanga Chui Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, ICC-01/04-01/07-1497, para. 56 (<http://www.legal-tools.org/doc/ba82b5/>); Kenya Article 15 Decision, para. 50; ICC, Situation in Central African Republic, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Trial Chamber, Decision on the Admissibility and Abuse of Process Challenges, 24 June 2010, ICC-01/05-01/08-802, para. 217 (<http://www.legal-tools.org/doc/a5de24/>).

11.5. Prosecutorial Neutrality and Case Studies of Preliminary Examinations Conducted in Africa¹²⁹

11.5.1. Neutrality as Non-biased Decision-making

The first principle of the theory is that prosecutors should not be biased in their decision-making. This means that the prosecutor should not be unduly influenced when deciding on prosecution. This principle of non-bias is corroborated, among others, by the policy of the Director Public Prosecution of Victoria, Australia on prosecutorial discretion. The policy provides that a decision whether or not to prosecute must not be influenced by (a) the race, religion, sex, national origin or political associations, activities or beliefs of the offender or any other person involved; (b) personal feelings concerning the offence, the offender or a victim; (c) possible political advantage or disadvantage to the Government or any political group or party; and (d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision-making.¹³⁰

The principle of non-bias in the US criminal justice system extends to what is called avoiding impermissible considerations,¹³¹ that is, prosecutors are not allowed to make decisions tainted with racial, ethnic or religious bias. This is one area where the discretion of the prosecutor is subject to judicial review as the right to non-bias is protected by the US Constitution.¹³² Therefore, when a decision of the prosecutor whether or

¹²⁹ This section contains a summary of the preliminary examinations conducted in the six African countries earlier identified in the chapter. Due to space constraints, a comprehensive discussion of the case studies is not possible. However, for a detailed and thorough analysis of most of the preliminary examinations conducted by the International Criminal Court, see Benson Olugbuo, “The Exercise of Prosecutorial Discretion during Preliminary Examinations at the International Criminal Court”, Ph.D. thesis submitted to the University of Cape Town, September 2016, pp. 145–236 (available on the university web site).

¹³⁰ Office of Public Prosecutions Victoria, *Policy of the Director of Public Prosecutions for Victoria*, 24 November 2014, chap. 1, para. 10, p. 4 (<http://www.legal-tools.org/doc/02d03e/>).

¹³¹ Earle Hobbs, “Prosecutor’s Bias, an Occupational Disease”, in *Alabama Law Review*, 1949, vol. 2, pp. 40–62.

¹³² US Supreme Court, *United States v. Batchelder*, 442 U.S. 114 (1979), p. 125.

not to prosecute is based on an unjustifiable standard such as race, religion, or other arbitrary classification, the courts are bound to interfere.¹³³

Racial and ethnic bias is where a decision is made for or against a person because of his or her race or ethnicity. In the same vein, a prosecutor may be biased in deciding whom to investigate or prosecute due to personal or economic interests. The prosecutor, in the decision to charge for a particular crime and not another one, especially when the crime committed falls under different counts of criminality, may also exhibit the possibility of bias. For countries that still retain the death penalty in their laws, the possibility of bias is always an issue. This is because any decision to charge for capital punishment may be questioned by critics when there is lack of uniformity in application.¹³⁴

Ultimately, discretion is the hallmark of the administration of criminal justice. The prosecutor is not under obligation to explain why he decides to pursue the death penalty in a particular case and not the other. It only become problematic if a glaring case of injustice results due to racial, ethnic, gender or religious sentiments, or if the rights of the defendants are trampled upon, in the process of initiating criminal proceedings.

Prosecutorial bias in the administration of criminal justice is also possible in countries where prosecutors are elected or appointed. In this instance, the prosecutor may be an active member of a political party and therefore use the position to further party interests instead of promoting justice and fairness to all parties involved in the criminal case. Bias can also be seen when a prosecutor takes a position not according to the law of the land but because of personal beliefs. The problem with personal beliefs is that although the right to hold a belief may be protected by the law, the prosecutor will be seen by those who practice a contrary belief as biased. A clear example as pointed out by Green and Zacharias is that of laws that call for the protection of abortion clinics, and those that restrict abortion practices.¹³⁵ In this instance, it may be difficult for the prosecutor

¹³³ US Supreme Court, *Oyler v. Boles*, 368 U.S. 448 (1962), p. 456. See also Angela Davis, "Prosecution and Race: The Power and Privilege of Discretion", in *Fordham Law Review*, 1998, vol. 67, no. 13, p. 41.

¹³⁴ John A. Horowitz, "Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty", in *Fordham Law Review*, 1997, vol. 65, no. 6, p. 2576.

¹³⁵ Green and Zacharias, 2004, p. 854, see *supra* note 30.

to effectively enforce either of the laws without accusation of bias by the other party.

Another instance of bias is a prosecutor's decision to press charges against a defendant based on personal or economic interest, or public and media pressure. The issue of personal or economic interests is clearly a case of conflict of interest, and may also result in breaking existing professional rules or legislation, which clearly speaks against prosecutors making decisions based on personal or economic benefit. On the other hand, public and media pressure may be used by the prosecutor to gain political capital to the detriment of the rights of the defendant. The International Association of Prosecutors argues that prosecutors should "remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest".¹³⁶

Thus, the theory of neutrality recognizes non-bias as a strong element in the exercise of discretion by the prosecutor. Bias based on ethnicity, race, religious group, economic or personal interests and party affiliations are generally seen as negating the principle of prosecutorial neutrality. However, it must be mentioned that these discussions are not cast in stone, and a decision by the prosecutor that is within an operational legal framework can still be labelled as biased, depending on the circumstance and the personalities involved. The courts can only step in when there is a clear violation of the laws of the land. This means that an accusation of bias against a prosecutor must be anchored in the provision of an existing law. The decision should not be based the discretion of the prosecutor to charge an individual for a crime and what charges should be brought before a court of law. Clearly, the courts will side with the prosecutor unless there is evidence that an impermissible consideration has been violated.

11.5.2. Neutrality as Non-partisan Decision-making

The second principle is that the prosecutor should engage in non-partisan decision-making. The factors that influence non-partisanship include (a) independence from those actors within and outside the prosecution who tend to influence decisions; (b) objectivity in weighing evidence before taking decisions; and (c) freedom from political agendas.¹³⁷ In relation to

¹³⁶ See International Association of Prosecutors, *Standards of Professional Responsibility and the Statement of the Essential Duties and Rights of Prosecutors*, 12 June 2017, Article 3(b) (<http://www.legal-tools.org/doc/e39b76/>).

¹³⁷ Green and Zacharias, 2004, p. 851, see *supra* note 30.

independence, prosecutors are not supposed to make decisions to prosecute or drop charges based only on the recommendations of the police or other investigating agencies. The decisions of prosecutors should be influenced by the evidence before them, the quality of witnesses, and the possibility of conviction. Although prosecutors may ordinarily be aligned with the cause of the police and victims of crimes, their primary constituency is neither the police nor the victim, but society at large.¹³⁸ Therefore, in the final analysis, the prosecutors should make decisions on the potential cases before them without leaning too closely either to the victim or the police who may have conducted the initial investigation.

Non-partisanship can also be referred to as objectivity in decision-making. This means that the prosecutor is under obligation to study the available evidence at all stages of reviewing a case file. The review of cases must be based on available evidence within the reach of the prosecutor.¹³⁹ However, the notion of objectivity also creates problems. As noted by Green and Zacharias, when prosecutors represent society at large, it equally means that the interest of the victim has to be protected. In addition, the prosecutor is under obligation to ensure that exculpatory evidence in favour of the defendant is made public or brought to the attention of the judge, as the sole aim of prosecution is not punishment, but to ensure that justice is done.¹⁴⁰ In addition, objectivity means that the personal dispositions of the prosecutor should not be an overriding factor in a decision whether to prosecute or not to. While they have to act in such a way as to express the will of the legislators (that is, according to the law that has been legislated), prosecutors are also under obligation to protect public interests and expectations of the society. Finally, they should be detached from factors that cloud their sense of judgment.¹⁴¹

Another facet of neutrality as non-partisanship is that prosecutors should act non-politically. A prosecutor should not use the office or position to further the political interests of affiliated political parties or politicians.¹⁴² Green and Zacharias agree that there is tension between this principle and the concept that the prosecutor's responsibility is to repre-

¹³⁸ *Ibid.*, p. 863.

¹³⁹ *Ibid.*, p. 864.

¹⁴⁰ *Ibid.*, p. 868.

¹⁴¹ *Ibid.*, p. 869.

¹⁴² *Ibid.*

sent the interest of the society. An example of this inconsistency is when the interest of society is akin to mob justice or societal agitations based on community sentiments. The prosecutor's role is not to follow a particular interest group, but to weigh the evidence and make a decision based on principled criteria, guided by an objective disposition of the circumstances of each case.¹⁴³ It may turn out that the prosecutor will become unpopular in the short term, however, a non-partisan decision will stand the test of time, better than the one taken to satisfy a section of the community. This means that the prosecutor will always engage in a balancing act to satisfy different and conflicting interests.

The need for independence, objectivity and non-partisanship cannot be under-estimated. It shows that the exercise of discretion, although within the bounds of the rights of the prosecutor, is usually constrained by some of the factors outlined above.

11.5.3. Neutrality as Principled Decision-making

The third principle of neutrality is that prosecutors should base their decisions and activities on readily identifiable and consistently applied criteria.¹⁴⁴ These include implementing legislative will, principled decision-making rooted in the purposes of criminal law, principled policy-making through the adoption of administrative policies, and avoiding non-legal rationale in decision-making.¹⁴⁵ A major essence of the prosecutor's job is to implement the laws enacted by lawmakers to curtail or punish crimes. It is therefore a responsibility of the prosecutor to ensure that the enforcement of the law is not arbitrary or inconsistent and meets the threshold of justice and fairness. At times, it is noted that the desire of the lawmakers to punish a particular conduct is born out of the desire to please the electorate. Under these circumstances, the prosecutor has to work the fine line of implementing the legislators' will and also ensuring that discretion is not used to pander to the whims and caprices of elected officials.

In relation to principled decision rooted in the purposes of criminal law, the prosecutor has to decide on the sole essence of seeking punishment for a defendant. This is where the theories of punishment become handy and the prosecutor is expected to ensure that the desire to press

¹⁴³ *Ibid.*, p. 870.

¹⁴⁴ *Ibid.*, p. 871.

¹⁴⁵ *Ibid.*

charges is rooted in the purposes of criminal law. This relates to the reason or aim of punishing a defendant, which can either be retributive, deterrent or restorative in nature.

In relation to retributive justice, there are several strands, which include vengeful, deontological and empirical conceptions of retribution.¹⁴⁶ The vengeful strand of retribution also known as *lex talionis* is associated with the Judeo-Christian Bible which seeks to punish the offender “eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe”.¹⁴⁷ Retributive justice is an improved version of a system of overwhelming punishment, like destroying a village for one person’s crime. The limited retribution in *lex talionis* is to ensure that the punishment could be no greater than the crime. Therefore, retributive justice aims at achieving equal punishment for the crime committed by the accused person.¹⁴⁸ The essence of punishment under retributive justice does not focus on the harm of the offense committed but on the culpability of the offender.¹⁴⁹ Therefore, a prosecutor’s decision to seek for punishment of the defendant is in furtherance of the purposes of criminal law and in this instance, retribution.

The main argument of the retributive theory of punishment is that criminal punishment is justified by the moral desert of the perpetrator. In other words, retributive justice theories are characterized by their emphasis on the relationship between punishment and moral wrongdoing of the perpetrator.¹⁵⁰ Another element of retributive justice is the fact that the victims are reduced to witnesses, and not really recognized as stakeholders in the process. Although some commentators have argued that the process of arrest, prosecution and punishment of the perpetration does justice

¹⁴⁶ Paul Robinson, “Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical”, in *Cambridge Law Journal*, 2008, vol. 67, no. 1, p. 146.

¹⁴⁷ See the *Book of Exodus*, King James Version, 21:24–25.

¹⁴⁸ Michael Moore, “The Moral worth of Retribution”, in Andrew von Hirsch and Andrew Ashworth (eds.), *Principled Sentencing: Readings on Theory and Policy*, 2nd edition, Oxford University Press, 1998, pp. 179–90.

¹⁴⁹ Robinson, 2008, p. 148, see *supra* note 146.

¹⁵⁰ Godfrey Musila, “Restorative Justice in International Criminal Law: The Rights of Victims in the International Criminal Court”, Ph.D. thesis submitted to the University of Witwatersrand, September 2009, pp. 8–10 (available on the university’s web site).

to the victims, it is clear that the focus of retributive justice is on the offender and not the victim.¹⁵¹

Second, a prosecutor's choice of punishment may be based on deterrence, which has its origin from the utilitarian moral philosophy espoused by philosophers like Jeremy Bentham, who argues that punishment persuades potential perpetrators not to commit crimes.¹⁵² Prospective perpetrators of crimes constantly engage in a cost-benefit analysis whether or not to commit crimes.¹⁵³ Therefore, perpetrators are assumed to always rationalize whether the possibility of apprehension and prosecution outweighs the benefits of committing the crime.

Generally, deterrence is divided into two broad categories of general deterrence and specific deterrence. General deterrence refers to the situation where punishment is meted out to an individual to deter the general public. However, specific deterrence refers to the punishment that is meted out to an individual, in order to deter that particular individual from committing a related crime. General deterrence is more pronounced than individual deterrence as the goal of deterrence is aimed more at the society than an individual. It is argued that a prosecutor who decides to prosecute a defendant to deter others or the particular individual facing investigation or prosecution is exercising discretion and furthering one of the aims of criminal law.

Third, if the prosecutor's reason for seeking punishment is to ensure justice for the victim through restorative justice, it is still within the confines of prosecutorial discretion. Restorative justice is aimed at both the defendant and victim of crime. It places victims at the centre of the criminal investigation and gives them a voice and place of participation, depending on the procedure in place. A major feature of the Rome Statute is the expansive focus on the rights of victims of international crimes. They participate in the proceedings and are entitled to reparations including compensation and restitution. In addition, a Victims' Trust Fund is dedicated to victims of international crimes. Therefore, a prosecutor who pri-

¹⁵¹ *Ibid.*

¹⁵² Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, reprint of 1823 edition, Clarendon Press, Oxford, 1907 (<http://www.legal-tools.org/doc/1746df/>).

¹⁵³ Richard Posner, "An Economic Theory of the Criminal Law", in *Columbia Law Review*, 1985, vol. 85, no. 6, p. 1195.

critiques the interests of victims in prosecuting a defendant is exercising discretion, in furtherance of the purposes of criminal law.

Another concept of prosecutorial neutrality is principled policy-making, which involves the adoption of administrative policies that guide the exercise of prosecutorial discretion.¹⁵⁴ It is the responsibility of the prosecutor to ensure that decisions follow laid-down procedures and easy to follow principles, policies and guidelines affecting the exercise of discretion.¹⁵⁵

Several countries have adopted different policies to guide the exercise of prosecutorial discretion. These policies vary from jurisdiction to jurisdiction. For example, the American Bar Association ('ABA') Standards for Criminal Justice in prosecutorial investigations provide standards governing the exercise of prosecutorial discretion during investigations.¹⁵⁶ The ABA Standards states that "a prosecutor is not an independent agent, but is a member of an independent institution, the primary duty of which is to seek justice".¹⁵⁷ The ABA Standards also expects the prosecutor not to take decisions that are considered impermissible, as earlier discussed.

In Ireland, there is a guideline for public prosecutors known as the Code of Ethics.¹⁵⁸ Its primary aim is to ensure the promotion of those principles and standards recognised as necessary for the proper and independent prosecution of offences. The Code of Ethics sets out the standards of conduct and practice expected of prosecutors working for, or on behalf of, the Director of Public Prosecutions in Ireland. It is intended to supplement, rather than to replace applicable professional codes, governing the conduct of lawyers and public servants.¹⁵⁹ The Code establishes minimum standards of ethical conduct. In addition, it is meant to provide general but not exhaustive, guidance to prosecutors. Furthermore, it is formulated to assist in securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings.

¹⁵⁴ Green and Zacharias, 2004, p. 877, see *supra* note 30.

¹⁵⁵ *Ibid.*, p. 870.

¹⁵⁶ American Bar Association, *ABA Standards for Criminal Justice: Prosecutorial Investigations*, 3rd edition, 2014 (available on the ABA web site).

¹⁵⁷ *Ibid.*, "Standard 26-1.2: General Principles".

¹⁵⁸ Office of the Director of Public Prosecutions, Ireland, *Guidelines for Prosecutors*, November 2010 (<http://www.legal-tools.org/doc/c89a25/>).

¹⁵⁹ *Ibid.*

The overriding principle in the exercise of prosecutorial discretion in Ireland is public interest. For example, the code of ethics provides that “a fundamental consideration when deciding whether to prosecute is whether to do so would be in the public interest”.¹⁶⁰ Therefore, a prosecution should be initiated or continued, subject to the available evidence disclosing a *prima facie* case, if it is in the public interest, and not otherwise.¹⁶¹

In New Zealand, prosecutorial discretion is exercised independently, and subject to evidentiary and public interest tests, which must be conducted by the prosecutor before any prosecution is carried out.¹⁶² Therefore, if there is evidentiary evidence that a crime has been committed, the prosecutor has to be satisfied that prosecution is required in the public interest.¹⁶³

It is clear from the discussions in this sub-section that some countries have adopted different administrative policies to guide the exercise of discretion. The extent to which these policies are adhered to is debatable. However, it is obvious that prosecutors who fail to observe the minimum ethics prescribed in these policies risk sanctions. From the foregoing, one thing that is clear is that the existence of these policies does not limit discretion, but tries to ensure consistency and less dependence on the personal disposition of the prosecutors.

There have been several debates on whether it is desirable to have clear, written criteria for the exercise of prosecutorial discretion. The contention is based on the fact that prosecutorial discretion is ordinarily not subject to judicial control and prosecutors are free to exercise their discretion within the confines of the law. However, the inability of prosecutors to show clearly how decisions are made affects citizens’ perceptions of the powers of the prosecutor.

11.5.4. Uganda and Central African Republic

The analysis of the situations in Uganda and Central African Republic, both self-referrals, shows that the Prosecutor’s methods concerning pre-

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² Government of New Zealand, Solicitor-General’s Prosecution Guidelines, 2013, Sections 5.3. and 5.5. (<http://www.legal-tools.org/doc/96038e/>).

¹⁶³ *Ibid.*

liminary examinations have evolved over time. The manner in which the preliminary examination in the two situations was handled differed in some important ways. While Moreno-Ocampo was not able to articulate clearly the procedure used in the preliminary examination in Uganda and in the Central African Republic I situation, Fatou Bensouda adopted the policy paper on preliminary examination and showed how she used it to arrive at her actions and decisions in Central African Republic II situation.

In terms of the substantive decisions taken, the Prosecutor was correct in concluding or assuming that both situations concerning Uganda and Central African Republic fell within the jurisdiction of the ICC. Furthermore, the Prosecutor was correct in concluding that the admissibility criteria, namely complementarity and gravity, were met in the Central African Republic situations I and II. However, in respect of the Uganda situation, the former Prosecutor failed to substantiate the decision that the crimes committed by government forces did not meet the threshold of gravity needed to trigger ICC jurisdiction and charges.

Regarding the application of the principle whether it was in the interests of justice that the preliminary investigation and full investigation took place, the policy paper adopted by the former Prosecutor holds that there is a difference between the ‘interests of peace’ and ‘interests of justice’, meaning that the Prosecutor is not concerned with peace negotiations and probable outcomes. However, these concepts are related and are difficult to separate in some cases during preliminary examinations.

On the general principles and policy objectives adopted by the Bensouda’s administration, it has been noted that there is a divergence between the activities of the former Prosecutor and the present Prosecutor regarding the policy paper on preliminary examination. One conclusion is that the former Prosecutor did not follow the policy paper on preliminary examination.

It is argued that the ICC Prosecutors applied restrictive interpretations to the provisions of the Rome Statute regarding the principle of positive complementarity during preliminary examinations, especially in Uganda. Since the policy paper was released in November 2013, evaluating the former Prosecutor based on the policy that was adopted by his successor in 2013 for an activity carried out in 2004 may be problematic. However, the draft policy paper was released in 2010 and contained many of the issues discussed in the current policy. Furthermore, the policy paper has its roots in the provisions of the Rome Statute. Therefore, the former

Prosecutor clearly endorsed most of the principles that later became the policy paper on preliminary examination.

11.5.5. Sudan and Libya

The UNSC has the power to refer States not party to the ICC as provided by the Rome Statute. In addition, the ICC legal framework provides for the conduct of preliminary examination irrespective of how the jurisdiction of the ICC was activated. The involvement of the UNSC under Chapter VII of the UN Charter was significant on its own and therefore indicated that the two situations were threats to international peace and stability.

There is evidence that legal factors like jurisdiction, admissibility (complementarity and gravity) and interests of justice were met during the preliminary examinations conducted by the ICC Prosecutor. However, it is argued that the Prosecutor did not adhere to some of the policies and principles adopted by the Office in the exercise of discretion during preliminary examination. These include the policies on interests of justice, positive complementarity and using the preliminary examination as a preventive mechanism against the commission of crimes within the jurisdiction of the court.

Despite the controversial nature of the UNSC referrals of the Darfur and Libyan conflicts, it could be argued that the referrals have strengthened the activities of the ICC. This is because the involvement of the UNSC gave the conflicts and the activities of the ICC a global attention. The chapter agrees with the decision of the Prosecutor that the crimes committed in the Darfur and Libyan conflicts meet the gravity threshold established in the Statute. One cannot but agree with the Prosecutor that there was a reasonable basis to proceed with investigations.

The interpretation of the interests of justice by the Prosecutor has necessitated abandoning the peace negotiations that were organized to end the Darfur conflict. None of them has proved to be successful so far and most of the recent ones took place after the decision to proceed with an investigation. However, in Libya, the limited time of conducting the preliminary examination did not give room to activate national proceedings through positive complementarity.

The Prosecutor did not provide enough information on how the preliminary examinations were conducted and the information that is readily available is contained in the reports submitted to the UNSC which are

unfortunately limited in content and analysis of issues involved. Regarding the jurisdiction of the Court over the crimes committed in Darfur and Libya, it is evident that though Sudan and Libya are not States party to the Statute, the referrals by the UNSC satisfy the jurisdiction threshold as UN members are under an obligation to carry out the decisions of the UNSC. Besides, the Rome Statute makes provision for the referral.

11.5.6. Kenya and Côte d'Ivoire

The situations in Kenya and Côte d'Ivoire marked the first time the Prosecutor decided there was a reasonable basis to proceed with investigations using the *proprio motu* powers in Article 15 of the Rome Statute. This power is subject to oversight by the Pre-Trial Chamber of the ICC whose responsibility is to scrutinise and weigh the evidence submitted by the Prosecutor.

In Côte d'Ivoire, the initial acceptance of jurisdiction of the Court and its subsequent ratification by the government meant that the Prosecutor's power to conduct the preliminary examination into that country's situation could not be challenged. The main challenge in Côte d'Ivoire was that the Prosecutor did not charge key perpetrators from all parties to the conflict for crimes. This has called into question the neutrality of the Prosecutor.

The use of 'inactivity' or 'inaction' under Article 17 of the Rome Statute to determine Kenya's challenge of jurisdiction is a lost opportunity to engage with the ICC on interpretations of unwillingness and inability in a *proprio motu* proceedings. The adoption of 'inaction' as a basis for the intervention of the ICC under Article 15 of the Statute raises fundamental issues in the activities of the Prosecutor during preliminary examinations. Although the Prosecutor has argued that positive complementarity is a key policy objective, it was not used in Kenya and Côte d'Ivoire to spur national trials, and this lack is clearly demonstrated by subsequent events in both countries.

There was lack of co-operation between the ICC and Kenya, and this constitutes one of the challenges faced by the ICC as lack of co-operation between a State and the ICC may hamper the investigation of crimes. However, there is cooperation between the Prosecutor and the government of Côte d'Ivoire although some of the requests made by the ICC to the Ivorian government are yet to be acceded to.

With regard to the bid by the Kenyan government to invite the UNSC to use Article 16 of the Rome Statute to stop the activities of the Court, it is noted that Kenya needed to demonstrate that the principles of positive complementarity applied to the case.

One major issue that the Prosecutor did not take into consideration during the preliminary examination conducted in the two countries is that the ICC policy paper provides for the use of positive complementarity. Positive complementarity presupposes that the ICC will defer to national judicial systems when they show interest in investigating and prosecuting crimes within the jurisdiction of the ICC. However, this issue was not prioritised in the Kenya and Côte d'Ivoire situations.

It is clear that the Prosecutor failed to charge all parties to the conflict for the crimes committed, especially in Côte d'Ivoire. Although the Prosecutor had used gravity to show why some parties to conflicts were not charged in Kenya, it is not clear how the Prosecutor reached the decision on who to charge or not to charge in Côte d'Ivoire and the reasons for the decision.

11.6. The Exercise of Discretion by the Prosecutor in Preliminary Examinations in Six African Countries – Key Findings

Six country situations, all African, were used to consider how the Prosecutor has applied the principles discussed above. In essence, the inquiry in the case studies sought to find out if the Prosecutors understood and correctly applied the substantive and procedural powers provided for in the Rome Statute in the exercise of prosecutorial discretion during preliminary examinations. The choice of case studies from Africa was informed by the fact that the strongest criticisms of the ICC has come from the African continent. It was thus important to establish whether there is a substantive claim that the Prosecutor is biased against African leaders.

The analysis of the case studies produced mixed results. For example, in the preliminary examinations conducted in Uganda and Central African Republic, while Moreno-Ocampo, the first Prosecutor, did not clearly articulate the procedure through which the preliminary examinations were carried out in Uganda and situation I of the Central African Republic, Fatou Bensouda adopted the policy paper on preliminary examination and used it to justify her actions and decisions in Central African Republic II situation.

In addition, in terms of the substantive decisions made during the preliminary examinations conducted in Uganda and Central African Republic, the study found that the Prosecutor was correct in concluding that both situations fell within the jurisdiction of the ICC. Furthermore, the Prosecutors were correct in concluding that the admissibility criteria, namely complementarity and gravity, were met in the Central African Republic situations I and II. However, in respect of the Uganda situation, Moreno-Ocampo failed to substantiate the decision that the crimes committed by government forces did not meet the threshold of gravity needed to trigger ICC jurisdiction and charges.

The former Prosecutor did not follow the policy paper on preliminary examinations in investigations conducted in Uganda and Central African Republic I although the policy paper mirrors provisions of the Rome Statute. Furthermore, the study argues that the former ICC Prosecutor applied a restrictive interpretation to the provisions of the Rome Statute regarding the principle of positive complementarity during preliminary examinations especially in Uganda. This means that Uganda was not given the benefit of doubt to prove that it was willing and able to hold accountable those accused of committing international crimes in the northern Uganda conflict.

In relation to the preliminary examinations conducted in Sudan and Libya, the study noted that UNSC has the power to refer States not party to the ICC as provided by the Rome Statute. Furthermore, the ICC legal framework provides for the conduct of preliminary examinations irrespective of how the jurisdiction of the ICC was activated, UNSC referrals inclusive. With respect to both Sudan and Libya situations, the study concludes that legal factors such as jurisdiction, admissibility and interests of justice were met during the preliminary examinations conducted by the ICC Prosecutor. However, the former Prosecutor did not adhere to some of the policies and principles adopted by the office in the exercise of discretion during preliminary examination. These include policies on positive complementarity and the use of preliminary examination to spur national trials.

The chapter agrees with the decision of the Prosecutor that the crimes committed in the Darfur and the Libyan conflict met the gravity threshold established in the Statute. Therefore, there was a reasonable basis to proceed with the investigations. The interpretation of the interests of justice by the Prosecutor necessitated abandoning the peace negotia-

tions that were organised to end the Darfur conflict. As noted in the study, none of these peace processes has proved to be successful so far and most of the recent ones took place after the decision to proceed with an investigation. In addition, the chapter argues that the limited time of conducting preliminary examination in Libya did not give room to the government of Libya to activate national proceedings through positive complementarity.

However, in Sudan and Libya, the former Prosecutor did not provide enough information regarding how the preliminary examinations were conducted and the information that is available are reports submitted to the UNSC, which are limited in content and analysis. Regarding the jurisdiction of the Court over the crimes committed in Darfur and Libya, the study argues that although Sudan and Libya are not States party to the Statute, the referrals by the UNSC satisfies the jurisdiction threshold.

The situations in Kenya and Côte d'Ivoire represent the first cases where the Prosecutor decided there was a reasonable basis to proceed with investigations using the *proprio motu* powers in Article 15 of the Rome Statute. This power is subject to oversight by the Pre-Trial Chamber of the ICC whose responsibility is to scrutinise and weigh the evidence submitted by the Prosecutor before approving a request by the Prosecutor to conduct an investigation into alleged crimes.

With respect to Côte d'Ivoire, the initial acceptance of the jurisdiction of the Court and subsequent ratification of the same by the government meant that the Prosecutor's power to conduct the preliminary examination into that country's situation could not be challenged. However, the Prosecutor did not charge the perpetrators of violence from all parties to the conflict for crimes. This called into question the neutrality of the Prosecutor.

With respect to Kenya, the use of 'inaction' or inactivity to determine Kenya's challenge of jurisdiction represented a lost opportunity to engage with the ICC on interpretations of unwillingness and inability in *proprio motu* proceedings. The adoption of 'inaction' or inactivity as a basis of the intervention of the ICC under Article 15 of the Statute raises fundamental questions for the Prosecutor during preliminary examinations. Although the ICC Prosecutors have argued that positive complementarity is a key policy objective, it was not utilised in Kenya and Côte d'Ivoire to spur national trials. Positive complementarity presupposes that the ICC will defer to national judicial systems when they show interest to investigate and prosecute crimes within the jurisdiction of the ICC.

Overall, the ICC Prosecutors mostly followed the provisions of the Rome Statute in the preliminary examinations conducted in Uganda, Central African Republic, Sudan and Libya. However, the study has found several grey areas in the implementation of the principles governing prosecutorial discretion. Of the six countries discussed in the study, the Prosecutor received most criticisms in respect of the preliminary examinations conducted in Kenya and Côte d'Ivoire. This is due in part to the fact that *proprio motu* examinations in situation countries are controversial, and perhaps also to the questionable decisions of the Prosecutor and supported by the ICC Chamber that the crimes committed in Kenya reached the threshold of gravity required for crimes against humanity, and the failure to charge all parties to the violence in Côte d'Ivoire.

The purpose of this chapter is to investigate the exercise of prosecutorial discretion during preliminary examinations and how the activities of the former ICC Prosecutor led to the sour relationship between the ICC and the AU. As the Prosecutor has a key role in the ICC, perceptions of partiality or of lack of independence or objectivity in his or her work, have an adverse impact on the effectiveness of the ICC and international criminal law in general. For that reason, this chapter seeks to provide suggestions on how the exercise of prosecutorial discretion during preliminary examinations could be improved.

A unique feature of this chapter is the use of the theory of prosecutorial neutrality, the legal criteria in the Rome Statute and the policies and principles of the Prosecutor as analytical tools. More importantly, the chapter investigated the situations of six countries across Africa, where specific criticisms of bias have been levelled against the ICC Prosecutor. It argues that the ICC Prosecutor should exercise his or her discretion independently, impartially and objectively, as demanded by the theory of prosecutorial neutrality in the interests of the effective administration of international criminal justice. Such neutrality has to be maintained at both the formal and practical levels.

It will be recalled that the theory of prosecutorial neutrality was originally propounded for the American criminal justice system. However, the theory was re-designed to accommodate developments at the ICC. This was possible by identifying the similarities and differences in the domestic and international criminal justice systems. In addition, the chapter noted that the exercise of discretion by the ICC Prosecutor is limited

by the Rome Statute through the oversight functions of the Pre-Trial Chamber of the ICC and the UNSC.

This chapter has demonstrated that the preliminary examination is an essential feature of the ICC and as such plays a strategic role in the administration of international criminal justice. The Rome Statute grants the Prosecutor unprecedented powers to initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the ICC, subject to the approval of the Pre-Trial Chambers of the ICC.¹⁶⁴ Even when States party to the treaty and the UNSC refer matters to the ICC, the Prosecutor has the discretion to decide whether there is a reasonable basis to proceed with investigations. This suggests that the discretion granted to the Prosecutor to conduct preliminary examinations is not limited by the powers of the UNSC to suspend investigations or prosecutions in Article 16 of the Rome Statute.

Preliminary examinations at the ICC serve different purposes. First, they are used to establish whether or not there is a reasonable basis to proceed with full investigation. Second, they are also used by the Prosecutor to advance the principle of positive complementarity. Third, they serve as an early warning mechanism enabling the Prosecutor to put parties to a conflict on notice that the ICC is following developments in a conflict situation.

The adoption of the policy paper on preliminary examinations is a welcome development and its contents have been thoroughly analysed in this chapter. Not only does it offer an opportunity for supporters and critics of the ICC, to scrutinise the activities of the Prosecutor based on the general principles and policy objectives adopted to guide the exercise of discretion during preliminary examinations, but it also helps the Prosecutor to make consistent decisions using the re-established criteria.

11.6.1. The Significance of the Theory of Prosecutorial Neutrality

It is essential that the Prosecutor is non-biased, non-partisan and principled. The Prosecutor must also be independent, objective, and non-political. These principles constitute the elements of the theory of prosecutorial neutrality. Implementing these principles in practice could make the decisions of the Prosecutor to be more transparent and accountable,

¹⁶⁴ ICC Statute, Article 15; Human Right Watch, *Courting History, The Landmark International Criminal Court's First Years*, July 2008, pp. 30–66.

and hence bolster public confidence in the administration of international criminal justice.

Prosecutorial neutrality is crucial to the administration of criminal justice at both national and international levels. It emphasizes the absence of bias, non-partisanship and the principled application of established rules and procedures, and also provides the possibility for the exercise of prosecutorial discretion that can ensure the just and fair administration of international criminal justice irrespective of the interests of the parties to a conflict.

11.6.2. Formal Independence of the ICC Prosecutor

From an institutional point of view, the ICC Prosecutor is guaranteed more independence than any of his predecessors. In addition, the ICC Prosecutor enjoys an uninterrupted nine-year term and can only be removed from office by the Assembly of States Parties of the Rome Statute due to “serious misconduct” or a “serious breach”. However, although the formal guarantee of independence is necessary, it is not sufficient to prevent perceptions of partiality. The Prosecutor must act independently in practice. As this chapter has shown, this could be achieved by the OTP adopting practices which promote transparency and accountability. In essence, the Prosecutor should be a three-dimensional neutral prosecutor.

Initially, the Prosecutor did not fully embrace the notion of prosecutorial neutrality, as already discussed. As a result, some of the preliminary examinations were conducted under the cloak of secrecy and decisions made were not justified publicly. This was partly because the former Prosecutor had not yet developed detailed guidelines, policies and principles governing the exercise of prosecutorial discretion in general and during preliminary examinations. There have been significant improvements with the adoption of the policy paper on preliminary examinations by the current Prosecutor. However, some problems still remain.

11.6.3. Legal Basis for Prosecutorial Discretion for Preliminary Examinations and Guidance

Article 53 establishes the legal framework for preliminary examinations. That article clearly shows that jurisdiction, admissibility (complementarity and gravity), and interests of justice are the substantive factors that must be taken into account when making decisions pertaining to preliminary examinations. In addition to these factors, the Prosecutor also has to

consider the question of jurisdiction in its all elements – subject matter, time and territory.

Article 17 of the Statute regulates complementarity and gravity and that, though they relate to issues of admissibility before the ICC, these are vital elements of preliminary examinations. It was also argued that the absence of proceedings by a State that has jurisdiction over a case is enough to make a situation admissible. If a State is inactive, the issues of unwillingness and inability do not arise.

Under gravity, it was argued that the Prosecutor’s assessment of gravity includes quantitative and qualitative considerations. Other factors affecting gravity include the scale, nature, manner of commission of the crimes, and their impact. The chapter found that the Prosecutor’s application of the principle of gravity to preliminary examinations has been inconsistent to the extent that it is not clear how the Prosecutor arrives at decisions on the issue of gravity. For example, in Uganda, the Prosecutor was not clear on how the gravity of the crimes allegedly committed by UPDF soldiers did not meet the assessment under the Rome Statute.

The last major factor that decisions on preliminary examinations have to consider is the interests of justice. It has been argued that the Prosecutor’s differentiation between ‘interests of peace’ and ‘interests of justice’ restricts a practical application of the principle of interests of justice in the Rome Statute. The Prosecutor’s policy paper states that the Office is only concerned with the interest of justice and not with the interest of peace. However, the Rome Statute does not make this distinction. The effect is that a situation where the Prosecutor should consider the broader effect of a peace negotiation or its potential impact on a situation is not a primary concern of the ICC Prosecutor. This is not a progressive interpretation of the Rome Statute and should be revised.

11.6.4. Accountability Mechanisms Regulating the Exercise of Prosecutorial Discretion

Despite the independence and discretion granted to the ICC Prosecutor, the Rome Statute also establishes checks and balances to ensure the Prosecutor does not act out of context. These checks and balances serve as accountability mechanisms. There are three main accountability mechanisms that serve as a check on the powers of the Prosecutor. The first is the judicial review carried out by the Pre-Trial Chamber before the Prosecutor is granted leave to proceed with an investigation under Article 15 of

the Rome Statute. In addition, if the Prosecutor decides that it is not in the interest of the justice to carry out an investigation, the Prosecutor is under an obligation to inform the Pre-Trial Chamber of this outcome.

Second, the Assembly of States Parties to the Rome is responsible for the election and discipline of the ICC Prosecutor. This means that if the Prosecutor commits a serious or material breach of his or her duties under the Rome Statute, the Assembly of States Parties can remove him or her from office with an absolute majority. Furthermore, the body approves the budget of the Prosecutor, which means they have a controlling influence on the activities of the OTP, through the allocation of funds to the Office.

Third, the UNSC acting under Chapter VII of the UN Charter can suspend an on-going investigation using Article 16 of the Rome Statute. The Rome Statute gives the UNSC the power to defer proceedings currently before the Court, if the proceedings constitute a threat to international peace and security.

11.7. Conclusion

This chapter is clearly a summary of the activities of the first ICC Prosecutor. As provided in the Rome Statute, the ICC Prosecutor enjoys significant institutional independence. There have also been notable improvements in the manner in which the office has carried out its functions especially in preliminary investigations, from the first Prosecutor who was not as transparent to the current Prosecutor who has been more so. The development of guidelines and policy papers has also helped to clarify the Prosecutor's own understanding of the powers and factors that must be taken into account when exercising prosecutorial discretion during preliminary examinations. Although most of these principles are valid and have a legal basis, their application in practice has raised some concerns, and this chapter has shown that some of those concerns have merit. It is in view of the foregoing discussions that the following recommendations are offered. This is to support the efforts of the current Prosecutor to ensure that the activities of the Court are understood by different stakeholders, including those directly affected by conflicts currently under preliminary examination, investigation or prosecution stages.

It is generally acknowledged that the Rome Statute is not a perfect document and contains ambiguous provisions that are difficult to reconcile. One issue that is not clear is whether preliminary examination is sub-

ject only to the discretion of the Prosecutor or whether the Pre-Trial Chamber can intervene in certain circumstances. In the situation in Central African Republic I, the decision of Pre-Trial Chamber III, and the response of the former Prosecutor are not clear on this.¹⁶⁵ It is therefore argued that this is an issue that needs to be clarified either in the Prosecutor's guidelines and policy papers or by the ICC. This will help to define the role of the Prosecutor during preliminary examinations and define the role of the Pre-Trial Chambers beyond authorisation for *proprio motu* investigations. Included in this clarification should be the timelines within which the Prosecutor has to make a decision.

The principle of a reasonable time adopted by Pre-Trial Chamber III in the Central African Republic I situation should be adopted as a benchmark, and the Court empowered to enforce a timeline on the Prosecutor regarding preliminary examinations.¹⁶⁶ This will be subject to the peculiarities of the situation and the Pre-Trial Chamber may give the Prosecutor the option of reporting the status of preliminary examinations while the process is ongoing.

The Pre-Trial Chamber should perform oversight functions on the exercise of prosecutorial discretion during preliminary examinations. This is because it will enhance the quality of proceedings at the ICC. If the Prosecutor routinely informs the Pre-Trial Chamber of its activities prior to a request for authorisation, it will create a dialogue process that will enable the Pre-Trial Chamber to understand the activities of the ICC Prosecutor better, thus enhancing the overall administration of justice at the ICC. After all, the Prosecutor has to obtain an authorisation from the Court before launching a *proprio motu* investigation.

The Prosecutor's application of the principle of gravity has been questionable. Although the Appeals Chamber has almost made gravity a non-issue during admissibility proceedings, the issue of gravity is still of

¹⁶⁵ See International Criminal Court, Situation in the Central African Republic, Pre-Trial Chamber, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, 30 November 2006, ICC-01/05-6 (<http://www.legal-tools.org/doc/76e607/>); See also OTP, 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-01/05-7 (<http://www.legal-tools.org/doc/1dd66a/>).

¹⁶⁶ International Criminal Court, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, 2006, see *supra* note 165.

importance to the Prosecutor during preliminary examinations. The former Prosecutor was not clear on the application of gravity and whether it involved a qualitative or quantitative analysis during some of the preliminary examinations carried out during his tenure. Although the policy paper on preliminary examination has clarified this position, stating that gravity involves both quantitative and qualitative analysis of victims of international crimes, it is not yet clear how the gravity analysis is carried out. It is recommended that a gravity policy specifically detailing how the Prosecutor analyses the gravity criteria in the Rome Statute be adopted. Since it is clear from this study that there is a change in policy between Moreno-Ocampo and Fatou Bensouda's administrations, it is recommended that the current gravity policy should be revisited.

The current Prosecutor states in the policy paper on preliminary examinations that the process is used to encourage positive complementarity whereby States are encouraged to investigate and prosecute international crimes. While there have been efforts to galvanize local support for the investigation and prosecution of international crimes by domestic judicial systems during preliminary examinations, the Prosecutor has not asserted the same pressure on all countries under preliminary examination, thereby fuelling allegations of bias against the Prosecutor. As already stated, the ICC is a court of last resort. This means that it is not meant to supplant or take-over genuine investigations and prosecutions of international crimes by national governments. Therefore, its strength should lie in the ability to ensure that States Parties comply with the provisions of the Rome Statute regarding the principle of complementarity.¹⁶⁷

It is recommended that the Prosecutor should endeavour to use preliminary examinations to spur national governments to investigate and prosecute crimes within the jurisdiction of the ICC committed by citizens. Such efforts will enhance positive complementarity and support national investigation and prosecution of international crimes. This will likely decrease the need to rely on the ICC for the investigation and prosecution of international crimes.

¹⁶⁷ Max du Plessis, Antoinette Louw and Ottilla Maunganidze, "African efforts to close the impunity gap: Lessons for complementarity from national and regional actions", in *Institute for Security Studies Paper No 241*, 2012, pp. 1–24; Thomas Hansen, "A Critical Review of the ICC's Recent Practice Concerning Admissibility Challenges and Complementarity", in *Melbourne Journal of international Law*, 2012, vol. 13, no. 1, pp. 217–34.

The Prosecutor argues that it uses preliminary examinations as an early warning mechanism. This is, however, a recent development and was not part of the practice of the ICC during the early years of its operations. The practice itself is currently not uniform and its effect is at best minimal. The press statements of the Prosecutor are mostly posted on the website of the ICC and distributed through social media, print and electronic media outlets. However, very few of the target audience get the information when it is needed most.

It is recommended that this policy be overhauled thereby necessitating the adoption of a better strategy that will ensure the statements and official communications of the Prosecutor reach the target audience. This suggests that translating the statements into the local languages where conflicts are ongoing is vital. In addition, other means of enhancing the effectiveness of public service announcements should be explored instead of restricting it to the traditional methods of press releases and uploading information on the website of the ICC.¹⁶⁸ These include uploading video and audio messages that can be played by radio and television stations across the States involved.¹⁶⁹

The current policy paper on the interests of justice adopted by the former Prosecutor of the ICC differentiates between the interests of peace and the interests of justice.¹⁷⁰ The implication is that only the UNSC acting under chapter VII of the UN can use Article 16 of the Rome Statute to defer proceedings currently before the Court. The political nature of the UNSC has made it impossible for the Council to operate in a transparent and fair manner. This development has resulted in the charge that the ICC is biased when the UNSC also has a role to play as provided under Article 16 of the Rome Statute.

¹⁶⁸ Press releases on preliminary examinations are posted on the first page of the ICC website. However, once the information is overtaken by other events, it gets lost in the site. It is only when the media picks up the information that it gets serious attention from the international community.

¹⁶⁹ The Prosecutor of the International Criminal Court issued a public statement ahead of Nigeria's elections in 2015. The ICC website contains downloadable audio and video files that can be played by radio and television stations across Nigeria. See ICC, *Statement by the Prosecutor of the International Criminal Court, Fatou Bensouda, ahead of elections in Nigeria: "I reiterate my call to refrain from violence"*, 16 March 2015 (<http://www.legal-tools.org/doc/db08e6/>).

¹⁷⁰ OTP, *Policy Paper on the Interests of Justice*, September 2007 (<http://www.legal-tools.org/doc/bb02e5/>).

The decision to suspend or defer investigations or prosecutions in the ‘interests of justice’ under Article 53 of the Rome Statute should be a shared responsibility between the ICC and the UNSC. This will involve the UNSC handling issues that emanate from its referrals using Article 16 of the Rome Statute while the Prosecutor concentrates on cases arising from States Party referrals or the Prosecutor’s *proprio motu* powers. This will conform to the argument by the Prosecutor that the ‘interests of peace’ are political in nature and therefore beyond the mandate of his office.

Situations referred by the UNSC to the ICC are usually threats to international peace and security. Therefore, it should be the UNSC who considers deferrals in these situations. Such a division of labour between the UNSC and the ICC Prosecutor in considering the deferral of cases will ensure that the checks and balances provided by the Rome Statute are used to its optimum and help avoid the UNSC exerting undue influence over the activities of the ICC.

The Prosecutor needs to review the reports announcing the termination of preliminary examinations. Although the Statute provides that those that inform the ICC Prosecutor of crimes allegedly committed in their countries should be notified of the outcome of preliminary examinations, it does not preclude the Prosecutor from making the information available to the public.¹⁷¹ Although it is conceded in the study that the effort of the Prosecutor in releasing reports has improved since Fatou Bensouda became the Prosecutor, reports that thoroughly discuss the substantive and procedural issues regulating the conduct of preliminary examinations is recommended.

¹⁷¹ *Policy Paper on Preliminary Examinations 2013*, para. 97.

Dealing with the Ongoing Conflict at the Heart of Europe: On the ICC Prosecutor's Difficult Choices and Challenges in the Preliminary Examination into the Situation of Ukraine

Iryna Marchuk*

12.1. Introduction

The chapter critically evaluates the progress of preliminary examination into the situation of Ukraine that is currently under consideration for possible investigation in the International Criminal Court ('ICC'). Following a brief discussion on the background of the conflict and Ukraine's relationship with the ICC, the chapter turns to the analysis of Ukraine's two declarations accepting the *ad hoc* jurisdiction of the Court¹ and then examines the steps undertaken by the ICC Prosecutor with respect to an investigation of the alleged crimes against humanity and war crimes. Re-

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¹ Declaration of the Verkhovna Rada of Ukraine to the ICC on the recognition of the jurisdiction of the ICC by Ukraine over crimes against humanity, committed by senior officials of the state, which led to extremely grave consequences and mass murder of Ukrainian nationals during peaceful protests within the period 21 November 2013–22 February 2014 signed by the Chairperson of the Verkhovna Rada of Ukraine Oleksandr Turchynov, 25 February 2014, case no. 790-VII ('Declaration I'); Declaration of Verkhovna Rada of Ukraine to the ICC on the recognition of the jurisdiction of the ICC by Ukraine over crimes against humanity and war crimes committed by senior officials of the Russian Federation and leaders of the Russian Federation and leaders of terrorist organizations "DNR" and "LNR", which led to extremely grave consequences and mass murder of Ukrainian nationals signed by the Chairperson of the Verkhovna Rada of Ukraine V. Groysman, 4 February 2015, case no. 145-VIII ('Declaration II').

garding Ukraine's declaration with respect to the Maydan crimes (Declaration I), it is argued that the ICC Prosecutor applied an overly stringent definition of crimes against humanity with respect to the Maydan crimes, thus reinforcing a perception that she will only be willing to move forward with an investigation if the attack is both widespread *and* systematic, notwithstanding the commonly agreed disjunctive test. Further, it is argued that the ICC Prosecutor – in invoking her broad discretionary powers – not only applied an unreasonably high evidentiary standard at the preliminary examination stage, but also denied the ICC judges an opportunity to clarify the application of the systematic requirement on a stand-alone basis, as well as how it interacts with the element of a State or organizational policy.

As for Ukraine's declaration regarding the situation in Crimea and eastern Ukraine (Declaration II), the chapter highlights a number of challenges that are most likely to be encountered by the ICC Prosecutor if the overall control test were to be established with respect to Russia's involvement in the conflict in eastern Ukraine. Similar, in the absence of Russia's co-operation with the Court, an investigation with respect to the situation in Crimea will most probably be deadlocked. Here, the ICC Prosecutor's main challenge is not whether the legal elements of war crimes and crimes against humanity are met, but more strategic in nature. How would potential proceedings against any suspects who are nationals of the Russian Federation affect the legitimacy of the work of the Office of the Prosecutor ('OTP') and the Court more generally?

To enhance the quality control in the ICC Prosecutor's preliminary examination of the situation in Ukraine, it is advised that the OTP carry out its inquiry into the alleged crimes without any further delay (especially given that the conflict is still ongoing) and make its final decision on the fate of Ukraine's first declaration with respect to the Maydan crimes in light of the submitted additional evidence. It is also advisable that the ICC Prosecutor be more transparent about communicating the work the OTP has done at the preliminary examination stage and actively foster a dialogue with all the relevant stakeholders. The ICC Prosecutor should dispel myths in Ukraine that the ICC will compensate for the deficient work of national authorities and prosecute all responsible ones in The Hague. Being transparent about the ICC's limitations and constraints might have a catalysing effect on the ability of the Ukrainian national authorities to

prosecute those who were involved in the commission of war crimes and crimes against humanity.

12.2. Background

The political tensions in Ukraine were sparked by the peaceful demonstrations against the government of the former President of Ukraine, Viktor Yanukovich, who refused to sign the deal on Ukraine's closer ties with the European Union.² The peaceful protests turned violent when Yanukovich authorized the law enforcement agencies to use violence against the protesters when dispersing the crowds in the centre of Kiev. The apogee of violence was reached on 18 February 2014 with the death of around one hundred protesters, mostly young university students, and hundreds of injuries of various gravity (known as the Maydan crimes).³ Although the former government attempted to strike a deal with the opposition leaders, this was plainly rejected by the general public that was shell-shocked by the Maydan crimes and demanded the resignation of Yanukovich with immediate effect, as well as the prosecution of those responsible for the crimes. Yanukovich claimed that his life was in danger and left, along with his entourage and associates, to neighbouring Russia where he remains until today.⁴

The dramatic events had a catalysing effect on Russia's actions in Crimea that assumed its control over the peninsula following the sham referendum, in which the inhabitants of Crimea expressed their will to secede from Ukraine in the presence of Russian troops, while the international observers were denied access to monitor the referendum.⁵ The Rus-

² Oksana Grytsenko, "Ukrainian protesters flood Kiev after president pulls out of EU deal", in *The Guardian*, 24 November 2013 (<http://www.legal-tools.org/doc/3746a7/>).

³ For an official source on the number of casualties, see Prosecutor General's Office ('PGO'), Register of Proceedings of Crimes During the Revolution of Dignity (<http://www.legal-tools.org/doc/95f3d2/>).

⁴ "Viktor Yanukovich Press Conference in Rostov", in *News of Ukraine*, 11 March 2014, available on YouTube at the time of writing. See also "Putin: Russia helped Yanukovich to flee Ukraine", in *BBC News*, 24 October 2014 (<http://www.legal-tools.org/doc/6c1504/>).

⁵ Shaun Walker, "Ukraine crisis: Crimea MPs vote to join Russian Federation sparks outrage", in *The Guardian*, 6 March 2014 (<http://www.legal-tools.org/doc/1c8c1e/>). See also Russia, Federal Constitutional Law N 6-ФКЗ, О принятии в Российскую Федерацию Республики Крым и образовании в составе Российской Федерации новых субъектов Республики Крым и города федерального значения Севастополя (Law on admitting to the Russian Federating the Republic of Crimea and establishing within the Russian Federa-

sian politicians welcomed the return of Crimea to its homeland, often referring to the restoration of historical truth and pointing towards a grave historical mistake when the peninsula was gifted by Nikita Khrushchev to the Ukrainian Socialist Republic in 1954.⁶ While Russia considers Crimea an integral part of its territory, the international community on many occasions has condemned the annexation of Crimea and demanded its return to Ukraine.⁷ Following the annexation, the human rights situation of the members of the Crimean Tatar and Ukrainian minority groups residing on the peninsula has considerably worsened. The allegations of the widespread abuses directed at the members of the minority groups range from torture, ill treatment, persecution to media harassment.⁸

The events in Crimea sparked similar secessionist sentiments in eastern Ukraine in April 2014 where fighting broke out between the pro-Russian rebels and the Ukrainian government forces. The conflict gained international notoriety when the MH17 passenger jet was shot down over the territory of eastern Ukraine and claimed 298 innocent lives.⁹ This became a turning point when the eyes of the international community were set on the fighting in eastern Ukraine, and the ICRC for the very first time declared the conflict to be governed by the rules of international humani-

tion new constituent entities the Republic of Crimea and the city of federal significance Sevastopol), 21 March 2014.

⁶ Крым. Путь на Родину. Документальный фильм Андрея Кондрашова (Crimea: Way Back Home. Documentary by Andrei Kondrashov), in *Russia-24*, available on YouTube at the time of writing.

⁷ United Nations General Assembly, Territorial Integrity of Ukraine, 1 April 2014, UN doc. A/RES/68/262 (<http://www.legal-tools.org/doc/985059/>); Council of Europe Parliamentary Assembly ('PACE'), Reconsideration on substantive grounds of the previously ratified credentials of the Russian delegation, 10 April 2014, Resolution 1990 (2014) (<http://www.legal-tools.org/doc/087ddc/>).

⁸ Office of the United Nations Commissioner for Human Rights, Report on the human rights situation in Ukraine (16 November to 15 February 2016), 15 March 2017 (<http://www.legal-tools.org/doc/11df8f/>); Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights and High Commissioner on National Minorities, Report of the Human Rights Mission on Crime (6-8 July 2015), 17 September 2015; Human Rights Watch Report, Rights in Retreat: Abuses in Crimea, November 2014 (<http://www.legal-tools.org/doc/479a72/>) last accessed on 28 December 2017 ('HRW Crimea report').

⁹ Dutch Safety Board, "Crash of Malaysia Airlines MH17: Hrabove, Ukraine, 17 July 2014", The Hague, October 2015.

tarian law and classified it as a non-international armed conflict.¹⁰ With Russia's involvement by supplying arms, weaponry, funds and manpower to the rebel groups in eastern Ukraine, the nature of the conflict had quickly transformed, bordering on an international armed conflict.¹¹ Russia has vehemently denied any involvement in directing the conflict from behind the scenes in eastern Ukraine, considering it to be an internal matter of Ukraine.¹² Most recently, in the context of proceedings before the International Court of Justice, the official position of Russia is that arms and weaponry, which were alleged by Ukraine to have been supplied by Russia, came from the old Soviet stockpiles and the retreating Ukrainian army.¹³ The involvement of the international community resulted in the two ceasefire agreements, Minsk Protocol I of 5 September 2014 and Minsk Protocol II of 11 February 2015, that were adopted with the aim of ceasing hostilities and achieving conflict resolution in eastern Ukraine. The countless violations of the Minsk agreements are reported to have taken place, as the fighting in eastern Ukraine does not show any signs of abating, with the most recent flare-up of fighting in Avdiivka.¹⁴ As it is clear from a brief recap of the conflict in Ukraine, it has taken place against the complex political backdrop when Ukraine lost control over Crimea and unsuccessfully attempts to regain control from the pro-Russian separatists in eastern Ukraine.

¹⁰ ICRC Press Release, "Ukraine: ICRC Calls on All Sides to Respect International Humanitarian Law", 23 July 2014 (<http://www.legal-tools.org/doc/24665e/>).

¹¹ Human Rights Watch News Release, "Eastern Ukraine: Questions and Answers About the Laws of War", 11 September 2014 (<http://www.legal-tools.org/doc/5a948f/>); Noelle Quenivet, "Trying to Classify the Conflict in Eastern Ukraine", in *IntLawGrrls*, 28 August 2014.

¹² "Песков: Россия не поставляет оружие ополченцам ДНР" (Russia does not supply weapons to the DNR rebels), in *NTV News*.

¹³ International Court of Justice, Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination, *Ukraine v. Russian Federation*, Oral hearings on indication of provisional measures, verbatim record, 7 March 2017, CR 2017/2, pp. 20-21 (<http://www.legal-tools.org/doc/e537cd/>).

¹⁴ European Union External Action, Statement by the Spokesperson on the ceasefire violations in eastern Ukraine, 31 January 2017 (<http://www.legal-tools.org/doc/bd5ee4/>).

12.3. Uneasy Relationship between Ukraine and the ICC: Constitutional Conundrum

Ukraine signed the Rome Statute on 20 January 2000 but has yet to ratify it. The major obstacle to ratification was the ruling of the Constitutional Court back in 2001 that the ICC's principle of complementarity would be contrary to the Constitution of Ukraine.¹⁵ The proceedings before the Constitutional Court were initiated by the former President of Ukraine, Leonid Kuchma, who in his submission argued that the Rome Statute's provisions on immunities (Article 27), the principle of complementarity (Articles 1, 17 and 20), surrender of nationals (Article 89) and enforcement of prison sentences (Articles 103 and 124) were in conflict with the Constitution.¹⁶ Further, he submitted that the Rome Statute was contrary to the constitutional provisions on the people's exercise of power, legislative competence of Parliament and the role of the prosecution.¹⁷ The President's submission to the Constitutional Court on the constitutionality of the Rome Statute thus differed from the official position of the Ministry of Foreign Affairs, which did not find any impediments to ratification of the Rome Statute.¹⁸

The judges dismissed nearly all arguments advanced by the former President, except the ICC's principle of complementarity, which they found to be contrary to the constitutional exclusive competence of national courts.¹⁹ As argued elsewhere, the finding of the Constitutional Court stems from its flawed interpretation of the principle of complementarity, as the ICC would only assert its jurisdiction if national courts are no longer a viable option due to their unwillingness or inability to prosecute the crimes falling within the jurisdiction of the ICC.²⁰ The preference clearly

¹⁵ Конституційний Суд України (Constitutional Court of Ukraine), Висновок Конституційного Суду України у справі за конституційним поданням Президента України про надання висновку щодо відповідності Конституції України Римського Статуту Міжнародного кримінального суду (Ruling on the Submission of the President of Ukraine Regarding Conformity of the Constitution of Ukraine with the Rome Statute of the International Criminal Court), 11 July 2001, Case No 1-35/2001 ('CC Ruling').

¹⁶ *Ibid.*, para. 1.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*, para. 2.1.

²⁰ Iryna Marchuk, "Ukraine and the International Criminal Court: Implications of the *Ad Hoc* Jurisdiction Acceptance and Beyond", in *Vanderbilt Journal of Transnational Law*, 2016, vol. 49, no. 2, pp. 331-32.

lies with national courts, as the ICC would only step in if Ukraine does not honour its obligations to prosecute international crimes. Nevertheless, as things stood, the only way to enforce the decision of the Court would be to amend the Constitution of Ukraine's provision on the exclusive competence of national courts, as the Ukrainian legislation does not allow reopening the case in the Constitutional Court on the grounds of an alleged wrongful interpretation of an international treaty.²¹

Despite many legislative initiatives aimed at such amendment,²² it took fifteen years for the Ukrainian parliament to adopt the necessary changes.²³ The turbulent situation in Ukraine sparked by the Maydan crimes that escalated with the annexation of Crimea and intense fighting in eastern Ukraine made that need even more acute. In January 2015, 155 members of the Ukrainian parliament submitted the draft law on amending Article 124 of the Constitution of Ukraine, which would provide that "Ukraine may recognize the jurisdiction of the ICC on the conditions stipulated by the Rome Statute of the ICC". The accompanying explanatory note emphasized upon the importance of the immediate ratification of the Rome Statute "given a large number of victims as a result of criminal acts committed by the highest governmental officials, as well as given the investigation of crimes that are of concern to the international community".²⁴ Notwithstanding the parliamentary committee's finding on the com-

²¹ Закон України 'Про Конституційний Суд України' (Law of Ukraine on the Constitutional Court of Ukraine), 16 October 1996, Article 68 (<http://www.legal-tools.org/doc/d3ef06/>). The reopening procedure can only be triggered by the discovery of new facts that, although had existed at the time of the case was heard by the court, were not subject by the proceedings.

²² See *Проект Закону про ратифікацію Римського статуту міжнародного кримінального суду* (Draft Law of Ukraine on Ratification of the Rome Statute of the ICC), 22 February 2014, no. 0072 (<http://www.legal-tools.org/doc/17cd5b/>) (it was recalled on 24 February 2014); *Проект Закону про внесення змін до статті 124 Конституції України (щодо визнання положень Римського статуту)* (Draft Law of Ukraine on Amending Article 124 of the Constitution of Ukraine (with Regard to the Recognition of the Rome Statute)), 16 January 2015, no. 1788 (<http://www.legal-tools.org/doc/72b221/>).

²³ *Проект Закону про внесення змін до Конституції України (щодо правосуддя)* (Draft Law of Ukraine on Amending the Constitution of Ukraine (with Regard to the Judiciary)), 25 November 2015, no. 3524 ('2015 Draft Law Regarding Judiciary') (<http://www.legal-tools.org/doc/747e68/>).

²⁴ Пояснювальна записка до проекту закону про внесення змін до статті 124 Конституції України (щодо визнання положень Римського статуту) (Explanatory Note

patibility of the law draft with the Constitution, it nevertheless did not recommend including the law draft on the parliamentary agenda, referring to the preliminary conclusions of the Prosecutor General's Office ('PGO'), the parliamentary committee on budgetary matters and the parliamentary committee on European integration.²⁵

The same year, President Petro Poroshenko submitted a law draft to Parliament on amending Chapter VIII of the Constitution with respect to the administration of justice, which was reviewed and endorsed by the Venice Commission.²⁶ The draft includes an identical provision to the one submitted by the parliamentarians on Ukraine's recognition of the jurisdiction of the ICC. Interestingly, the law draft provides that the provision on the ICC's exercise of jurisdiction will only "come into force three years after the date of the official publication of the law act".²⁷ The provision on the ICC remained unchanged in the final version of the law adopted by Parliament and will come into force on 30 June 2019.²⁸ Although the obstacle to ratification has thus been removed, the Ukrainian parliament has yet to ratify the Rome Statute by adopting a specific law on ratification with the full text of the Statute.²⁹ Further, given that the necessary changes to existing laws, in particular the Criminal Code of Ukraine, the draft law accounting for such changes need to be submitted to Parliament along with the law on ratification of the Rome Statute.³⁰

to the Draft Law of Ukraine on Amending Article 124 of the Constitution of Ukraine (with regard to the recognition of the ICC Statute), 16 January 2015.

²⁵ Висновок комітету щодо включення до порядку денного, The Committee's Conclusion Regarding Including (the Law Draft) on the Parliamentary Agenda, 09 December 2015. The PGO noted the necessity of further work on the draft. The parliamentary committee on budgetary matters voiced its concerns regarding the anticipated increase of budgetary expenses with the adoption of the law draft, whereas the parliamentary committee on European integration found that the law draft was not part of the prioritized Ukrainian legislation that should conform to the EU law.

²⁶ 2015 Draft Law Regarding Judiciary, see *supra* note 23.

²⁷ *Ibid.*

²⁸ Закон України 'Про внесення змін до Конституції України (щодо правосуддя)' (Law of Ukraine on Amending Article 124 of the Constitution of Ukraine (with regard to the recognition of the ICC Statute), 2 June 2016 (<http://www.legal-tools.org/doc/31cd61/>). See also *Конституція України* (Constitution of Ukraine), 28 June 1996 with subsequent amendments, Article 124 (<http://www.legal-tools.org/doc/d1a72d/>).

²⁹ Закон України 'Про міжнародні договори України' (Law of Ukraine on International Treaties of Ukraine), 29 June 2004, Article 9(1) (<http://www.legal-tools.org/doc/337dd8/>).

³⁰ *Ibid.*, Article 9(7).

The rationale behind the introduction of a three-year period before the constitutional provision on the ICC comes into force is not entirely clear, with no explanation provided in an accompanying note to the law draft. One may speculate that Ukraine is reluctant for the provision to come into force with immediate effect, given that the ongoing fighting in eastern Ukraine has been marred by serious violations of international humanitarian law by all parties to the conflict, including the members of the Ukrainian military forces.³¹ Another plausible explanation is that ratification was postponed until after new parliamentary elections in 2019. However, despite this strategic manoeuvre, the ICC Prosecutor is currently examining the situation in Ukraine, since the Ukrainian government has already accepted the *ad hoc* jurisdiction of the ICC two years ago by lodging two declarations to the Court under Article 12(3) of the Rome Statute.

By accepting the *ad hoc* jurisdiction of the ICC with respect to the Maydan crimes (Declaration I) and the situation in eastern Ukraine and Crimea (Declaration II), Ukraine authorized the Court to exercise its jurisdiction retroactively with respect to the crimes committed within the specific temporal framework as outlined by the two declarations. The second declaration lodged by Ukraine includes an open-ended temporal jurisdictional clause from 2014 onwards, which means that the ICC Prosecutor is fully entitled to investigate the crimes falling within this broad jurisdictional framework committed by all sides to the conflict.

12.4. The ICC Prosecutor's Preliminary Examination into the Maydan Crimes (Declaration I)

The first declaration accepting the jurisdiction of the ICC was signed on 25 February 2014 in rather peculiar constitutional circumstances.³² The former President Yanukovich – vested with the constitutional authority to sign international treaties on behalf of Ukraine – fled the country following the Maydan crimes without tending his resignation proper and thus leaving the country without a president.³³ In these rather unusual circum-

³¹ FIDH Report, Ending Impunity in Eastern Ukraine: new report reveals the urgency to open an ICC investigation, 23 November 2015, part: 2(b) (Pro-Ukrainian forces abuses: no longer a taboo issue?) ('FIDH Report') (<http://www.legal-tools.org/doc/de6f22/>).

³² Declaration I, see *supra* note 1.

³³ *Про самоусунення Президента України від виконання конституційних повноважень та призначення позачергових виборів Президента України* (Resolution of Verkhovna Rada of Ukraine 'On Self-Withdrawal of the President of Ukraine from Performing His

stances, Parliament bestowed presidential duties upon the Chairperson of Parliament, Oleksandr Turchynov, who signed the parliamentary declaration accepting the jurisdiction of the Court with respect to the Maydan crimes in his capacity as *ex officio* Head of State.³⁴ Three months later, Ukraine lodged its declaration with the Registrar of the ICC. In its press release, the ICC confirmed that Ukraine's declaration was relayed to the OTP for further consideration.³⁵ As clarified in the press release, Ukraine's acceptance of the ICC's jurisdiction did not automatically trigger an investigation, as it was within the discretion of the ICC Prosecutor to decide whether or not to request the Pre-Trial Chamber's authorization of an investigation.³⁶

Despite Ukraine's high hopes, the ICC Prosecutor, in her annual preliminary investigation report nearly one and a half year later, made known her decision not to act on Ukraine's declaration with respect to the alleged crimes against humanity during the 2014 Maydan protests.³⁷ In deciding whether a reasonable basis for initiating an investigation exists, the ICC Prosecutor is guided by a three-prong test laid down in Article 53(1)(a)-(c) of the Rome Statute by considering "whether (a) [...] a crime within the jurisdiction of the Court has been committed or is been committed; (b) the case is or would be inadmissible under Article 17 of the Statute; and (c) taking into account the gravity of the crime and the interests of justice". When examining the first limb of the test (whether the alleged crimes during the Maydan protests may amount crimes against humanity within Article 7 of the Rome Statute), the ICC Prosecutor found the alleged crimes did not constitute crimes against humanity, as they had not been committed in the context of a widespread or systematic attack against the civilian population.³⁸

Constitutional Duties and Scheduling Early Elections of the President of Ukraine'), 22 February 2014 (<http://www.legal-tools.org/doc/54dc2c/>).

³⁴ *Конституція України* (Constitution of Ukraine), Article 112 (stating that in the event of early termination of the presidential duties, the chairperson of the Verkhovna Rada of Ukraine acts as *ex officio* Head of State until the elections of a new president).

³⁵ ICC Press Release, Ukraine Accepts the ICC Jurisdiction over Alleged Crimes Committed Between 21 November 2013 and 22 February 2014, ICC-CPI-20140417-PR997, 17 April 2014 (<http://www.legal-tools.org/doc/289ef1/>).

³⁶ *Ibid.*

³⁷ ICC Office of the Prosecutor, *Report on Preliminary Examination Activities 2015*, 12 November 2015 (<http://www.legal-tools.org/doc/ac0ed2/>) ('2015 OTP Report').

³⁸ *Ibid.*, para. 101.

That further broke down to the questions (1) whether the alleged crimes constituted an attack against the civilian population, (2) whether there existed a State of organizational policy to carry out such attack, and (3) whether the alleged attack was widespread or systematic.³⁹ Firstly, the ICC Prosecutor was satisfied that there was “an attack direct against a civilian population” due to the use of “excessive and indiscriminate force” by the Ukrainian security forces and *titushky* (pro-government group of civilians who provided support to law enforcement during demonstrations) against protesters who took to the streets to voice their dissent against the former government.⁴⁰

Secondly, the ICC Prosecutor inferred the existence of a State policy to attack the civilian population from a number of factual circumstances, such as (1) “coordination of [state authorities], and cooperation with, anti-Maydan citizen volunteers”; (2) “the consistent failure of state authorities to take any meaningful or effective action to prevent the repetition of incidents of violence”; and (3) “the apparent efforts to conceal or cover the alleged crimes”.⁴¹ On the basis of the available information and at the backdrop of the turbulent political situation in Ukraine, the Prosecutor therefore found that the acts of the Ukrainian security forces and *titushky* were carried out pursuant to or in furtherance of a State policy aimed at suppressing the Maydan protest movement.⁴²

Thirdly, however, the ICC Prosecutor found that the attack directed against the civilian population in the Maydan protests was neither widespread nor systematic. At the outset, she dismissed the widespread characteristic of the attack, reasoning that it was “limited in its intensity and geographic scope”.⁴³ In support of this finding, she noted that the alleged crimes were committed in the context of “a limited number of clashes and confrontations between security forces and protesters” during the three-month period, as well as that the majority of the alleged crimes were primarily committed in a limited geographic area within the city of Kyiv.⁴⁴ Further to this, she concluded that the cumulative effect of the killing of at

³⁹ *Ibid.*, paras. 89-100.

⁴⁰ *Ibid.*, para. 90.

⁴¹ *Ibid.*, para. 93.

⁴² *Ibid.*

⁴³ *Ibid.*, para. 96.

⁴⁴ *Ibid.*

least 75 persons and the injury of over 700 protesters rendered the widespread nature of the attack questionable.⁴⁵ As argued elsewhere, the ICC Prosecutor's finding on the absence of the widespread nature of the attack is not entirely surprising, as it appears to be consistent with her earlier evaluation of the crimes against humanity allegations in the context of the situations of Kenya and Ivory Coast.⁴⁶ In those two situations, which were considered by the ICC Prosecutor, a number of casualties was substantially higher, as well as the crimes were more geographically scattered.⁴⁷

A more controversial finding of the ICC Prosecutor was the absence of the systematic dimension of the attack. According to the report, the alleged crimes did "not necessarily appear to have been carried out in a consistent, organized manner or on a regular or continual basis".⁴⁸ Notwithstanding the report findings on the unjustified and disproportionate nature of the attack against protesters, it nevertheless concludes that the alleged crimes were "aimed to limit the protests rather than being part of a deliberate, coordinated plan of violence methodically carried out against the protest movement", appearing to have "occurred only sporadically, in limited instances".⁴⁹ As argued elsewhere, this finding appears to stem "from the lack of clarity in international criminal law as to how the systematic requirement is applied on a stand-alone basis as well as how it interacts with the policy element".⁵⁰

As it is clear from the developed jurisprudence of international criminal courts, one does not have to prove both dimensions of the attack

⁴⁵ *Ibid.*, para. 97.

⁴⁶ Iryna Marchuk, "No Crimes Against Humanity During the Maydan Protests in Ukraine? Or the ICC Prosecutor's Flawed Interpretation of Crimes Against Humanity?", in *Boston University International Law Journal*, 2017, vol. 35, no. 1, p. 62.

⁴⁷ During the post-election violence in Kenya, between 1,133 and 1,220 persons died and 3,561 persons were injured. More than 1,000 persons were killed during the post-election violence in Ivory Coast. See ICC, Situation in the Republic of Kenya, Pre-Trial Chamber, 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. 131 ('Kenya Article 15 Decision') (<http://www.legal-tools.org/doc/338a6f/>); ICC, Situation in the Republic of Côte D'Ivoire, Pre-Trial Chamber, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, ICC-02/11-14, paras. 103, 105 (<http://www.legal-tools.org/doc/7a6c19/>).

⁴⁸ 2015 OTP Report, para. 98, see *supra* note 37.

⁴⁹ *Ibid.*, paras. 99-100.

⁵⁰ Marchuk, 2017, p. 67, see *supra* note 46.

in the context of crimes against humanity, as the proof of either *widespread* or *systematic* dimension will suffice.⁵¹ However, notwithstanding this disjunctive test, it appears that the ICC Prosecutor will only be willing to move forward and seek the Pre-Trial Chamber's authorization of an investigation if both requirements of the attack are in fact present.⁵² In the absence of any precedent in which the systematic requirement was deemed sufficient on a stand-alone basis for the purposes of crimes against humanity, there is a certain degree of uncertainty as to what kind of conduct may satisfy this requirement alone. This is also complicated by the lack of clarity as to how the systematic requirement interacts with the element of a State or organizational policy. In the jurisprudence of the *ad hoc* tribunals, the existence of a policy element was treated as an evidentiary matter attesting to the systematic nature of the attack.⁵³ However, in the context of the ICC, the drafters of the Rome Statute introduced a State or organizational policy as a separate contextual element of crimes against humanity in addition to the widespread or systematic requirement.⁵⁴ However, as rightly noted in the academic literature, the inclusion of the policy element in the Rome Statute's definition of crimes against humanity has not elevated it into the "more prominent role [...] in the crimes against humanity concept" in the ICC.⁵⁵

Whereas the existence of the policy element is an important indicator of the 'systematicity' of the attack (albeit not the only one from which

⁵¹ ICTY, *Prosecutor v. Tadić*, Trial Chamber, Opinion and Judgment, 7 May 1997, IT-94-1-T, para. 647 (<http://www.legal-tools.org/doc/0a90ae/>); ICTR, *Prosecutor v. Akayesu*, Trial Chamber, Trial Judgment, 2 September 1998, ICTR-96-4-T, para. 579 (<http://www.legal-tools.org/doc/b8d7bd/>).

⁵² Marchuk, 2017, p. 53, see *supra* note 46. This position is also reinforced by the ICC Prosecutor's policy paper, in which it states that "the Office will pay particular consideration to crimes committed on a large scale, as part of a plan or pursuant to a policy". Office of the Prosecutor, *Policy Paper on Preliminary Examinations*, 1 November 2013, para. 81 (<http://www.legal-tools.org/doc/acb906/>) ("OTP 2013 Policy Paper").

⁵³ ICTY, *Prosecutor v. Kunarac*, Appeals Chamber, Judgment, 12 June 2002, IT-96-23/1-A, para. 98 (<http://www.legal-tools.org/doc/029a09/>); ICTY, *Prosecutor v. Vasiljević*, Trial Chamber, Judgment, 29 November 2002, IT-98-32-T, para. 36 (<http://www.legal-tools.org/doc/8035f9/>); ICTY, *Prosecutor v. Naletilić*, Trial Chamber, Judgment, 31 March 2003, IT-98-34-T, para. 234 (<http://www.legal-tools.org/doc/f2cfeb/>).

⁵⁴ Darryl Robinson, "Defining 'Crimes Against Humanity' at the Rome Conference", in *American Journal of International Law*, 1999, vol. 93, no. 1, p. 48.

⁵⁵ Marjolein Cupido, "The Policy Underlying Crimes Against Humanity: Practical Reflections on a Theoretical Debate", in *Criminal Law Forum*, 2011, vol. 22, no. 3, p. 296.

the systematic nature of the attack may be inferred), here the ICC Prosecutor did not establish the systematic requirement of the attack, notwithstanding her earlier finding on the existence of a State policy aimed at suppressing the Maydan protest movement.⁵⁶ As discussed elsewhere, the Prosecutor overlooked the existence of a State policy as an important indicator of the systematic nature of the attack, as well as failed to consider additional indicators attesting to the systematicity of the attack directed against the Maydan protesters.⁵⁷ In the analysis section on the policy element, the ICC Prosecutor recognized that the acts of violence were not “mere aggregate of random acts”.⁵⁸ However, while discussing the systematic requirement, the ICC Prosecutor considers that the crimes “do not necessarily appear to have been carried out in a consistent, organized manner or on regular or continual basis”.⁵⁹ It is somehow paradoxical that the acts of violence, which encompassed killing by security forces of over 75 persons and injuring over 700 at the peak of violence, were considered by the ICC Prosecutor to have been carried out in a completely unorganized, inconsistent or irregular manner.⁶⁰ A high number of casualties resulting from the acts of the security forces and *titushky* acting on orders from the Ukrainian senior officials is indicative of a systematic dimension of the attack. Not only the Ukrainian senior political leadership turned a blind eye to the crimes committed against protesters, but it also condoned such crimes by failing to effectively prosecute perpetrators.

As argued in greater detail elsewhere, other indicators of the systematic nature of the attack include: (1) thorough organization of the attacks evidenced by a high degree of organization of the Ukrainian security forces and *titushky* who coordinated in quelling the protests; (2) the existence of a regular pattern of behaviour demonstrated by the Ukrainian security forces and *titushky* in terms of characteristics, the targeted population, the alleged perpetrators and location; (3) repeated and continuous commission of crimes directed against the protesters who opposed the former government; (4) condoning of crimes by the Ukrainian political leadership and failure to sanction the commission of crimes; (5) implication of high-level political leaders in the commission of crimes, including,

⁵⁶ 2015 OTP Report, para. 93, see *supra* note 37.

⁵⁷ Marchuk, 2017, pp. 62-63, see *supra* note 46.

⁵⁸ 2015 OTP Report, para. 92, see *supra* note 37.

⁵⁹ *Ibid.*, para. 98.

⁶⁰ Marchuk, 2017, pp. 63-64, see *supra* note 46.

among others, the former President of Ukraine, Viktor Yanukovich, the former Minister of Interior Affairs, Vitaliy Zakharchenko, the former General Prosecutor of Ukraine, Viktor Pshonka; and (6) involvement of substantial public and private resources to quell the Maydan protests (around 11,000 law enforcement officers and hundreds of *titushky* were deployed in Kyiv on public order duties during the Maydan protests).⁶¹

What are the conclusions to be drawn from the ICC Prosecutor's findings with respect to the Maydan crimes at the preliminary examination stage? First, by narrowly construing the widespread or systematic requirement of crimes against humanity, the ICC Prosecutor overlooked the interests of justice and denied the judges an opportunity to decide on whether the crimes satisfied the threshold of crimes against humanity.⁶² There is a clear gap in the jurisprudence of the ICC, which has not been addressed yet, as to how the systematic element interacts with the element of a State or organizational policy. Shedding light on the theoretical understanding of crimes against humanity is not only significant in the context of the ICC Prosecutor's inquiry into the Maydan crimes, but is of utmost importance for the future development of the law on crimes against humanity.

Second, from a purely strategic perspective, the ICC Prosecutor's might have missed an opportunity to enhance the fragile legitimacy of the Court plagued by the African bias claims and boost the credibility of international justice in Ukraine. In the absence of any credible prosecutions of the Maydan crimes at the national level and the deficit of trust in the work of the PGO and national courts, the general public's only hope is that the ICC could deliver justice.⁶³ Failing to address the Maydan crimes

⁶¹ *Ibid.*, pp. 64-66.

⁶² *Ibid.*, p. 67. The Pre-Trial Chamber cannot review the ICC Prosecutor's decision not to proceed with an investigation into the Maydan crimes. This could have been only possible if the decision was solely based on the interests of justice criterion. See also ICC Statute, Article 53(3).

⁶³ Valentyna Polunina, "Unfinished Business: Acceptance of International Criminal Justice in Ukraine", in Susanne Buckley-Zistel, Friederike Mieth and Marjana Papa (eds.), *After Nuremberg. Exploring Multiple Dimensions of the Acceptance of International Criminal Justice*, International Nuremberg Principles Academy, Nuremberg, 2017; Svitlana Dorosh, "Кров Майдану: кінця розслідуванню не видно" (Maydan Blood: No Prospects of Investigation Soon), in *BBC News*, 15 February 2017 (<http://www.legal-tools.org/doc/ea47a0/>). For the latest updates on the progress of national proceedings concerning the Maydan crimes, consult PGO Register, see *supra* note 3.

at the national and international levels only reinforces the perception of impunity of top political leadership who commit crimes against their own nationals.

Third, it appears that the ICC Prosecutor applied an unreasonably high evidentiary standard at this stage of proceedings, as the reasonable basis standard suffices at the stage of seeking Pre-Trial Chamber's authorization to initiate an investigation. The information available to the Prosecutor during the preliminary examination does not have to be "comprehensive" or "conclusive" of the alleged crimes, since it is only necessary for the Pre-Trial Chamber to arrive at the conclusion that "a sensible or reasonable justification for a belief" that the crimes within the jurisdiction of the Court have been committed exists.⁶⁴

As soon as the ICC Prosecutor's decision with respect to the Maydan crimes became public, various NGOs and human rights activists in Ukraine claimed that the Ukrainian PGO was largely to blame for not furnishing the ICC Prosecutor with the sufficient information regarding the crimes committed during the Maydan protests.⁶⁵ There were calls of encouragement addressed to the civil society and other relevant stakeholders to provide more information that could persuade the ICC Prosecutor to change her mind with respect to Ukraine's first declaration accepting the jurisdiction of the Court. There were suggestions to focus on providing evidence on the widespread nature of the acts of violence directed against a larger group of victims and covering a broader geographical area, as well as providing evidence of a carefully planned decision by top political leadership to unleash violence against protesters, thus demonstrating that the acts of violence were not the result of indiscriminate and spontaneous response to the Maydan protest movement.⁶⁶ In 2016, legal representatives of families of victims of the Maydan crimes (known as 'Heaven's Hundred') submitted additional evidence to the ICC, arguing that the crimes were carefully orchestrated by the top political leadership and satisfied the systematic requirement of crimes against hu-

⁶⁴ Kenya Article 15 Decision, paras. 27-35, see *supra* note 47.

⁶⁵ "'No crimes against humanity on Euromaidan' finding of the ICC may be result of poor prosecutor's work", in *Euromaidan Press*, 18 November 2015 (<http://www.legal-tools.org/doc/e8a03a-1/>).

⁶⁶ Ukraine Crisis Media Center, 25 November 2015 (<http://www.legal-tools.org/doc/fdfe61/>).

manity.⁶⁷ At the same time, the General Prosecutor of Ukraine, Yuriy Lutsenko, announced that more evidence regarding the Maydan crimes would be submitted to the ICC.⁶⁸ Later that year, the PGO representative revealed that the analysis of evidence with respect to the Maydan crimes took more time, given that only one prosecutor was in charge of systematizing the evidence on the Maydan crimes.⁶⁹ From the public reports, it is not entirely clear whether the PGO submitted additional evidence to the ICC. It is also difficult to understand why the PGO is not willing to allocate more resources to deal with the analysis of evidence on the Maydan crimes, as the ICC is heavily dependent upon the quality of evidence furnished by national authorities at the stage of preliminary examination.

12.5. The ICC Prosecutor’s Preliminary Examination into the Conflict in Eastern Ukraine (Declaration II)

Given a limited scope of the first declaration that only focused on the Maydan crimes, the Ukrainian government lodged yet another declaration accepting the jurisdiction of the ICC that covered the crimes committed in the context of the ongoing fighting in eastern Ukraine and at the territory of the occupied Crimea.⁷⁰ As outlined in the declaration of 8 September 2015, it was submitted “for the purpose of bringing senior officials of the Russian Federation and leaders of terrorist organizations ‘DNR’ and ‘LNR’ [...] in respect of crimes against humanity and war crimes [...] committed on the territory of Ukraine from 20 February 2014 and to the present time”. Unlike the first declaration, which is limited in its temporal scope, the second declaration includes an open-ended temporal jurisdictional clause.

⁶⁷ “Адвокати родин “Небесної Сотні” передали справу до Міжнародного суду в Гаазі” (Lawyers Representing Families of “Heaven’s Hundred” Submitted Evidence to the ICC in The Hague), in Високий Замок, 6 October 2016 (<http://www.legal-tools.org/doc/3b06e4/>).

⁶⁸ “Документи у справі Майдану передадуть в Міжнародний кримінальний суд за 2-3 місяці” (Evidence in the case of Maydan will be submitted to the ICC in 2-3 months), in Zaxid.net, 23 November 2016 (<http://www.legal-tools.org/doc/013762/>).

⁶⁹ Human Rights Information Centre, “У Генпрокуратурі лише один прокурор систематизує злочини під час Майдану для Гаазького суду – Горбатюк” (In the General Prosecutor’s Office there is only one prosecutor to systematize evidence on the Maydan crimes for the ICC in The Hague – Gorbatyuk), 19 December 2016 (<http://www.legal-tools.org/doc/2b5351/>).

⁷⁰ Declaration II, see *supra* note 1.

The declaration explicitly alleges the responsibility of “senior officials of the Russian Federation” and “leaders of terrorist organizations DNR and LNR”. It is important to keep in mind that the ICC Prosecutor is not obligated to limit the scope of her preliminary examination to the parties as identified in Ukraine’s declaration.⁷¹ By nature of her mandate, the Prosecutor will have to examine the responsibility of *all* parties to the conflict, including the responsibility of Ukrainian armed forces. Non-governmental organizations reporting on the conflict in Ukraine have on many occasions condemned both Ukrainian governmental forces and separatist forces for indiscriminate attacks against the civilian population that involved the use of weapons incapable of distinguishing between civilian and military objects with sufficient accuracy.⁷²

With the escalation of the hostilities in eastern Ukraine in April 2014, the Ukrainian government declared that it was waging an anti-terrorist offensive against the pro-Russian separatists in eastern Ukraine. Despite Ukraine’s treatment of the DNR and LNR organizations as terrorist groups, they have been recognized by international organizations and civil society as parties to an armed conflict, which is governed by the rules of international humanitarian law.⁷³ Hence, Ukraine’s qualification of the members of the DNR and LNR as “militant-terrorists” is of no legal significance to the ICC. In any case, the Court can neither exercise its jurisdiction over the crime of terrorism nor over a war crime of spreading terror among the civilian population.

As for the responsibility of senior Russian leaders alleged in Ukraine’s declaration, the ICC Prosecutor is tasked with identifying suspects at a later stage of proceedings, provided that the Pre-Trial Chamber will authorize a full-scale investigation into the situation of Ukraine. If

⁷¹ OTP 2013 Policy Paper, para. 27, see *supra* note 52.

⁷² “Eastern Ukraine: Both Sides Responsible for Indiscriminate Attacks”, in Amnesty International, 6 November 2014 (<http://www.legal-tools.org/doc/5f268e/>); “Ukraine: Rising Civilian Death Toll. Unlawful Unguided Rocket Attacks on Populated Areas”, in Human Rights Watch, 3 February 2015 (<http://www.legal-tools.org/doc/378f7b/>). More generally, see also FIDH Report, see *supra* note 31.

⁷³ ICRC, Ukraine: ICRC Calls on All Sides to Respect International Humanitarian Law, 23 July 2014 (<http://www.legal-tools.org/doc/24665e/>); “Ukraine: Escalation Triggers Laws of War”, in Human Rights Watch, 30 June 2014 (<http://www.legal-tools.org/doc/3764b5/>); ICC Office of the Prosecutor, *Report on Preliminary Examination Activities 2016*, 14 November 2016, paras. 168-169 (<http://www.legal-tools.org/doc/f30a53/>) (‘2016 OTP Report’).

the case moves forward, the ICC Prosecutor will have some difficult choices to make given the highly politicized context in which the annexation of Crimea and the escalation of hostilities in eastern Ukraine have taken place. Senior Russian leaders have denied any wrongdoing in annexing Crimea, claiming that the peninsula historically belongs to Russia and was incorporated into the territory of Russia based on free will of the inhabitants of Crimea during the referendum.⁷⁴ Likewise, Russia denies any widespread or systematic instances of crimes committed against the members of the Crimean Tatar and ethnic Ukrainian communities.⁷⁵

As for the situation in eastern Ukraine, Russian leaders deny that they have been orchestrating the conflict from behind the scenes by providing continuous support to the pro-Russian separatist groups in the form of funds, arms, weaponry and manpower.⁷⁶ Although Russia has not ratified the Rome Statute and recently withdrew its signature from the Statute,⁷⁷ the Court will be able to exercise its jurisdiction over Russian nationals, provided that the crimes have been committed at the territory of Ukraine. By withdrawing its signature from the Rome Statute, Russia clearly signalled that the ICC Prosecutor should not count on any form of cooperation with respect to the situation of Ukraine, unlike the cooperation it enjoyed with respect to the situation of Georgia.

12.5.1. International, Non-International or Hybrid Armed Conflict in Ukraine?

In the report on the preliminary examination activities, the ICC Prosecutor finds that the situation in Crimea amounts to an international armed conflict between Ukraine and the Russian Federation.⁷⁸ As a starting point of the conflict, the Prosecutor took 26 February 2014, when Russia deployed its armed forces in the territory of Crimea without the consent of the

⁷⁴ Crimea documentary, see *supra* note 6.

⁷⁵ International Court of Justice, *Ukraine v. Russian Federation*, Oral hearings on indication of provisional measures, verbatim record, 7 March 2017, pp. 53-62, see *supra* note 13.

⁷⁶ *Ibid.*, pp. 16-22 (per Ilya Rogachev representing the government of the Russian Federation before the ICJ). See also “Рогозин объяснил, почему Россия не поставляет оружие Киеву (Rogozin explained why Russia does not supply weapons to Kiev)”, in *NTV*, 1 July 2015 (<http://www.legal-tools.org/doc/fe5456/>).

⁷⁷ Sergey Sayapin, “Russia’s Withdrawal of Signature from the Rome Statute Would Not Shield its Nationals from Potential Prosecution at the ICC”, in *EJIL: Talk!*, 21 November 2016.

⁷⁸ 2016 OTP Report, para. 155, see *supra* note 73.

Ukrainian government. Further to this, the Prosecutor finds that the law of international armed conflict would continue to apply after 18 March 2014 “to the extent that the situation within the territory of Crimea and Sevastopol factually amounts to an ongoing state of occupation”.⁷⁹ The ICC Prosecutor was not required to consider whether the intervention which led to the occupation was lawful or not, since for the purposes of the Rome Statute, an international armed conflict may exist “if one or more States partially or totally occupies the territory of another State, whether or not the occupation meets with armed resistance”.⁸⁰ The findings of the ICC Prosecutor with respect to the existence of an international armed conflict at the territory of Crimea is hardly surprising, as it is commonly known that Russia exercises its effective control over Crimea, as well as that the rules governing the law of occupation would apply even in the absence of any armed resistance.⁸¹

The classification of the conflict in eastern Ukraine was far more problematic, as it shares characteristics of both an international and a non-international armed conflict. The ICC Prosecutor found that by 30 April 2014, the level of intensity of hostilities between Ukrainian government forces and pro-Russian separatist armed groups, as well as the level of organization of parties to a conflict were sufficient to qualify the situation as a non-international armed conflict and trigger the application of the law of armed conflict.⁸² In parallel to a non-international armed conflict, the Prosecutor found that evidence on mutual shelling by Russia and Ukraine, as well as their detention of each other’s military personnel, point to direct military engagement between Russian and Ukrainian armed forces, and therefore, suggest the existence of an international armed conflict in eastern Ukraine from 14 July 2014 onwards.⁸³

Given the allegations of Russia’s continuous support of the armed groups in eastern Ukraine, the nature of such support may transform the otherwise non-international armed conflict to an international armed con-

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

⁸¹ Human Rights Watch, “Questions and Answers: Russia, Ukraine, and International Humanitarian and Human Rights Law”, 21 March 2014 (<http://www.legal-tools.org/doc/d3f028/>); ICRC, “Occupation and International Humanitarian Law: Questions and Answers”, 4 August 2004 (<http://www.legal-tools.org/doc/aac441/>).

⁸² 2016 OTP Report, para. 168, see *supra* note 73.

⁸³ *Ibid.*, para. 169.

flict. Therefore, the ICC Prosecutor is examining allegations that the Russian Federation has exercised overall control over armed groups in eastern Ukraine.⁸⁴ If the ICC Prosecutor were to establish the existence of a single international armed conflict in eastern Ukraine, this would entail the application of the Rome Statute's provisions relevant to an armed conflict of international character.

The overall control test, as defined by the ICTY Appeals Chamber in *Tadić*, implies a situation when a State goes beyond mere financing and equipping of opposition groups and participates in the planning and supervision of military operations, thus qualifying an armed conflict for the status of an international armed conflict.⁸⁵ In the context of Ukraine's case, the ICC Prosecutor will have to assess whether the available information shows that "Russian authorities have provided support to the armed groups in the form of equipment, financing and personnel, and also whether they have generally directed or helped in planning actions of the armed groups in a manner that indicates they exercised genuine control over them".⁸⁶ At the moment, the OTP is undertaking a detailed analysis of the relevant evidence in order to establish whether there exists a single international armed conflict, or an international armed conflict that runs in parallel to a non-international armed conflict.⁸⁷

12.5.2. No Prospects of Justice in Eastern Ukraine without the ICC Prosecutor's Involvement?

The publicly available information indicates that Ukraine has done little to prosecute the crimes committed in eastern Ukraine. Despite compelling evidence of the commission of both war crimes and crimes against humanity, it is noted by human rights experts that "there is a little sign of justice done at the local level".⁸⁸ Numerous reports, public statements and expert opinions shed light on the difficulties encountered by the Ukrainian

⁸⁴ *Ibid.*, para. 170.

⁸⁵ ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Judgment, 15 July 1999, IT-94-1-A, paras. 131, 137, 145 (<http://www.legal-tools.org/doc/8efc3a/>).

⁸⁶ 2016 OTP report, para. 170, see *supra* note 73.

⁸⁷ ICC Office of the Prosecutor, *Report on Preliminary Examination Activities 2017*, 4 December 2017, para. 95 ('2017 OTP Report') (<http://www.legal-tools.org/doc/e50459/>).

⁸⁸ International Partnership for Human Rights ('IPHR'), Submission to the International Criminal Court on war crimes and crimes against humanity in Ukraine, 20 October 2015 (per Brigitte Dufour, Director of IPHR) (<http://www.legal-tools.org/doc/d44c7d/>).

authorities in dealing with the effective investigation and prosecution of war crimes and crimes against humanity.

One of the most serious impediments to the effective investigation of the crimes committed in the context of the conflict is the lack of technical and financial capabilities, including the lack of human resources in conducting pre-trial investigation of international crimes. This is complicated by the lack of professional qualifications of investigators to deal with the crimes against the backdrop of hybrid warfare in eastern Ukraine and uncertainty of the situation on the ground.⁸⁹ The local law enforcement units are understaffed, as many left their work or changed their allegiance to the DNR or LNR groups following the escalation of violence in 2014.⁹⁰ Those who remain employed in the law enforcement units lack motivation to effectively investigate the crimes, given the uncertainty surrounding the conflict in eastern Ukraine, rampant institutional corruption, unclear aspects on the potential application of amnesties to certain categories of individuals, as well as personal non-work related connections (such as family and friends) to suspects.⁹¹ Other reasons hindering the effective prosecution of crimes in eastern Ukraine include “the lack of transparency of the actions of Ukrainian authorities on separatist-controlled territories, the highly politicized context of investigations and entrenched problems in the functioning of the Ukrainian justice system”.⁹²

Given Ukraine’s failed attempts at ratifying the Rome Statute, the Criminal Code of Ukraine, in its part on the crimes against peace, security and international order (Chapter XX), does not contain an elaborate list of crimes corresponding to the catalogue of crimes in the Rome Statute, hindering the correct qualification of crimes as war crimes or crimes against

⁸⁹ Center for Civil Liberties, “У ПОШУКАХ СПРАВЕДЛИВОСТІ. Розслідування злочинів, пов’язаних із порушенням права на життя, особисту недоторканість і свободу від тортур, вчинених у зоні АТО: недоліки роботи слідчих органів та рекомендації від правозахисників” (Quest for Justice. Investigation of Crimes Dealing With the Violation of the Right to Life, Security of Person and the Freedom from Torture in the Zone of “АТО”: Shortcoming of the Work of Investigative Units and Recommendations from Human Rights Defenders), 2016, p. 8.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² IPHR, “Ukraine: IPHR delegation submits communication on war crimes and crimes against humanity to the ICC”, 26 October 2015 (per Roman Romanov, Human Rights and Justice Program Initiative Director at the International Renaissance Foundation in Ukraine) (<http://www.legal-tools.org/doc/e0cf21/>).

humanity.⁹³ To demonstrate its commitment to international law, Ukraine should prioritize the ratification of the Rome Statute, as it would catalyse the development of the national criminal justice system and enable the prosecution of international crimes. In its resolution 2112 (2016), PACE (the Parliamentary Assembly of the Council of Europe) strongly urged Ukraine to bring its national legislation, including the Criminal Code and the Criminal Procedural Code, in conformity with the international criminal law standards, in particular with respect to the status of captured persons and the crime of torture.⁹⁴

12.5.3. The ICC Prosecutor's Access to Evidence and Co-operation with National Authorities in Ukraine

Unlike other situations where access to evidence may prove to be difficult for the ICC Prosecutor given the volatility of the situation on the ground, it is possible to gain access to abundant materials on the crimes committed in eastern Ukraine. However, such access is far more challenging on the territory of Crimea due to Russia's refusal to allow international organizations to visit the peninsula. Even if the ICC Prosecutor were to send requests to obtain information from *de facto* Russian authorities in Crimea, this would most likely be denied (it is not clear whether this has been attempted at all). Russia clearly signalled that the ICC should not be counting on its co-operation with the Russian authorities when it withdrew its signature from the Rome Statute. Nevertheless, there are many credible reports produced by international organizations on the situation in Crimea.⁹⁵ Also, it is possible to collect witness testimonies on the crimes potentially falling within the jurisdiction of the ICC from IDPs (internally displaced persons) who left Crimea for mainland Ukraine. National au-

⁹³ The law draft on amending the Criminal Code of Ukraine in part on international crimes has been recently subject to public consultations initiated by the Ministry of Justice. See проект Закону України «Про внесення змін до деяких законодавчих актів щодо забезпечення гармонізації кримінального законодавства з положеннями міжнародного права» (Law Draft of Ukraine “On amending some legislative acts in order to ensure harmonisation of criminal legislation with the norms of international law” (<http://www.legal-tools.org/doc/e9cd62/>).

⁹⁴ PACE, The humanitarian concerns with regard to people captured during the war in Ukraine, 21 April 2016, Resolution 2112 (2016), para. 12.1.3 (<http://www.legal-tools.org/doc/853ef5/>).

⁹⁵ HRW Crimea report, see *supra* note 8; Andrii Klymenko, *Human Rights Abuses in Russian-Occupied Crimea*, Atlantic Council and Freedom House, March 2015 (<http://www.legal-tools.org/doc/c8f6e6/>).

thorities, in particular the Office of the Prosecutor in the Autonomous Republic of Crimea (in exile), together with the NGOs working in Ukraine have been instrumental in collection of evidence by conducting interviews with witnesses and victims and documenting instances of crimes. The active engagement of national authorities and other relevant stakeholders is extremely important at the preliminary examination stage, since the OTP “does not enjoy investigative powers, other than that for the purpose of receiving testimony at the seat of the Court”.⁹⁶ In addition to collection of information through Article 15 communications, the OTP held a number of meetings with the Government of Ukraine, national and international organizations at the seat of the Court, as well as during its missions to Ukraine in 2016 and 2017.⁹⁷

Given the lack of public trust placed by Ukrainians in its public institutions and law enforcement agencies, the ICC is viewed as a credible institution that could deliver justice in Ukraine. Civil society in Ukraine plays an incredibly important role in reporting on the conflict, collecting and systematizing evidence that could be used by the ICC Prosecutor. In October 2015, the International Partnership for Human Rights submitted a communication to the ICC detailing instances of war crimes and crimes against humanity in Ukraine. The communication was accompanied by a compilation of over 300 testimonies of victims and witnesses. Although the communication notes the commission of crimes by both sides to the conflict, the collected evidence primarily concerns crimes committed by the pro-Russian separatist forces noting security issues related to the access to the separatists controlled territories in eastern Ukraine.⁹⁸ As noted above, legal representatives of the families of the victims of the Maydan crimes, having lost trust in national authorities, submitted additional evidence, hoping that it will make the ICC Prosecutor re-assess her findings on the absence of crimes against humanity.

⁹⁶ OTP 2013 Policy Paper, para. 85, see *supra* note 52.

⁹⁷ 2016 OTP Report, para. 188, see *supra* note 73; 2017 OTP Report, para. 116, see *supra* note 87.

⁹⁸ IPHR, “Ukraine: IPHR delegation submits communication on war crimes and crimes against humanity to the ICC”, 26 October 2015 (<http://www.legal-tools.org/doc/e0cf21/>). The evidence submitted to the ICC encompassed five major categories of the alleged crimes, such as torture, killings, shelling, looting and treatment of prisoners of war.

12.6. What's Next? Will the ICC Prosecutor Move Forward with an Investigation?

There are high hopes in Ukraine that the ICC Prosecutor will move forward with the two declarations accepting the jurisdiction of the ICC. Whereas the ICC Prosecutor's initial assessment of the Maydan crimes fell short of those expectations, it is nevertheless hoped that the Prosecutor will re-assess the Maydan crimes based on the submitted additional evidence.⁹⁹ Given that the ICC judges cannot exercise quality control in the form of judicial oversight over the ICC Prosecutor's decision not to proceed with an investigation of the Maydan crimes, it is important that the ICC Prosecutor review in an expeditious manner additional evidence submitted to the Court in relation to those crimes and shed more light on the interpretation of a widespread of systematic attack in the context of crimes against humanity. In addition to bringing more clarity to the law of crimes of humanity, the involvement of the ICC Prosecutor will be deemed extremely valuable by Ukrainians who are deeply dissatisfied with a slow pace of national proceedings against those who were involved in the Maydan crimes. However, it should be communicated more clearly at the national level that even if the ICC Prosecutor were to move forward with the allegations of crimes against humanity committed during the Maydan protests, this would not cover the prosecution of low-ranking officials, but will only be limited to senior officials who authorized and tolerated the use of violence by the law enforcement agencies against the demonstrators.¹⁰⁰ This is in accordance with the principle of transparency that prominently features in the OTP policy paper with the aim "to promote a better understanding of the process and to increase predictability" in order to dissuade "undue expectations that an investigation will necessarily be opened".¹⁰¹

Obtaining those senior officials would be another obstacle encountered by the ICC Prosecutor, since the former President Yanukovich and his entourage left Ukraine for neighbouring Russia, which will most likely be unwilling to surrender the suspects residing on its territory to the ICC. However, the symbolic value of outstanding arrest warrants against senior

⁹⁹ 2017 OTP Report, para. 117, see *supra* note 87. The latest report states that the new information related to the Maydan crimes is being examined.

¹⁰⁰ OTP 2013 Policy Paper, para. 66, see *supra* note 52.

¹⁰¹ *Ibid.*, para. 94.

Ukrainian officials cannot be underestimated. First of all, this will provide a certain sense of relief to Ukrainians that something is being done to address crimes committed by the former government against its own nationals. This could also have a catalysing impact on the prosecution of crimes committed by low-ranking perpetrators at the national level.¹⁰² Coupled with other initiatives to achieve post-conflict justice in Ukraine, the intervention by the ICC Prosecutor would promote reconciliation at the national level and reinforce the idea that the international community has not abandoned Ukraine to deal with its problems. However, the ICC cannot do the work of Ukrainian national authorities in investigating the crimes, as the prospects of the ICC Prosecutor looking into the Maydan crimes largely depend upon the quality of evidence provided by national authorities, in particular at the initial stage of the preliminary examination. While the OTP does not enjoy investigative powers at this preliminary stage, it is important that the ICC Prosecutor utilize more amply its opportunities to consult with the competent authorities, the affected communities and civil society regarding the information received on the alleged crimes and the ongoing upsurges of violence. This communication strategy will undoubtedly enhance the quality control in the preliminary examination, as it will demonstrate to the relevant stakeholders the seriousness of the OTP's approach towards achieving its goals of ending impunity and prevention.¹⁰³

Whereas the ICC Prosecutor had her doubts whether the violence during the Maydan protests satisfied the requirements of crimes against humanity, any similar doubts should be dispelled with respect to the crimes committed in eastern Ukraine. There are numerous accounts of war crimes and crimes against humanity having taken place on the rebel-controlled territories in eastern Ukraine. The most challenging part of the ICC's Prosecutor's job is to establish whether the crimes have taken place in the context of a single international armed conflict. If the Prosecutor were to establish Russia's overall control, it would be undoubtedly met by strong resistance on the part of Russia that would most likely accuse the Court of politically motivated decisions. Although Russia's occupation of Crimea entails applicability of the rules of international humanitarian law

¹⁰² *Ibid.*, para. 100 where it is stated that "States bear the primary responsibility for preventing and punishing crimes, while proceedings before the ICC should remain an exception to the norm".

¹⁰³ *Ibid.*, paras. 100-106.

and qualifies as an international armed conflict, the ICC Prosecutor would need to weigh her options carefully whether to proceed with an investigation into the situation in Crimea, as she will struggle to obtain any suspects into the custody to the Court and might be left with cases that will be impossible to move from a dead point.

On the one hand, acting on Ukraine's declarations would enhance legitimacy of the Court and demonstrate that the ICC Prosecutor is willing to focus on the situations geographically removed from the African continent. On the other hand, adding another situation to the workload of the Court – one in which the prospects of obtaining suspects into the custody of the Court are bleak and entail confrontation with a permanent member of the UN Security Council – could potentially lead to yet another legitimacy crisis. The only way to enhance the quality control at this stage would be for the ICC Prosecutor to be actively engaged in a meaningful dialogue with all the relevant stakeholders and to be transparent about the OTP preliminary examination activities in order to fend off any potential bias or politicization claims at a later stage of proceedings. It may be also beneficial if the ICC Prosecutor prioritizes the preliminary examinations in situations where the conflict or violence are still ongoing, or at least adopts a more proactive strategy in calling upon the parties to refrain from engaging in conduct that could potentially be prosecuted by the ICC. The situation in Ukraine tests the ability of the Court to deal with the ongoing conflict at the heart of Europe that shows no signs of abating. Hence, sitting idle and waiting for the conflict to be resolved by itself is not an option. While action is expected from the ICC Prosecutor, Ukraine has finally to stop playing political games and re-affirm its commitment to the ICC by ratifying the Rome Statute without any further ado.

Accountability for British War Crimes in Iraq? Examining the Nexus Between International and National Justice Responses

Thomas Obel Hansen*

13.1. Introduction

In May 2014, Chief Prosecutor of the International Criminal Court ('ICC') Fatou Bensouda announced that her Office had decided to re-open a preliminary examination into alleged war crimes committed by British soldiers in Iraq in the period 2003-08. Bensouda's decision followed in the wake of a "devastating dossier" of evidence being provided to her Office by public international law and human rights groups.¹ The Office of the Prosecutor's ('OTP' or 'Office') decision put the United Kingdom ('UK') – an ICC State Party and long-standing supporter of the Court – under scrutiny for the second time. A previous examination had been terminated by former Chief Prosecutor Luis Moreno-Ocampo on the grounds that the allegations of UK abuses in Iraq were not sufficiently grave.²

The Iraq/UK preliminary examination is of interest for several reasons. First, it presents the first time that a major power and State Party has been put under ICC scrutiny, raising novel questions concerning ICC-

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¹ The term used in *The Independent*: Jonathan Owen, "Exclusive: Devastating dossier on 'abuse' by UK forces in Iraq goes to International Criminal Court", in *The Independent*, 12 January 2014.

² See OTP, "OTP response to communications received concerning Iraq", 9 February 2006 (<http://www.legal-tools.org/doc/5b8996/>).

State relations. Second, the alleged crimes involve war crimes, such as abuse of detainees committed in a major international armed conflict, as opposed to the type of civil war and/or election violence situations which have been the focus of most ICC activity to date. Third, the existence of a variety of judicial processes in the UK which address crimes allegedly committed in Iraq raises important questions relating to the ICC's existing complementarity regime.

Based on interviews with British authorities, ICC officials, the lawyers who made submissions to the ICC (the Article 15 communication providers), and other human rights lawyers and academics,³ this chapter examines the dynamics, consequences and impact of the Iraq/UK preliminary examination. Overall, the chapter aims to clarify how this preliminary examination has been approached and whether it has impacted justice processes in the domestic sphere – and the rule of law more broadly – and if so, how and why. In this way, the chapter provides a critical empirical examination of the assumptions made in the scholarship and by ICC prosecutors about ‘positive complementarity’ as well as an early case study of how a great power responds to and interacts with the Court when subject to a preliminary examination.

In particular, the chapter offers a detailed analysis of the interactions between the ICC's preliminary examination into alleged UK abuses in Iraq and the response by the British government, including judicial measures put in place domestically to address the alleged crimes and broader policy responses. The chapter further identifies and elaborates the strategies adopted by the OTP, British authorities and other relevant stakeholders such as the civil society groups and lawyers submitting material to the OTP. In this way, the chapter contributes to our understanding of how the ICC approaches preliminary examinations in ‘hard cases’ involving major powers (in this case involving a permanent member of the UN Security Council), and how such powers respond and engages the Court when put under scrutiny. Notwithstanding some debate among academics concerning the Iraq/UK preliminary examination,⁴ this chapter –

³ Whereas some interviewees agree to be cited by name, several of the interviews are confidential and can therefore not be cited to by name in this chapter. All interviews and consultations were carried out in 2016–17 at various locations, including The Hague, London, Belfast and elsewhere.

⁴ Davis Bosco, for example, observes that the “UK is taking ICC scrutiny quite seriously”, and speculate that the ICC Prosecutor’s decision may reflect “increased institutional confi-

together with Rachel Kerr's contribution to this volume – present the first detailed academic analyses of how the Iraq/UK preliminary examination has unfolded to date, the responses to it by British authorities and its broader ramifications.⁵

While focusing on the interaction between the ICC's preliminary examination and domestic accountability efforts, the chapter demonstrates how the examination is just one part of a number of critical developments that have engendered an interest in investigating alleged crimes perpetrated by UK forces in Iraq. The chapter sheds light on a complex network of factors that have driven British authorities to investigate these crimes, including the creation of the Iraq Historic Allegations Team ('IHAT'), a unit established to examine the veracity of the alleged crimes with an eye on criminal prosecutions. In so doing, the chapter illustrates complex interactions between the UK and the ICC concerning how the preliminary examination should proceed with a shared object in mind: avoiding a direct confrontation between the Court and the UK. At the same time, there are conflicting interests and understandings concerning what the accountability processes for alleged crimes in Iraq should look like and how they should proceed. This raises profound questions relating to quality control in preliminary examinations, including whether avoiding a confrontation may come at the price of not opening a formal investigation due to long-lasting but not necessarily effective investigate steps domestically.

The chapter proceeds as follows: First, it outlines the assumptions made about the connections between preliminary examinations and positive complementarity, including relevant OTP standards and policy objectives (Section 13.2.). Next, it provides an overview of the Iraq/UK preliminary examination as well as the crimes under examination (Section 13.3.). It then proceeds to an analysis of the OTP's strategies, expectations to domestic proceedings and the Office's engagement with other stakehold-

dence and a new willingness to discomfit – if not yet formally investigate – major powers". See, for example, David Bosco, "British War Crimes Investigations and the ICC's Shadow", *Lawfare*, 11 January 2016.

⁵ The two chapters supplement each other in that Rachel Kerr's contribution takes the starting point in analysing the legal processes in the UK and the political debate about accountability in the country, whereas the present chapter takes the starting point in the ICC's preliminary examination and expectations to positive complementarity, and on that basis elaborates the connections to domestic responses and judicial processes. Accordingly, Kerr's chapter provides for a more detailed account of the various judicial processes in the UK addressing war crimes in Iraq.

ers in this accountability process (Section 13.4.). Following that analysis, the chapter examines how UK authorities have responded to the preliminary examination, including an analysis of how the ICC's preliminary examination and the dynamics surrounding it have impacted legal processes in the UK (Section 13.5.). The chapter concludes by discussing the broader ramifications of the Iraq/UK preliminary examination.

13.2. Preliminary Examinations and Positive Complementarity

13.2.1. Assumptions about the Connection between Preliminary Examinations and Positive Complementarity

Existing scholarship tends to assume that preliminary examinations hold considerable potential for galvanizing accountability processes at the national level.⁶ The expectation in much of what has been said about positive complementarity is that once the OTP opens a preliminary examination, the threat that the Office will proceed to a full investigation will add sufficient pressure on the State for it to commence its own proceedings, even if there may be important contradicting interests, in this way rendering further steps by the ICC unnecessary – and in legal terms, inadmissible under the complementarity regime. This prevailing view is well summarized by Christine Bjork and Juanita Goebertus, who note that the anticipated reaction from a State under preliminary examination is that it will “aggressively and fairly pursue domestic prosecutions of international crimes so as not to trigger the jurisdiction of the ICC over the case and invite the glare of the eyes of the international community upon it”.⁷

ICC prosecutors have similarly made far-reaching claims concerning the importance of positive complementarity, sometimes implying that

⁶ For examples of such expectations to positive complementarity, see William Burke-White, “Implementing a Policy of Positive Complementarity in the Rome System of Justice”, in *Criminal Law Forum*, 2008, vol. 19, no. 1, pp 59–85 (noting at p. 62 that “the overall goal of the Rome Statute—ending impunity—may be best achieved through [...] encouragement of national prosecutions”); David Bosco, “The International Criminal Court and Crime Prevention: Byproduct or Conscious”, in *Michigan State Journal of International Law*, 2011, vol. 19, no. 2, pp. 163–200 (noting at p. 181 that preliminary examinations can serve as an effective means of catalyzing political will toward prosecution in situations under analysis as they create pressure for national judicial proceedings and the possible incarceration of those responsible for crimes).

⁷ Christine Björk and Juanita Goebertus, “Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya”, in *Yale Human Rights and Development Law Journal*, 2011, vol. 14, no. 1, pp. 205–30, at p. 208.

the ultimate goal of advancing accountability for international crimes is best achieved by encouraging national authorities to prosecute these in their own jurisdictions at the expense of ICC prosecutions. Even in 2003 – shortly after the Court became operational – former Chief Prosecutor Moreno-Ocampo infamously stated that as “a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency [...] on the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success”.⁸ ICC prosecutors are in particular emphasizing the capacity of preliminary examinations to contribute to positive complementarity. For example, Bensouda argues that the preliminary examination phase “is one of the most remarkable efficiency tools we have at our disposal as it encourages national prosecutions and prevents or puts an end to abuses”, allowing the Court “to avoid opening investigations and prosecutions when national mechanisms are functioning in accordance with our founding Statute”.⁹

The Policy Paper on Preliminary Examinations (‘PE Policy Paper’) published by the OTP in 2013 further clarifies the Office’s expectations of how preliminary examinations will impact domestic proceedings. Importantly, one of the overall goals of preliminary examinations set out by the PE Policy Paper involves the “ending of impunity, by encouraging genuine national proceedings”¹⁰ – a goal sometimes referred to in the Paper as “ending impunity through positive complementarity”.¹¹ The Paper emphasizes that “a significant part of the Office’s efforts at the preliminary examination stage is directed towards encouraging States to carry out their primary responsibility to investigate and prosecute international

⁸ Moreno-Ocampo as cited in ICC, *Informal Expert Paper: The Principle of Complementarity in Practice*, 2003, p. 3 (<http://www.legal-tools.org/doc/90915d/>).

⁹ Fatou Bensouda, “Reflections from the International Criminal Court Prosecutor”, in *Case Western Reserve Journal of International Law*, 2012, vol. 45, no. 1, pp. 505–11, at 508–09. The 2016 Report on Preliminary Examination Activities similarly suggests that preliminary examination activities “constitute one of the most cost-effective ways for the Office to fulfil the Court’s mission”. See OTP, *Report on Preliminary Examination Activities 2016*, 14 November 2016, at para. 16 (<http://www.legal-tools.org/doc/f30a53/>) (hereinafter ‘2016 Report on Preliminary Examination Activities’).

¹⁰ OTP, *Policy Paper on Preliminary Examinations*, 1 November 2013, at para. 93 (<http://www.legal-tools.org/doc/acb906/>) (hereinafter ‘PE Policy Paper’).

¹¹ *Ibid.*, para. 100.

crimes”.¹² The PE Policy Paper further explains that the “complementary nature of the Court requires national judicial authorities and the ICC to function together”; that “proceedings before the ICC should remain an exception to the norm”; and that a “Court based on the principle of complementarity ensures the international rule of law by creating an interdependent, mutually reinforcing international system of justice”.¹³

13.2.2. Lack of Empirical Support and Conceptual Clarity concerning Positive Complementarity

Despite ICC prosecutors’ optimism concerning the capacity of preliminary examinations to galvanize domestic accountability proceedings, there is little empirical evidence this actually occurs.¹⁴ The limited empirical research that does exist often challenges – and sometimes even contradicts – the assumption made by prosecutors that preliminary examinations, through positive complementarity, present the most significant tool for advancing accountability. Based on research involving a number of African countries, Dancy and Montal, for example, observe that although ICC involvement in countries “significantly increases domestic human rights prosecutions in the intermediate term”, this impact of the ICC is triggered only at the investigation stage, not the preliminary examination stage because it does not “carry high costs for states since the Court is not empowered to do much more than to collect information”.¹⁵ Similarly, examining whether the ICC’s preliminary examination in Kenya contributed to accountability at the domestic level in that country, Bjork and Goebertus conclude that the examination “did not appear to encourage Kenyan authorities to take action”.¹⁶

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ As noted by Dancy and Montal, “little systematic empirical research has been carried out on the relationship between ICC investigations and domestic human rights prosecutions”. See Geoff Dancy and Florencia Montal, “Unintended Positive Complementarity: Why International Criminal Court Investigations Increase Domestic Human Rights Prosecutions”, in *American Journal of International Law*, 2017, vol. 111, no. 3, pp. 689–723.

¹⁵ See *ibid.*, p. 13. As discussed below in this Article, the limited powers of the OTP at the preliminary examination stage may in some ways make it difficult to decide whether there is a reasonable basis to proceed in the Iraq/UK examination.

¹⁶ Björk and Goebertus further argue that the ICC’s intervention may more broadly have had a negative impact on the rule of law in the country, in particular because NGOs viewed participation in criminal justice system reform as posing a threat to the ICC’s involvement due to the government’s ability to cite such reforms in a potential admissibility challenge.

Moreover, despite the broad claims made about the value of ‘positive complementarity’, it is not necessarily clear what precisely is understood by that notion and how it departs from the assumedly broader term of ‘complementarity’.

The PE Policy Paper observes that ‘complementarity’ forms part of the admissibility assessment under Article 17 of the Statute whereby “an examination of the existence of relevant national proceedings in relation to the potential cases being considered for investigation by the Office” is required.¹⁷ In contrast, the Paper uses the term ‘positive complementarity’ to refer to a situation where national judicial authorities and the ICC “function together” to create an “interdependent, mutually reinforcing international system of justice”.¹⁸ Elsewhere, Bensouda has explained that positive complementarity implies “a proactive policy of cooperation and consultation, aimed at promoting national proceedings and at positioning itself as a sword of Damocles, ready to intervene in the event of unwillingness or inability by national authorities”.¹⁹ However, prosecutors’ understandings of positive complementarity have varied over time. Moreno-Ocampo implied a less collaborative conception, stating that it “is not about training judges, [us] passing information, [us] building capacity. No, complementarity is what the others are doing”.²⁰

The lack of conceptual clarity became increasingly clear around 2010. That year, the Assembly of States Parties Bureau published a report which defined positive complementarity in very broad terms as “all activities/actions whereby national jurisdictions are strengthened and enabled to conduct genuine national investigations and trials of crimes included in the Rome Statute, without involving the Court in capacity building, financial support and technical assistance, but instead leaving these actions and

See Björk and Goebertus, 2011, pp. 205–30, see *supra* note 7. Research by this author similarly suggests that even if the ‘uncertainty’ brought about by the preliminary examination may have helped to sustain a national debate about accountability, it did not ‘trigger’ any credible accountability process in Kenya. See Thomas Hansen, “Complementarity in Kenya? An Analysis of the Domestic Framework for International Crimes Prosecution”, in Ron Slye (ed.), *The Nuremberg Principles in Non-western Societies: A Reflection on their Universality, Legitimacy and Application*, The International Nuremberg Principles Academy, 2016, pp. 143–65.

¹⁷ *PE Policy Paper*, para. 8, see *supra* note 10.

¹⁸ *Ibid.*, para. 100.

¹⁹ Bensouda, 2012, p. 507, see *supra* note 9.

²⁰ As cited in Björk and Goebertus, 2011, p. 213, see *supra* note 7.

activities for States, to assist each other on a voluntary basis”.²¹ However, as Morten Bergsmo *et al.* note, this broad understanding was criticized by some during the plenary at the 2010 Review Conference in Kampala.²²

The 2009-12 Prosecutorial Strategy settled on the following definition: “The positive approach to complementarity means that the Office will encourage genuine national proceedings where possible, including in situation countries, relying on its various networks of cooperation, but without involving the Office directly in capacity building or financial or technical assistance”.²³ The Strategy clarifies that the Office’s approach to positive complementarity includes measures such as:

- the provision of information “collected by the Office to national judiciaries upon their request pursuant Article 93(10)”, though subject to certain caveats;
- “calling upon officials, experts and lawyers from situation countries to participate in OTP investigative and prosecutorial activities”;
- “acting as a catalyst with development organizations and donors’ conferences to promote support for relevant accountability efforts”; and
- other activities.²⁴

Whereas these types of activities *may* be valuable from the perspective of positive complementarity in situations where there is political will in the relevant State to advance accountability for the crimes under scruti-

²¹ ICC ASP, Resolution ICC-ASP/8/Res.9, 25 March 2010, Appendix, para. 16 (<http://www.legal-tools.org/doc/6077ca/>).

²² Bergsmo *et al.* note: “Whilst repeated reference was made to the term [that is, ‘positive complementarity’], some States questioned its use, preferring the term ‘technical assistance’. It was highlighted that the term had no basis in the Rome Statute and served to confuse judicial capacity building with the principle of complementarity as laid down in Article 17 of the Rome Statute. Despite some hesitation of the use of the term ‘positive complementarity’, there was general agreement during all meetings that the active involvement of States and civil society in building national capacity is desirable. Furthermore, doubts as to the use of the term ‘positive complementarity’ may have been outweighed by the frequency with which the term was used”. See Morten Bergsmo *et al.*, “Complementarity After Kampala: Capacity Building and the ICC’s Legal Tools”, in *Goettingen Journal of International Law*, 2010, vol. 2, no. 2, pp. 791–811, at pp. 797–802.

²³ OTP, “Prosecutorial Strategy 2009-2012”, 1 February 2010, para. 17 (hereinafter ‘2009-2012 Prosecutorial Strategy’) (<http://www.legal-tools.org/doc/6ed914/>).

²⁴ *Ibid.*, para. 17.

ny, one might question if they will have any significant impact when such political will is essentially absent.

Accordingly, the term ‘complementarity’ is usually seen to refer to the legal regime relating to the admissibility test set out in Article 17 of the Statute whereby the ICC can only exercise jurisdiction insofar as national authorities are unable or unwilling to pursue the persons and crimes subject to ICC investigation. ‘Positive complementarity’, in turn, is used to refer to a policy objective to promote accountability at the domestic level for Rome Statute crimes on the basis of active steps taken by the Court, especially the OTP, and preliminary examinations are often seen to provide a particularly useful tool in that regard.²⁵

Yet, positive complementarity may include two rather distinct approaches, the ramifications of which have not been sufficiently elaborated in OTP standards or in the scholarship, namely: (1) efforts by the Court, especially the OTP, to ensure that crimes subject to ICC scrutiny are investigated and prosecuted domestically at the *expense* of ICC prosecutions (referred to in this chapter as the ‘hand-over version of complementarity’); and (2) efforts by the Court, especially the OTP, to facilitate some form of *burden-sharing* whereby the ICC typically proceeds with prosecuting those most responsible for the crimes committed whereas national authorities target other, typically lower level, perpetrators (referred to in this chapter as the ‘burden-sharing version of complementarity’). It is usually the hand-over version of complementarity that is emphasized by

²⁵ Accordingly, whereas the exact meaning of the term ‘positive complementarity’ is contested, it does remain clear, as Burke-White points out, that there is a significant difference between the notion of complementarity in the Rome Statute’s admissibility regime and the principle of ‘positive complementarity’, as expressed by the OTP and scholars alike, as the latter suggests that the Rome Statute “does far more than merely define the limits of the Court’s power”. See Burke-White, 2008, p. 60, see *supra* note 6. Rod Rastan similarly notes that complementarity contains two conceptual approaches, namely 1) the admissibility principle that deals with competing jurisdictions, and 2) a principle of “burden sharing for the consensual distribution of caseloads”. See Rod Rastan, “Complementarity: Contest or collaboration?”, in Morten Bergsmo (ed.) *Complementarity and the Exercise of Universal Jurisdiction for Core International Crimes*, Torkel Opsahl Academic EPublisher, Oslo, pp. 83–132, at p. 83 (<http://www.toaep.org/ps-pdf/7-bergsmo>). On the notion of positive complementarity, see further Carsten Stahn, “Complementarity: A Tale of Two Notions”, in *Criminal Law Forum*, 2008, vol. 19, no. 1, pp. 87–113; and more generally the essays in Carsten Stahn and M. El Zeidy (eds.), *The International Criminal Court and Complementarity: From Theory to Practice*, Cambridge University Press, 2011.

ICC prosecutors and scholars in the context of preliminary examinations, especially in more recent accounts.²⁶

13.2.3. OTP Standards Relating to Positive Complementarity at the Preliminary Examination Phase

The PE Policy Paper commits the Office to take active steps to encourage domestic proceedings, noting that where potential cases falling within the jurisdiction of the Court have been identified, the Office “will seek to encourage, where feasible, genuine national investigations and prosecutions by the States concerned in relation to these crimes”.²⁷ The commitment to advance domestic proceedings at the expense of escalating the ICC’s intervention is, however, not absolute. According to the Paper, the “nature of the Office’s efforts towards encouraging genuine national proceedings will be dependent on the prevailing circumstances”, in this regard emphasizing that the Office will only engage with national authorities to the extent that it does not “risk tainting any possible future admissibility proceedings”.²⁸

The PE Policy Paper takes note that the standard of proof for proceeding with an investigation into a situation under the Statute is “reasonable basis”, and notes that Article 53(1)(a)-(c) of the Statute provides that the OTP shall consider the following factors during a preliminary examination: (a) jurisdiction (including temporal, material, and either territorial or personal jurisdiction); (b) admissibility (including complementarity and gravity); and (c) the interests of justice.²⁹ Among them, the complementarity assessment takes place in the so-called Phase 3 of preliminary examinations.³⁰ As there is not yet a “case” – that is, “an identified set of incidents, suspects and conduct” – the Office’s consideration will be based on

²⁶ As Dancy and Montal note, a significant development took place around 2010, in that the role of OTP was seen to morph from “encouraging referrals to avoiding full investigations” and positive complementarity turned increasingly from “an instrument to strengthen the Court into a tool to strengthen domestic jurisdiction”. See similarly Dancy and Montal, 2017, see *supra* note 14.

²⁷ *PE Policy Paper*, para. 101, see *supra* note 10.

²⁸ *Ibid.*, para. 102.

²⁹ The Paper takes note that the requisite standard of proof of ‘reasonable basis’ has been interpreted by the Chambers of the Court to require “a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court has been or is being committed”. *Ibid.*, paras. 5, 34.

³⁰ *Ibid.*, paras. 15, 82.

“potential cases” identifiable from the available information that would likely arise from an investigation into the situation.³¹ As discussed in further detail below, there may be significant challenges determining what makes up ‘potential cases’ at the preliminary examination stage.

In particular, what type of perpetrators must be targeted to satisfy the Office’s expectations of domestic proceedings? In this regard, the PE Policy Paper states that its policy of investigating and prosecuting those “most responsible for the most serious crimes” means that the Office’s efforts towards encouraging genuine national proceedings at the preliminary examination stage will “centre on potential cases that fall within the ambit of this policy, without being limited to those cases”.³² Although the Paper does not clarify whether the Office operates with specific guidelines concerning the seniority of persons it would require to be prosecuted domestically, it does emphasize that a determination of “inactivity” may follow from the “deliberate focus of proceedings on low-level or marginal perpetrators despite evidence on those more responsible”.³³ The Office’s annual reports on preliminary examination activities offer some additional clues concerning prosecutors’ expectations to the nature and scope of domestic accountability processes. For example, with respect to national proceedings against members of the Afghan authorities, the 2016 report implies that in light of the allegations of widespread ill-treatment of detainees, the Office may not view it as sufficient that authorities have prosecuted only two security officials.³⁴

The annual reports on preliminary examination activities further suggest that a variety of developments not strictly related to domestic accountability processes, such as cabinet appointments, may be perceived as relevant by the Office in conducting the complementarity assessment.³⁵ The annual reports also clarify how the Office approaches the *timing* of domestic proceedings. In one preliminary examination, the Office emphasized that whereas the fight against impunity “appear[s] to remain a priority” of the authorities, the Office will only accept an (unspecified) “rea-

³¹ *Ibid.*, para. 43.

³² *Ibid.*, para. 103.

³³ *Ibid.*, para. 48.

³⁴ *2016 Report on Preliminary Examination Activities*, para. 217, see *supra* note 9.

³⁵ For example, in the Guinea examination, the Office cites to the (re)appointment of a named Minister of Justice as signalling the “continued support of the authorities” for the investigations carried out by the Guinean panel of judges. *Ibid.*, para. 272.

sonable delay” in domestic proceedings.³⁶ The PE Policy Paper makes clear that delays in national proceedings may be assessed in light of indicators such as “the pace of investigative steps and proceedings; whether the delay in the proceedings can be objectively justified in the circumstances; and whether there is evidence of a lack of intent to bring the person(s) concerned to justice”.³⁷

The above suggests that ‘positive complementarity’ is seen as a key ideal outcome of preliminary examinations, but also that the OTP has considerable flexibility as to how it conducts preliminary examinations, including the pace with which they proceed and the tools utilized to promote accountability at the domestic level. In the following sections, the chapter examines how the OTP has applied these goals and standards of preliminary examinations to the Iraq/UK examination, and how British authorities have responded thereto.

13.3. The Iraq/UK Preliminary Examination: Status and Crimes under Scrutiny

13.3.1. Closing and Re-opening of the Iraq/UK Examination and Broader Context

The ICC’s preliminary examination in Iraq relates to war crimes allegedly committed by British troops in the context of the Iraq war and subsequent occupation in the period 2003-2008. Unlike several other examinations – including the Afghanistan examination, which is examining the conduct of US military forces and the CIA, the Taliban and their affiliated Haqqani

³⁶ The statement was made with regard to the Guinea examination. *Ibid.*, para. 271. Some commentators are critical of the Office’s apparent flexibility in this regard, noting that the OTP has “tolerated a slow pace of judicial action in relation to the Guinean Conakry massacre”. See Louise Chappell *et al.*, “The Gender Justice Shadow of Complementarity: Lessons from the International Criminal Court’s Preliminary Examinations in Guinea and Colombia”, in *International Journal of Transitional Justice*, 2013, vol. 7, no. 3, pp. 455–75, at p. 467. More generally, some scholars have criticised the Office for not being consistent in terms of the extent to which it is willing to ‘wait’ for domestic proceedings to advance. See Kai Ambos and Ignaz Stegmiller, “Prosecuting International Crimes at the International Criminal Court: Is there a Coherent and Comprehensive Prosecution Strategy?”, in *Crime Law Soc Change*, 2013, vol. 59, pp. 415–437, at 427.

³⁷ The *PE Policy Paper* makes clear that delays in national proceedings may be assessed in light of indicators ‘such as, the pace of investigative steps and proceedings; whether the delay in the proceedings can be objectively justified in the circumstances; and whether there is evidence of a lack of intent to bring the person(s) concerned to justice’. *PE Policy Paper*, para. 52, see *supra* note 10.

Network, and Afghan government forces³⁸ – the focus of the Iraq examination is limited to crimes allegedly committed by one actor only, namely British service personnel. Although Iraq is not a State Party, the ICC can exercise jurisdiction over crimes committed on its territory by British nationals since the UK is a State Party.³⁹

In 2006, Moreno-Ocampo decided to close the preliminary examination into Iraq on the basis that, even if British soldiers appeared to be responsible for a number of war crimes, the gravity requirement in the Rome Statute was likely not satisfied due to the relatively low number of alleged violations. He further stated that “[i]n light of the conclusion reached on gravity, it was unnecessary to reach a conclusion on complementarity”, but nevertheless noted that his Office had “collected information on national proceedings, including commentaries from various sources, and that national proceedings had been initiated with respect to each of the relevant incidents”.⁴⁰

On 13 May 2014, current Chief Prosecutor Bensouda announced that she had decided to re-open the preliminary examination.⁴¹ This presents the first time that the Office has re-opened an earlier terminated examination. The decision to re-open the preliminary examination was made explicitly with reference to new information submitted to the Office on 10 January 2014 by the European Center for Constitutional and Human Rights (‘ECCHR’) together with Public Interest Lawyers (‘PIL’).⁴² This

³⁸ See *2016 Report on Preliminary Examination Activities*, para. 198, see *supra* note 9. For a detailed account of the Afghanistan examination, including the actors and type of crimes under examination, see further Carla Ferstman, “The International Criminal Court and Extraordinary Rendition”, in Didier Bigo, Elspeth Guild and Mark Gibney (eds.), *Extraordinary Renditions and Secret Detentions: Challenges to Democratic Control of Intelligence Services and Human Rights Remedies*, Routledge (forthcoming 2018) (on file with author).

³⁹ See the Rome Statute of the International Criminal Court, 17 July 1998, Article 12(2)(b) (‘ICC Statute’) (<http://www.legal-tools.org/doc/7b9af9/>).

⁴⁰ See OTP, “OTP response to communications received concerning Iraq”, 9 February 2006 (<http://www.legal-tools.org/doc/5b8996/>), see *supra* note 2.

⁴¹ OTP, “Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq”, 13 May 2014, ICC-OTP-20140513 (<http://www.legal-tools.org/doc/d9d9c5/>).

⁴² Bensouda notes that the 10 January 2014 communication provided further information that was not available to the Office in 2006, emphasizing that the communication “alleges a higher number of cases of ill-treatment of detainees and provides further details on the factual circumstances and the geographical and temporal scope of the alleged crimes”. *Ibid.* The January 2014 submission by ECCHR and PIL involves a 250-page document with a detailed factual and legal analysis of alleged war crimes in Iraq by British service person-

highlights the quite significant role NGOs and lawyers may have in bringing about the opening of a preliminary examination – particularly when they frame the allegations and legal analysis in ways that correspond with the OTP’s analytical process.⁴³ Keeping in mind Moreno-Ocampo’s earlier comments on gravity, ECCHR and PIL deliberately decided to include a large number of allegations and evidence supporting them to avoid a collapse of the examination on reasons of gravity.⁴⁴

Following the initial communication by ECCHR and PIL in January 2014, PIL submitted a second communication in September 2015, which, in the words of the ICC Prosecutor, added “substantively” to the allegations contained in the first communication, including expanding the list of alleged crimes in relation to new cases of alleged detainee abuses and providing additional information in support of the allegations.⁴⁵ The Prosecutor is considering the “comprehensive response” made by the UK authorities to the Prosecution with respect to the allegations contained in the communications.⁴⁶

Since the re-opening in May 2014 of the Iraq/UK examination and as of the time of writing, it has been placed in Phase 2, meaning that ICC prosecutors continue to focus on examining subject-matter jurisdiction. Taking into account the large number of alleged crimes and the level of details provided by ECCHR and PIL to support the allegations, the fact that the examination has remained in Phase 2 for more than three years suggests that the prosecutors are applying a high threshold (some would suggest too high a threshold) for determining whether there is a ‘reasonable basis’ to believe crimes within the jurisdiction of the Court have been

nel. See ECCHR and PIL, *Communication to the Office of the Prosecutor of the International Criminal Court: The Responsibility of Officials of the United Kingdom for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008*, 10 January 2014 (<http://www.legal-tools.org/doc/8d151d/>) (hereinafter ‘*ECCHR and PIL January 2014 communication*’).

⁴³ According to Bethany Shiner, a lawyer formerly working with PIL, the OTP expressed its view that the ECCHR and PIL submission was the “highest quality reports they have ever received”. Author’s interviews (Bethany Shiner) (on file with author – same hereinafter).

⁴⁴ Author’s interviews (Andreas Schüller).

⁴⁵ See Office of the Prosecutor, *Report on Preliminary Examination Activities 2015*, 12 November 2015, paras. 26–27 (hereinafter ‘*2015 Report on Preliminary Examination Activities*’) (<http://www.legal-tools.org/doc/ac0ed2/>).

⁴⁶ *Ibid.*, para. 25.

committed.⁴⁷ Arguably, the slow pace of the examination brings into question its ability to advance positive complementarity – to the extent that it is possible at all – as pressure on national authorities to conduct genuine proceedings ought in theory to be more pronounced in Phase 3 where ICC prosecutors explicitly focus on complementarity. However, the OTP has noted that even if questions relating to admissibility are formally examined only in Phase 3, the Office had received and is considering information on relevant national proceedings conducted by the UK authorities. Both the 2015 and 2016 reports on preliminary examinations note that the “Office is in particular mindful that domestic proceedings involving a judicial review of the [IHAT] activities are taking place in the UK”.⁴⁸ This and other OTP activities during the preliminary examination, including its engagement with British authorities and the senders of the Article 15 communications, are discussed in more detail below.

The UK government has responded in multiple ways to the re-opening of the preliminary examination. On the same day that Bensouda publicly announced that the preliminary examination was re-opened, then Attorney General Dominic Grieve QC stated that the UK remains “a strong supporter of the ICC” and will co-operate with the Court on the examination.⁴⁹ At the same time, however, Grieve rejected the idea that British armed forces in Iraq carried out systematic abuses, seemingly suggesting that the ICC does not have subject-matter jurisdiction.⁵⁰ Director of the Service Prosecuting Authority (‘SPA’),⁵¹ Andrew Cayley QC, further suggested that ICC prosecutors would be unlikely to move ahead with an investigation due to the existence of domestic accountability processes, thus intimating that the complementarity principle would render

⁴⁷ Author’s interviews (various).

⁴⁸ *2015 Report on Preliminary Examination Activities*, para. 43, see *supra* note 45; *2016 Report on Preliminary Examination Activities*, para. 106, see *supra* note 9.

⁴⁹ Attorney General Dominic Grieve as cited in Ian Cobain, “ICC to examine claims that British troops carried out war crimes in Iraq”, in *The Guardian*, 13 May 2014.

⁵⁰ *Ibid.*

⁵¹ The SPA works independently from the military chain of command. For a description of the SPA’s mandate, see its web site. See further UK, the Armed Forces Act 2006 (Chapter 52), 8 November 2006, which addresses issues relating to jurisdiction, offences, modes of liability, investigation and prosecution (<https://www.legal-tools.org/en/doc/73ec98/>).

any potential cases inadmissible.⁵² These and other responses by the British authorities are further elaborated below.

Before outlining the alleged crimes, it should be briefly noted that public opinion in the UK on the war in Iraq predominantly relates to responsibility for a war now viewed widely as illegitimate and unlawful, as opposed to the crimes allegedly committed during this war. A number of politicians, including current Labour leader Jeremy Corbyn, have called for the prosecution of Tony Blair for unlawfully intervening in Iraq.⁵³ In contrast, few politicians have called for prosecuting those responsible for war crimes in Iraq.⁵⁴ Indeed, as will be detailed further below, Members of Parliament and government officials have often taken an outright hostile position towards the legal processes set up to address the allegations – not to mention the persons making submissions to these bodies.

Perhaps partly as a consequence of the above, statements made by politicians and the UK media reporting on the preliminary examination of Iraq/UK have frequently made incorrect assumptions about the ICC's ability to examine the legality of the war as such, often with reference to the need to prosecute Blair for invading Iraq.⁵⁵ As Chief Prosecutor Bensouda noted in a press statement in July 2016 following a particularly misleading article in *The Telegraph*, the potential illegality of the resort to

⁵² Andrew Cayley as cited in Ian Cobain, "ICC to examine claims that British troops carried out war crimes in Iraq", in *The Guardian*, 13 May 2014, see *supra* note 49.

⁵³ For example, in November 2016 Parliament voted on a motion accusing Tony Blair of misleading Parliament about Iraq and demanding a fresh investigation by a Commons committee into his conduct (the motion was defeated by 439 votes to 70). See Andrew Sparrow, "MPs vote down motion accusing Blair of misleading them over Iraq by majority of 369 - Politics live", in *The Guardian*, 30 November 2016. At the time of writing this chapter, a lawsuit brought by former Iraqi general Abdulwaheed al-Rabbat which claims that Blair can be prosecuted for the crime of aggression in the UK was pending before the High Court. See Owen Bowcott, "Tony Blair should be prosecuted over Iraq war, high court hears", in *The Guardian*, 5 July 2017.

⁵⁴ Although there has been very limited political support for prosecuting war crimes in Iraq, it is noteworthy that Corbyn has called for an investigation of allegations that members of the elite SAS regiment executed civilians in Afghanistan and covered up the crimes. See *The Sun*, Natasha Clark, "'Risking our rep': Jeremy Corbyn demands investigation into claims SAS soldiers executed dozens of unarmed Afghan civilians and covered up the killings", in *The Sun*, 3 July 2017.

⁵⁵ Such calls have been made, among others, by opposition leader Jeremy Corbyn and Scottish National Party leader Alex Salmond. See Mark Kersten, "Confused Partisan Bluster won't Bring Blair to Justice – Or Serve Accountability in Iraq", *Justice in Conflict*, 26 May 2016.

use of force by the UK and other States in Iraq in 2003 is not an issue that can be addressed by the ICC because the crime of aggression does not currently come under the Court's jurisdiction.⁵⁶

13.3.2. The Alleged Crimes

The Iraq/UK preliminary examination involves inquiry into two main forms of war crimes, namely (1) abuse of detainees (including torture and other forms of ill-treatment, rape and other forms of sexual violence); and (2) unlawful killings.⁵⁷

Concerning the first type of violations, the Prosecutor is examining allegations made by ECCHR and PIL that British forces “systematically abused hundreds of detainees in different UK-controlled facilities” across the territory of Iraq throughout their deployment from 2003 to 2008.⁵⁸ According to the 2016 report on preliminary examinations, the alleged abuses involve a total of 1,071 Iraqi detainees, of which the Office by November 2016 had analysed accounts relating to 831 “to assess the credibility of the allegations and identify any crime patterns”.⁵⁹ The Office summarizes the most frequently reported methods of abuse as involving: beatings and other forms of battery, cuffing and other forms of restraining, sensory deprivation, sensory overstimulation, deprivation of clothes, deprivation of food, deprivation of medical care, deprivation of privacy, deprivation of sleep, deprivation of toilet facilities, deprivation of water, forced exertion, exposure to harsh environments, forced immobility and/or silence, prolonged solitary confinement/isolation, stress positions, sexual violence, sexual humiliation/other forms of sexual assaults, electrocution and burning, suspension, water techniques/waterboarding, in-

⁵⁶ Bensouda noted the Telegraph article was “aggravating the spread of inaccurate information concerning the ongoing preliminary examination carried out by my Office with respect to the Situation in Iraq”. See OTP, “Statement of the Prosecutor correcting assertions contained in article published by The Telegraph”, 4 July 2016 (<http://www.legal-tools.org/doc/74578d/>).

⁵⁷ The 2015 *Report on Preliminary Examinations Activities* stated that ECCHR and PIL had also submitted allegations relating to failure to respect fair trial standards, noting that “at least 88 detainees were entitled to the protection of the Geneva Convention III until such time as their status would be determined by a competent tribunal in accordance with article 5 of the Geneva Convention III”. See 2015 *Report on Preliminary Examination Activities*, para. 37, see *supra* note 45. There is no suggestion in the 2016 Report that the Office is actively examining these allegations.

⁵⁸ *Ibid.*, para. 33.

⁵⁹ 2016 *Report on Preliminary Examination Activities*, para. 89, see *supra* note 9.

duced desperation, threats, religious and cultural humiliation, and verbal abuse.⁶⁰ The Office is examining allegations of rape of 21 male detainees and other forms of sexual violence against another 135.⁶¹

Concerning the second type of abuses, the Prosecutor is examining allegations made by ECCHR and PIL involving 319 cases of unlawful killings, of which 267 occurred in the course of military operations not relating to arrest or detention.⁶² As of November 2016, the Office had analysed 204 of these allegations.⁶³ As noted in the 2016 report on preliminary examinations, the majority of alleged unlawful killings therefore “appear to have occurred in the context of conventional military or counterinsurgency operations by the UK forces”.⁶⁴

Although the reports on preliminary examinations address both types of crimes, the Office appears to be mainly focusing on the first type of allegations (that is, detainee abuse). This may in part be because under international humanitarian law “not every instance of killing necessarily amounts to a crime under the Statute”.⁶⁵ Further, torture and other forms of ill-treatment of detainees – for which there is, in contrast, an absolute prohibition – if found to have occurred on a large-scale is more likely to be the result of a ‘system failure’, or even a deliberate policy of the military or the political leadership, as alleged by PIL and ECCHR.⁶⁶ To the extent the Office mainly focuses on ill-treatment of detainees, this will also be more in alignment with perceptions in the public, which now largely condemns abuse of detainees – persons captured, no longer posing an immediate threat and subject to the full control of the detaining authority. In contrast, there will be much less sympathy – at least in Britain – for prosecuting “18 year old boys” for “pulling the trigger too fast” in the intense pressure and chaos of combat situations.⁶⁷

⁶⁰ Other forms of alleged ill-treatment include forced (unnecessary) medical treatment; collective punishment; forced labour; inadequate bedding; use of pepper spray; and forced feeding. See *ibid.*, para. 91.

⁶¹ *Ibid.*, paras. 93–94.

⁶² *Ibid.*, para. 95.

⁶³ *Ibid.*, para. 96.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, para. 89.

⁶⁷ Author’s interviews (various).

The submission made by ECCHR and PIL strongly suggest that detainee abuse was systematic and argue that criminal responsibility “may attach all the way up the chain of command to the Chief of Defence Staff”.⁶⁸ The submission specifically name former Defence Minister Adam Ingram and former Defence Secretary Geoff Hoon as being the most senior people responsible for the crimes on the basis that they “knew or consciously disregarded information about the abuse of Iraqi detainees by UK Services Personnel in Iraq”.⁶⁹ The ECCHR and PIL submissions suggest that in the apparent absence of detailed regulation of interrogation techniques in Iraq, the “limits of interrogation were, in effect, set by those responsible for training the interrogators”.⁷⁰ Many interrogators reportedly received only about two weeks’ training lacking in important aspects before their deployment to Iraq.⁷¹

⁶⁸ Further noting that: “available evidence strongly indicates that the unlawful treatment of detainees during arrest and transit operations was systemic. This is apparent from the continuity of abusive and degrading treatment by UK Services Personnel despite changes of personnel on the ground”. See *ECCHR and PIL January 2014 communication*, p. 169, see *supra* note 42.

⁶⁹ Noting that they “either knew or recklessly and deliberately took no notice of information regarding serious ill treatment, and in some cases deaths, of detainees, despite credible and substantial evidence that war crimes had been committed and evidence which demonstrated that there was a significant risk that war crimes were about to be committed”. *Ibid.*, p. 198 (and further pp. 186–99 on the allegations against Hoon, Ingram and other senior figures in the MoD).

⁷⁰ *Ibid.*, p 22.

⁷¹ Author’s interviews (various). For an overview of the findings of the Baha Mousa Inquiry on the topic and alleged criminal liability for those who allegedly failed to put in place adequate training, see further *ECCHR and PIL January 2014 communication*, pp. 172–76, see *supra* note 42. In one case forwarded to it by IHAT, the SPA reportedly decided against prosecuting an interrogator for using ‘harshing’ in an interrogation session because successful prosecution was seen to be “complicated by the training then provided to the suspect soldiers” and “appears to be in keeping with trained techniques albeit the decision as to how best to apply these techniques was left to the interrogator”. *Ibid.*, p. 233 (citing to a letter from the SPA to the lawyers representing the victim, namely PIL). The Commons Defence Sub-Committee noted as follows on the training provided to interrogators: “It is not disputed that there were incidents of abuse of Iraqi prisoners by British armed forces service personnel. However, it appears that this may have been at least partly because the training given to military interrogators was inaccurate and may have placed them, unwittingly, at risk of breaking the Geneva Conventions in their work.” On this basis, the Committee concluded: “The admission that training material for interrogations contained information which could have placed service personnel outside of domestic or international law represents a failing of the highest order”. See House of Commons Defence Sub-Committee, *Who guards the guardians? MoD support for former and serving personnel: Sixth Report of Session 2016–17*, 10 February 2017, paras. 83, 86 (hereinafter ‘February

The official reports by the OTP do not clarify whether, and if so how, the Office is examining whether the crimes were the result of plans or policies, direct orders from – or omissions by – the military or political leadership. In the Baha Mousa Inquiry,⁷² Sir William Gage found that there had been a “gradual loss of the doctrine” prohibiting the use of the ‘five techniques’ – involving hooding, white noise, food and drink deprivation, painful stress positions, and sleep deprivation – in guidelines on interrogation,⁷³ in this regard pointing to a “corporate failure” in the MoD.⁷⁴ These techniques, previously used by the British army in the Northern Ireland campaign, were banned by the government in the early 1970s.⁷⁵ The European Court of Human Rights (‘ECtHR’) has held that the ‘five techniques’ breach the prohibition on inhuman and degrading treatment in Article 3 of the Convention,⁷⁶ and the House of Lords has more recently suggested that “it may well be” that such conduct would now be determined to amount to torture.⁷⁷

2017 report by House of Commons Defence Committee’) (<http://www.legal-tools.org/doc/7a0253/>).

- ⁷² The mandate of the Baha Mousa Inquiry – established under the Inquiries Act 2005 and chaired by a retired Court of Appeal judge, Sir William Gage – was: “To investigate and report on the circumstances surrounding the death of Baha Mousa and the treatment of those detained with him, taking account of the investigations which have already taken place, in particular where responsibility lay for approving the practice of conditioning detainees by any members of the 1st Battalion, The Queen’s Lancashire Regiment in Iraq in 2003, and to make recommendations.” See The National Archives, “The Baha Mousa Public Inquiry” (available on the Archives’ web site).
- ⁷³ See the Right Honourable Sir William Gage, *The Report of the Baha Mousa Inquiry*, vol. II, 2011, The Stationery Office, London, part IV, chap. 10, para. 4.174 (<http://www.legal-tools.org/doc/8b8421/>).
- ⁷⁴ See *ibid.*; and the Right Honourable Sir William Gage, *The Report of the Baha Mousa Inquiry*, vol. I, 2011, The Stationery Office, London, part II, chap. 21, para. 2.1551 (<http://www.legal-tools.org/doc/acafaa/>). In the hearings before the Defence Sub-Committee, Peter Ryan admitted that “the MoD had ‘lost the fact’ that certain techniques had been banned and that it was lost somewhere ‘between 1970-something and 2003’”. See *February 2017 report by House of Commons Defence Committee*, para. 85, see *supra* note 71.
- ⁷⁵ In the UK House of Commons on 2 March 1972 then Prime Minister Ted Heath stated that the Government had “decided that the techniques which the Committee examined will not be used in future as an aid to interrogation”. As cited in *ECCHR and PIL January 2014 communication*, p. 16, see *supra* note 42.
- ⁷⁶ ECtHR, *Ireland v. UK*, 18 January 1978, Series A no. 25.
- ⁷⁷ *R (A and Others) v Secretary of State for the Home Department* [2005] UKHL 71, para. 101. See further *ECCHR and PIL January 2014 communication*, pp. 17–18, see *supra* note 42.

SPA Director Andrew Cayley QC states that he has seen no evidence that the ‘five techniques’ – or any other interrogation technique that breach the Geneva Conventions – were officially authorized in the Iraq war: “The five techniques were never authorised by the MoD. If they were being used – [and] I’ve seen no evidence of that [...] – it was because people were deciding to do it by themselves, but it certainly was never authorised”.⁷⁸ However, Nicholas Mercer, who was the most senior legal adviser to the British Army when the Iraq war commenced in 2003, states that he witnessed detainees in stress positions and being hooded.⁷⁹ Mercer states that he reported to the military leadership that techniques against the Geneva Conventions were being used, but to no avail.⁸⁰ According to him, one key problem was that the usual chain of command was being bypassed, with interrogators claiming to “report to London” – assumedly meaning they referred directly to the Ministry of Defence (‘MoD’) and thus felt at liberty to ignore the advice given by Mercer and other military lawyers working within the ordinary chain of command.⁸¹ Crucially, Mercer states that he saw written instructions to interrogators allowing the use of some of the ‘five techniques’, specifically hooding and stress positions.⁸² If this is the case (the MoD denies such instructions existed) and detainee abuse was as systematic as claimed by PIL, ECCHR and others, this suggests that criminal liability could extend to senior civil servants in the MoD itself.⁸³

⁷⁸ Author’s interviews (Andrew Cayley).

⁷⁹ Author’s interviews (Nicholas Mercer).

⁸⁰ *Ibid.* For further details concerning how Mercer raised his concern about ill-treatment of detainees, see Witness statement of Nicholas Mercer to the Baha Mousa Inquiry, 9 September 2009 (<http://www.legal-tools.org/doc/e3ea83/>) (hereinafter *Mercer witness statement to Baha Mousa Inquiry*).

⁸¹ Mercer adds that prior campaigns, including the 1991 Gulf War, did not see the MoD “interfering” to the extent they did during the 2003 Iraq War where MoD lawyers “imposed themselves at the top of the pyramid”. He also notes: “There’s another issue, and that’s the attorney general, the previous one, Lord Goldsmith was potentially implicated. There have been allegations that *he* gave the advice on interrogation [...] The MoD lawyers, one of their favourite tricks in theatre, was to outmanoeuvre the military by saying they’ve been to the attorney general and taken his advice and whereas they heard what we had to say, the Attorney General said something different”. Author’s interviews (Nicholas Mercer). See further *Mercer witness statement to Baha Mousa Inquiry*, see *supra* note 80.

⁸² Author’s interviews (Nicholas Mercer).

⁸³ Even assuming that evidence pointing to authorization of (some of) the five techniques comes to the attention of ICC Prosecutors, it remains an open question whether they will

13.4. The OTP's Strategies, Expectations to Domestic Accountability Processes and Engagement with Other Actors

13.4.1. Best Case Scenario and Challenges to Positive Complementarity

The general view that emerges from this research is that the understanding of 'best case scenario' within the OTP is that the Iraq/UK preliminary examination can be terminated with reference to the existence of a genuine domestic accountability process in the UK.⁸⁴ If so, this could bolster the Office's policies on preliminary examinations and positive complementarity discussed above. This preference however is also likely to reflect that the OTP has little appetite for proceeding with a full investigation, as this would lead to a direct confrontation with a major power and key supporter of the Court.⁸⁵ At the same time, should the Office terminate the examination on the basis of a conclusion that the alleged crimes were not sufficiently large-scale, this could spark renewed critique of double standards from African States Parties, the human rights community, and others, especially since the ECCHR and PIL communications involve a much larger number of allegations compared to those that led Moreno-Ocampo to close the examination in 2006. From the perspective of the OTP, the ideal scenario therefore likely involves a situation where the 'hand-over version' of complementarity can be said to 'work': genuine domestic proceedings, targeting persons at a sufficiently high level, will take place in the UK, which renders further steps by the OTP unnecessary,

view such conduct as sufficiently grave to warrant investigation and prosecution. If one takes the starting point in the gravity of the nature of violations, other allegations contained in the *ECCHR and PIL January 2014 communication* relating, for example, to rape and beating to death detainees, as happened in Mousa's case, would appear 'graver' to most compared to sensory deprivation or stress positions. Yet, one might argue that the conception of gravity ought, at least partially, to depend on how systematic the crimes were. See e.g. Kevin Jon Heller, "Situational Gravity Under the Rome Statute", in Carsten Stahn and Larissa van den Herik (eds.), *Future Directions in International Criminal Justice*, TMC Asser/Cambridge University Press, 2009.

⁸⁴ Author's interviews (various). The understanding that the preliminary examination should make positive complementarity 'work' was also the rationale for the Article 15 communication senders to engage the ICC in the first place, but, as Andreas Schüller of the ECCHR emphasizes, if that did not occur within a reasonable timeframe – which he believes it has not – the expectation is that the ICC should proceed with an investigation. Author's interviews (Andreas Schüller).

⁸⁵ Author's interviews (various).

and this can at least partially be attributed to the ICC's preliminary examination.⁸⁶

However, it is also clear that the Office has certain expectations to a domestic accountability process which may make it difficult to terminate the preliminary examination with reference to the complementarity regime, at least as the situation currently stands. Even if the UK is widely seen as a 'sophisticated country' with a system in place to address war crimes, ICC prosecutors are likely aware that there are significant political obstacles in the country to prosecuting members of the armed forces for humanitarian law violations, especially to the extent this involves senior commanders, or even MoD officials.⁸⁷ In short, the main challenge for making positive complementarity work is not 'ability' but 'willingness'.

At the same time, the OTP must be aware that moving ahead with requesting the opening of an investigation with reference to 'unwillingness' (or 'inactivity') would be extremely sensitive, especially if this determination is made on the basis that existing domestic proceedings fail to pursue sufficiently senior people.⁸⁸ Proceeding with an investigation on the basis of unwillingness where some form of domestic process is in place would be a delicate matter in *any* situation. However, the OTP is likely to be particularly careful 'judging the quality' of judicial processes in the UK due to a general understanding that the country's legal system is robust, and perhaps even more so because accountability processes in the UK relating to the abuses in Iraq are headed by leading experts on international criminal law, notably SPA Director Andrew Cayley QC.⁸⁹ The OTP is assumedly also aware that the British authorities have significantly more resources at their disposal – both financial and personnel – compared to what the OTP has allocated to this preliminary examination and what the Office would be able to apply to an investigation, should one be

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ *Ibid.* This is certainly the understanding advocated by British government officials. Joyce Anelay, the minister with responsibility for the ICC, argues: "British justice has perhaps the best and longest tradition in the world of being able to be robust and independent. If anybody thinks British justice can be swayed by national prejudice, they will be 100 per cent wrong." See Thomas Escritt, "'Robust' domestic probes would pre-empt ICC charges against UK soldiers: minister", in *Reuters*, 29 January 2016.

opened.⁹⁰ This above suggests that preliminary examinations are likely to proceed quite differently in situations involving States with significant resources and strong legal systems.

The OTP has in the past referred to IHAT as a process that is being considered for the purposes of complementarity.⁹¹ The fact that the MoD decided to terminate this process by the end of June 2017⁹² – together with most of the cases it was intended to investigate – may, at least on the face of it, complicate reaching a positive assessment of complementarity.⁹³ However, the OTP’s determination will obviously depend, not on names, but on the nature and operations of the new system to be set up – referred to as the Service Police Legacy Investigations (‘SPLI’), a mechanism discussed below.

13.4.2. Key Factors in the Complementarity Assessment

One particularly critical aspect of the complementarity assessment will be whether, and if so how, domestic processes are able to tackle ‘systemic issues’, understood to involve system failures such as poor supervision, lack of guidance and lack of training, some of which may potentially constitute criminal conduct in the form of omissions.⁹⁴ To the extent the OTP concludes that there is a reasonable basis to believe that crimes within the jurisdiction of the Court were committed on a large scale, the Office will expect domestic processes to address systemic issues for it to make a call that complementarity renders further steps by the Office unnecessary. For example, if the Office finds that specific units appear to have been consistently involved in the commission of crimes, it will be of particular importance for the complementarity assessment whether domestic pro-

⁹⁰ As SPA Director Andrew Cayley notes, ICC Prosecutors “know that if, theoretically, they were to take this on, they couldn’t put as much [resources] [...] this has always been an overarching factor for them [...] they couldn’t do that themselves and they know it”. Author’s interviews (Andrew Cayley).

⁹¹ See *2015 Report on Preliminary Examination Activities*, at para. 43, see *supra* note 45; *2016 Report on Preliminary Examination Activities*, para. 106, see *supra* note 9.

⁹² Curiously, by early August 2017, there was no indication at IHAT’s website that IHAT had been closed.

⁹³ UK authorities informed ICC Prosecutors of the intended closure of IHAT before it occurred. Author’s interviews (Andrew Cayley).

⁹⁴ Author’s interviews (various).

cesses manage to address the conduct of persons in charge of such units, rather than examining only the conduct of direct perpetrators.⁹⁵

IHAT has been criticized for approaching investigations of alleged crimes in Iraq on a case-by-case basis.⁹⁶ However, SPA Director Cayley states that UK investigators and prosecutors *are* “looking at systemic issues” and points to the existence of “a number of investigations that are specifically addressing systemic issues”.⁹⁷ Cayley explains that a special team to address systematic issues was created already in 2013,⁹⁸ rendering meaningless any speculation that such investigations were *launched* as a consequence of the preliminary examination re-opened in 2014, though of course it remains a possibility that they *improved* due to the ICC’s intervention. Should the preliminary examination proceed to Phase 3, the OTP’s assessment of complementarity will for a large part depend on Cayley’s ability to convince ICC prosecutors that domestic mechanisms are genuinely addressing systemic issues.⁹⁹ In simpler terms, the OTP hopes to push the UK authorities to adequately address systemic issues, and if ICC prosecutors feel they succeed, the preliminary examination will likely be terminated on that basis (if it is not already terminated in phase two on grounds of subject-matter jurisdiction).¹⁰⁰

⁹⁵ *Ibid.*

⁹⁶ *Ibid.* See also Roslyn Fuller, “ICC & British war crimes: The trial of Tony Blair?”, in *RT*, 21 May 2014.

⁹⁷ Author’s interviews (Andrew Cayley). It is of interest in this regard that the Common’s Defence Sub-Committee noted as follows: “We expect the MoD to confirm that no cases under consideration by IHAT are based on the actions of individuals who were following that flawed guidance. If there are, we ask the MoD to set out how it will support individuals who are subject to claims arising from actions which their training advised was lawful”. See *February 2017 report by House of Commons Defence Committee*, para 86, see *supra* note 71.

⁹⁸ *Ibid.*

⁹⁹ Besides the IHAT/ SPA set-up, the MoD has created a ‘Systemic Issues Working Group’ (SIWG), chaired by the MoD’s Director of Judicial Engagement Policy, and mandated to conduct a review of IHAT reports and issues relating to training and to review “the action that has been taken to address the issues identified, and determine whether such measures are appropriate and sufficient – or whether further action needs to be undertaken”. See Ministry of Defence, Systemic Issues Working Group, “Systemic Issues Identified From Investigations Into Military Operations Overseas: July 2014” (<http://www.legal-tools.org/doc/157c02/>) (hereinafter ‘*MoD 2014 Report on Systemic Issues Identified From Investigations Into Military Operations Overseas*’).

¹⁰⁰ Author’s interviews (various).

Yet, there is a separate question concerning domestic processes' ability to address 'systematic issues', understood to involve potential plans or policies to commit crimes, such as authorizing or ordering interrogators to use techniques that breach the Geneva Conventions. If that is the case, this could trigger the criminal responsibility of high ranking officials who put in place any such plan or policy to abuse detainees. The UK authorities have made it clear that such allegations do not form part of domestic investigations within the context of the IHAT/SPLI/SPA set-up for the simple reason that they have seen no evidence of such plans or policies.¹⁰¹ Similarly, the potential existence of plans or policies to use interrogation techniques or conditions of detention that violate the Geneva Conventions do not appear to currently be actively investigated by the OTP. However, should credible evidence pointing to such a 'systematic basis' for the crimes come to the Office's attention, one would expect ICC prosecutors to question the ability of the structures currently in place in the UK to adequately address such a situation.¹⁰²

Another important aspect of a potential complementarity assessment relates to the timing of domestic processes. In essence, if the OTP comes to the conclusion that crimes within the jurisdiction of the Court are likely to have been committed on a large scale, and therefore proceeds to Phase 3 of the examination, should the complementarity assessment then await the final outcome of the judicial processes in the UK, or can a more holistic assessment be made that 'systems are in place' which are, in principle, capable of addressing war crimes in Iraq in a genuine manner?¹⁰³

The first approach will likely result that the preliminary examination will be kept open for the years to come. In addition to increased pressure from the UK Government to end the examination, this could lead to

¹⁰¹ Author's interviews (Andrew Cayley).

¹⁰² The SPA can only prosecute service personnel. However, the ordinary civilian criminal processes also apply to service personnel at the time they are serving and subsequently.

¹⁰³ The *PE Policy Paper* does not address this specific issue. The Paper simply takes note that the Statute provides no timelines for bringing a preliminary examination to a close, and further that the Prosecutor must continue the examination until the information provides clarity on whether there is a reasonable basis to proceed with an investigation. The Paper clarifies that this may require gathering and analysing and assessing "specific relevant national proceedings, where they exist, over a long period of time in order to assess their genuineness and their focus throughout the entirety of the proceedings, including any appeals". *PE Policy Paper*, para. 90, see *supra* note 10.

the type of criticism levelled against the Office’s lengthy examination in Colombia. Should the second approach be followed, the determination of whether the system in place is sufficient for terminating the examination with reference to complementarity is likely to be significantly influenced by the OTP’s understanding of whether such a process appears capable of adequately addressing the ‘systemic issues’ relating to the commission of crimes discussed above.

However, an obvious risk of pursuing the latter strategy is that, even if the systems set up are nominally capable of pursuing accountability in a manner that satisfies OTP expectations, investigations could last for years, and there is of course no guarantee that any of these investigations will lead to prosecutions. The possibility that judicial processes at the national level look solid on paper but are dragged on endlessly and ultimately lead to no or only very limited prosecutions raises serious questions concerning the effectiveness of the regime for positive complementarity as it is currently conceptualized. The burden is clearly on the OTP – and perhaps overly so – in situations where there *are* ongoing domestic proceedings regardless of how slowly these proceed.¹⁰⁴

13.4.3. OTP Engagement with Other Stakeholders

Although not unusual, it should be noted that ICC prosecutors notified UK government officials that a preliminary examination was to be opened before this information was made public.¹⁰⁵ More generally, the OTP has remained in close contact with UK government officials to “verify the seriousness of the information in its possession, discuss the progress of the Office’s preliminary examination process, address methodological issues as well as to solicit updates and provision of additional relevant information”.¹⁰⁶ This has involved several visits by OTP officials to the UK, including at the premises of IHAT and SPA. During these visits, the general progress of domestic proceedings was discussed and ICC prosecutors requested detailed information from the UK authorities concerning

¹⁰⁴ For the OTP to justify a request to open an investigation in such a situation, it would need to label a country unwilling to genuinely carry out the investigation with reference to the standards in Article 17(2)(b) which speaks to a situation where there has been “an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice”.

¹⁰⁵ Author’s interviews (various).

¹⁰⁶ See *2015 Report on Preliminary Examination Activities*, para. 40, see *supra* note 45.

the status of these processes. In a sense, as SPA Director Cayley observes, OTP officials “monitor” how the UK authorities conduct their investigations, and are keen to be kept up to date on all relevant developments.¹⁰⁷

OTP officials have reportedly not requested access to material in the possession of IHAT and SPA which could help clarify the credibility of specific allegations included in the submissions by ECCHR and PIL. Significantly, most interrogations in Iraq were video recorded and are available to IHAT and the SPA, but OTP officials have reportedly not requested access to these recordings to date.¹⁰⁸ Some find this surprising because – in the words of Mercer – “it is a prosecutor’s dream to have it all on film”.¹⁰⁹ As noted above, the OTP does not enjoy investigative powers at the preliminary examination stage and can therefore not *compel* the UK authorities to share such material. It is disputed whether ICC prosecutors could *request* access to specific recordings at the preliminary examination stage.¹¹⁰

Another interesting aspect of the Iraq/UK examination relates to the Office’s engagement with the civil society organizations and lawyers who submitted the Article 15 communications. The Office has regularly met with representatives of these organizations and law firms to clarify issues relating to the submissions, receive additional supporting information and related issues.¹¹¹ Involved lawyers have experienced their engagement

¹⁰⁷ Author’s interviews (Andrew Cayley).

¹⁰⁸ Author’s interviews (various). Geoff White, the former head of IHAT testified in *Ali Zaki Mousa* that over 3,500 such recordings exist. According to *ECCHR and PIL January 2014 communication*, videos disclosed during the judicial review proceedings in the UK show interrogation techniques such as sensory deprivation, food and water deprivation and sleep deprivation are being used, and some videos additionally show soldiers beating and kicking Iraqis outside of detention facilities. See *ECCHR and PIL January 2014 communication*, pp. 110–12, see *supra* note 42.

¹⁰⁹ Author’s interviews (Nicholas Mercer).

¹¹⁰ The *PE Policy Paper* emphasizes that although the Office does not enjoy full investigative powers at the preliminary examination stage, it “may seek additional information from States, organs of the United Nations, intergovernmental and non-governmental organisations, and other reliable sources that are deemed appropriate”. *PE Policy Paper*, paras. 12, 85 and 102, see *supra* note 10. Some interviewees suggest that requesting access to material such as video recordings would amount to an investigative step, and is hence not permitted at the preliminary examination stage. Author’s interviews (various).

¹¹¹ Bethany Shiner, formerly with PIL, explains that when ICC Prosecutors came to PIL offices, they were provided with full access to the relevant files and provided with “hundreds of pages worth of information to support the allegations”. Author’s interviews (Bethany Shiner).

with the OTP as “generally open” and “productive”, though sometimes left with a feeling that OTP staff can be “hard to work out” because they do not share the assessments they make.¹¹²

The OTP has also conducted “a thorough evaluation of the reliability of sources and credibility of information received on alleged crimes”, including a mission to PIL offices in October 2015 “for the purposes of screening the supporting material relating to the claims”.¹¹³ However, as will be discussed below, lawyers from PIL (and other law firms in the UK involved in Iraq suits) have been subject to allegations of misconduct, which potentially affect the credibility of the information they submitted to both national justice institutions and the ICC. In this regard, the OTP states as follows in the 2016 preliminary examination report:

The Office is mindful of issues affecting in particular the reliability of the providers of information, including the closing-down of PIL, allegedly as a result of disruption of legal aid funding for breach of contractual requirements with the national competent agency; and allegations of misconduct against the PIL and other groups representing Iraqi’s claimants in the UK, leading *inter alia* to an investigation before the Solicitors Regulation Authority (“SRA”) and the subsequent referral of both PIL and Leigh Day to the Solicitors Disciplinary Tribunal (“SDT”). The Office has closely scrutinized and will continue to keep abreast of relevant developments at the national level in the context of the proceedings before the SDT.¹¹⁴

As will be discussed below, a key justification for closing IHAT relates exactly to the allegations made against PIL, and lead lawyer Phil Shiner’s admission to counts of misconduct. Although Shiner’s misconduct does not necessarily mean that the material submitted to the OTP lacks credibility, ICC prosecutors are likely to carefully consider its ramifications. It remains a real possibility that the examination could be terminated on exactly this basis. Looked at cynically, some might even suggest this could be the easiest ‘way out’ of a situation that could prove increasingly difficult for the OTP to manage. But it is also a strategy that is bound to raise questions concerning the Office’s motivations for terminat-

¹¹² Author’s interviews (Bethany Shiner).

¹¹³ See *2015 Report on Preliminary Examination Activities*, para. 42, see *supra* note 45.

¹¹⁴ See *2016 Report on Preliminary Examination Activities*, para. 105, see *supra* note 9.

ing the examination, unless it convincingly demonstrates a link between Shiner’s misconduct and the credibility of the material provided by ECCHR and PIL.

Besides the Article 15 communication senders, the Office is also examining material provided by other NGOs, such as Redress, Amnesty International, and Human Rights Watch. The Office states that it uses such information to “cross-check allegations of unlawful killings of Iraqi civilians by UK personnel in situations outside of custody, such as in the course of military and counterinsurgency operations conducted by the British army”.¹¹⁵ However, it is not clear to what extent the Office actively pursues corroborating evidence at this stage. For example, one human rights organization has encouraged the OTP to contact Mercer, but the OTP has not done so to date, even if ICC prosecutors have been made aware that he is willing to provide evidence to the Office relating to the abuses he witnessed in detention facilities and other information that could prove crucial in determining whether there is basis to proceed with an investigation.¹¹⁶

13.4.4. Is the OTP Treating the Iraq/UK Examination Differently from Other Preliminary Examinations?

Much in the above raises the question whether the OTP treats the Iraq/UK examination differently from other preliminary examinations. Put otherwise: does the UK’s international standing, diplomatic leverage and strong support for the ICC in general somehow impact how the Office conducts this preliminary examination? It seems clear that ICC prosecutors are sensitive to the ramifications of examining a major power, including the increased scrutiny this in turn creates of the Office’s actions, and hence very carefully considers any action and statements it makes in this examination. However, the general view that emerges from this research is that the Office is committed to applying the same standards to this examination as it applies to others, including a principled willingness to proceed with requesting the Pre-Trial Chamber’s authorization for an in-

¹¹⁵ See *ibid.*, para. 102.

¹¹⁶ Author’s interviews (Carla Ferstman and Nicholas Mercer). However, some interviewees believe doing so would amount to an investigative step that is not permissible at the preliminary examination stage. Author’s interviews (various).

investigation if the Office believes that the standards in Article 53 are met.¹¹⁷

One particularly important question in this regard is whether the Afghanistan examination, involving allegations of crimes by US military forces and the CIA, somehow affects the Iraq/UK examination. Simultaneously opening investigations that involve two major Western powers would self-evidently present an entirely new direction for international justice with significant ramifications for the OTP and the Court as whole. However, the timing of potential investigations is likely to be quite different. The Prosecutor stated in the November 2016 report on preliminary examinations that the decision on whether to request Pre-Trial Chamber authorization to commence an investigation into the situation in Afghanistan will be made “imminently”.¹¹⁸ As seen from the analysis in this chapter, any such decision in the Iraq/UK examination is likely to be far less imminent. Additionally, there is the question of resources. Moving ahead simultaneously with two new investigations involving extremely complex situations and what is likely to amount to hereto unseen pressure on the Office by States with significant diplomatic power could strain the Office beyond its capacity. Even if the OTP is committed to acting professionally and objectively determining whether there is basis for requesting the opening of a formal investigation of the Iraq/UK situation, it seems implausible that it will do so any time soon if an investigation into the situation in Afghanistan is to be opened in the near future.

13.5. UK Government Responses to the Preliminary Examination

13.5.1. Overall Responses to the ICC’s Re-opening of the Preliminary Examination

The UK government has reacted to the re-opening of the Iraq/UK preliminary examination by deploying three overall strategies. First, the government has stated its intention to co-operate with the OTP – and it has

¹¹⁷ Author’s interviews (various). However, as noted elsewhere in this Article, some interviewees believe that the OTP is applying a new and higher threshold in this examination for determining whether there is a reasonable basis to determine whether crimes within the jurisdiction of the Court were likely committed. Author’s interviews (various).

¹¹⁸ See *2016 Report on Preliminary Examination Activities*, para. 230, see *supra* note 9. As of August 2017, the OTP was yet to make an announcement on whether it will proceed with requesting the authorization of an investigation of the situation in Afghanistan.

seemingly done so to date in all ways expected by the Office.¹¹⁹ Second, the government has made it clear that it believes the preliminary examination should be closed, on three grounds: (1) the Court lacks jurisdiction since the crimes were not committed on a large scale and/or systematically; (2) due to the existence of judicial measures in the UK which address crimes in Iraq, the Rome Statute's complementarity regime renders the situation inadmissible; and (3) the information that the preliminary examination is based on is not credible.¹²⁰ Third, and closely connected to that, the British authorities have targeted the lawyers involved in the accountability processes, and have made broader moves aimed at avoiding a repeat of the legal processes that have emerged in this case, including a proposal to derogate from human rights law so that it no longer applies to situations of armed conflict.¹²¹

Concerning the first claim as to why the preliminary examination should be closed, government officials have continuously stated that the crimes committed in Iraq were not systematic, intimating that the ICC lacks subject-matter jurisdiction. For example, following the submission by ECCHR and PIL to the OTP in January 2014, an MoD spokesperson plainly stated that they “reject the suggestion the UK's Armed Forces – who operate in line with domestic and international law – have systematically tortured detainees”.¹²² Then Foreign Secretary William Hague similarly noted that whereas “there have been some cases of abuse that have been acknowledged and apologies and compensation have been paid appropriately”, the “government has always been clear and the armed forces

¹¹⁹ There is no suggestion by any of the persons consulted for this research that the UK government has in any way failed to live up to that promise to cooperate with the ICC.

¹²⁰ Government officials have communicated these views to ICC Prosecutors in no uncertain terms, and on that basis requested an end to the examination as soon as possible. Author's interviews (various).

¹²¹ Prime Minister Theresa May has stated that the proposal, which would be “implemented by introducing a ‘presumption to derogate’ from the ECHR in warfare”, aims at putting “an end to the industry of vexatious claims that has pursued those who served in previous conflicts”. See Peter Walker and Owen Bowcott, “Plan for UK military to opt out of European convention on human rights”, in *The Guardian*, 4 October 2016. For a further discussion of the proposal, see Marko Milanovic, “UK to Derogate from the ECHR in Armed Conflict”, in *EJIL: Talk!*, 5 October 2016.

¹²² Jonathan Owen, “Exclusive: Devastating dossier on ‘abuse’ by UK forces in Iraq goes to International Criminal Court”, in *The Independent*, 12 January 2014, see *supra* note 1.

have been clear that they absolutely reject allegations of systematic abuses by the British armed forces”.¹²³

Concerning the second claim as to why the preliminary examination should be closed, government officials have continuously pointed to the existence of domestic judicial processes, in particular IHAT, as something that renders ICC action unnecessary and cases inadmissible.¹²⁴ For example, in January 2014, an MoD spokesperson noted that the allegations made by ECCHR and PIL are “either under thorough investigation or have been dealt with [...] further action through the ICC is unnecessary when the issues and allegations are already known to the UK Government, action is in hand and the UK courts have already issued judgments”.¹²⁵ Then Foreign Secretary William Hague similarly noted: “These allegations are either under investigation already or have been dealt with already in a variety of ways, through the historic abuses system that has been established, through public inquiries, through the UK courts or the European courts”.¹²⁶ Notwithstanding the rejection that the ICC has subject-matter jurisdiction in this case, British diplomats have attempted to portray the above as “a clear demonstration of complementarity in action” in the context of the Assembly of States Parties.¹²⁷

Concerning the third claim as to why the preliminary examination should be closed, government officials have contested the credibility of the information submitted to the ICC as well as the credibility of the senders of the Article 15 communications. Former Prime Minister David Cameron promised to crack down on “spurious” legal claims, and further stated in January 2016: “I want our troops to know that when they get

¹²³ *Ibid.*

¹²⁴ In his review of IHAT, Sir David Calvert-Smith suggested that the processes employed by the IHAT would “certainly satisfy the requirements of civilian investigation and prosecution organizations in England and Wales”, and he “would be very surprised therefore if an international tribunal were to take a different view”. See UK Attorney General’s Office and Ministry of Defence, Sir David Calvert-Smith, *Review of the Iraq Historic Allegations Team*, 15 September 2016, p. 37 (*‘Review of the Iraq Historic Allegations Team’*) (<http://www.legal-tools.org/doc/35793d/>).

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ During the 2015 Assembly of States Parties, the UK stated that it had “demonstrated to the [ICC] Prosecutor that these matters are being thoroughly dealt with at national level – a clear demonstration of complementarity in action.” See Catherine Adams, “Statement of the United Kingdom of Great Britain and Northern Ireland”, 18 November 2015 (<http://www.legal-tools.org/doc/bb9cc0/>).

home from action overseas this government will protect them from being hounded by lawyers over claims that are totally without foundation”.¹²⁸ Government officials and politicians have frequently referred to the lawyers involved in these legal processes using terms that are worrying from a rule of law perspective, especially since many of the allegations were made while legal proceedings against PIL and Phil Shiner were on-going. For example, Colonel Bob Stewart, a Tory MP on the Commons Defence Sub-Committee, noted: “Not only do we have civilian battlefield ambulance chasers, we now have MoD battlefield ambulance chasers. I’m fed up with our soldiers being chased and harassed and intimidated after they have put their lives on the line”.¹²⁹ It is not clear whether the OTP would be considering statements of this nature for the purposes of assessing ‘willingness’ should the examination proceed to Phase 3. What is clear, however, is that rather than targeting the OTP for re-opening the preliminary examination, some politicians have in a sense “gone after the messengers”.¹³⁰

Taken together, the above suggests that the British government takes the preliminary examination – and more broadly the legal processes surrounding the alleged crimes in Iraq – quite seriously. Besides the reputational costs associated with being subject to an ICC preliminary examination for a leading democracy, the UK may be particularly sensitive to allegations of torture due the critiques arising out of previous military campaigns in Northern Ireland and in the context of de-colonization.

13.5.2. Judicial Processes in the UK Addressing Crimes in Iraq and their Connections to the Preliminary Examination

A variety of judicial processes in the UK address abuses committed during the Iraq war, but they do so in quite different ways, and not all of them are strictly relevant from the perspective of complementarity.¹³¹ This sub-

¹²⁸ “Investigations into unlawful killings by British soldiers dropped”, 25 January 2016, in *The New Arab*.

¹²⁹ Carri-Ann Taylor, “Ambulance-chasing lawyers handed taxpayers’ cash to try to prosecute Iraq war heroes”, in *The Sun*, 4 January 2016.

¹³⁰ This strategy is not unique to the Iraq claims, but has been previously used by British authorities, for example, in the context of lawyers and NGOs pursuing justice for abuses in Northern Ireland.

¹³¹ A comprehensive analysis of these judicial measures is provided in Rachel Kerr’s contribution to this volume. See Rachel Kerr, “The UK in Iraq and the ICC: Judicial Intervention, Positive Complementarity and the Politics of International Criminal Justice”, in Morten

section will briefly outline these processes and point to their relevance to the ICC's preliminary examination, and then proceed to a more thorough analysis of the mechanisms that specifically address criminal liability, namely IHAT and the new mechanism set up following its closure – the SPLI – together with the SPA.

As such, three legally distinct processes in the UK address the crimes allegedly committed by British forces in Iraq, namely: (1) judicial reviews aimed at satisfying obligations under the European Convention on Human Rights ('ECHR') (and the implementing legislation in the UK, the Human Rights Act) to investigate violations of Articles 2 and 3 of the Convention;¹³² (2) civil suits seeking compensation for Iraqi victims, leading to settlements in numerous cases;¹³³ and (3) criminal investigations, initially involving Royal Military Police ('RMP') investigations leading to a limited number of courts martial,¹³⁴ and more recently the investigations undertaken by IHAT – now the SPLI – in conjunction with the military's prosecuting authority, the SPA.¹³⁵

In terms of connections between these legal processes and the ICC preliminary examination, it is noteworthy that the OTP reports on preliminary examinations cite the findings of the judicial review proceedings, noting that their outcomes are being considered in the assessment of whether crimes within the jurisdiction of the Court "were committed on a

Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 1*, Torkel Opsahl Academic EPublisher, Brussels, 2018, chap. 14.

¹³² Kerr outlines the details of the 13 judicial review cases relating to abuses Iraq in her chapter in this volume. See *ibid.*, appendix 3. Besides these reviews, there is also the Iraq Fatality Investigations, which is not discussed in detail in this chapter. See further <http://www.iraq-judicial-investigations.org>.

¹³³ For a further analysis of these cases, see, for example, Monica Feria-Tinta, "Extra-Territorial Claims in the 'Spider's Web' of the Law? UK Supreme Court Judgment in *Ministry of Defence v Iraqi Civilians*", in *EJIL: Talk!*, 25 May 2016.

¹³⁴ Altogether four Courts Martial relating to the situation in Iraq have been completed, with most defendants acquitted or the cases stopped by the Advocate General. One of these cases however, *R v. Payne* relating to Baha Mousa's death led to the conviction of Corporal Donald Payne, who pleaded guilty to a charge of inhumane treatment and was sentenced to 12-months imprisonment. The Courts Martial have been criticized for not being up to standards. Kerr, 2018, appendix 2, see *supra* note 131.

¹³⁵ Additionally, the military has undertaken its own investigations, leading to the publication of the Aitken Report (2008) and the Purdy Report (2010). These reports are not addressed in this chapter. For some comments on these reports, see *ECCHR and PIL January 2014 communication*, pp. 226–27, see *supra* note 42.

large scale or pursuant to a plan or policy”.¹³⁶ This suggests a more complex interplay between international and national justice processes than typically considered in the literature on complementarity, in that national justice processes which work independently and make findings concerning the nature and scope of crimes can potentially serve to bolster OTP activities, as opposed to simply advancing positive complementarity and making an escalation of ICC activities less likely. For the same reasons, it is of interest that the submission made by ECCHR and PIL rely heavily on the findings made by Sir William Gage in the Baha Mousa Inquiry as well as the evidence made available by the government during that inquiry.¹³⁷

Moreover, the fact that more than 300 civil suits in which Iraqi victims have sued the MoD have been settled and led to more than £20 million being paid in compensation is seen by many as undermining the government’s narrative that the abuses in Iraq were not systematic.¹³⁸ As Mercer argues: “anyone who has fought the MoD knows that they don’t pay out for nothing [...] clearly this isn’t just one or two bad apples, as they have been characterised, this is on a fairly large and substantial scale”.¹³⁹ Many of the allegations in the ECCHR and PIL submissions to the ICC involve victims who have also pursued civil suits. However, because the facts of these settled cases are not publicly available, they are unlikely to directly inform the ICC’s preliminary examination.¹⁴⁰

At the same time, the tendency of domestic legal processes to focus on individual abuses as opposed to systemic issues was a main reason for ECCHR and PIL to approach the ICC in the first place. Bethany Shiner, formerly with PIL, explains:

¹³⁶ See *2015 Report on Preliminary Examination Activities*, para. 44, see *supra* note 45.

¹³⁷ The ECCHR and PIL submission notes that the Baha Mousa Inquiry “has facilitated the present communication”, and relies extensively on the legal and factual findings of the judge leading the inquiry. For example, ECCHR and PIL cite to the contents of video recordings and detainees’ medical records disclosed by the MoD during the inquiry as well as testimonies by government officials given in the context of the inquiry. The submission by ECCHR and PIL also cite to the Courts Martial, emphasizing that in *R v. Payne and Others* the Court accepted Colonel Mendonca’s defence that he had genuinely believed that the Brigade had sanctioned the use of stress positions and hooding. See *ECCHR and PIL January 2014 communication*, pp. 20–22, 109–18 and 223–24, see *supra* note 42.

¹³⁸ The Guardian reported in October 2016 that 326 cases had been settled with about £20m being paid in compensation. See Press Association, “British troops face investigation over ill-treatment of Iraqis”, in *The Guardian*, 16 October 2016.

¹³⁹ Author’s interviews (Nicholas Mercer).

¹⁴⁰ Author’s interviews (Bethany Shiner).

Essentially, in the judicial review proceedings, in *Ali Zaki Mousa II* [...] the claim was advanced that this should be a single Iraq inquiry, which is essentially an overarching independent systemic issues inquiry [...] the Secretary of State said, ‘we’d refuse that inquiry on the grounds of cost, time, expertise, so forth’ [...] And the Secretary of State said, ‘our decision can’t be impugned by the court’, and the court agreed. So, that quickly shot down the possibility of getting systemic issues outside of the Baha Mousa case aired. Because the system that was established, and is still in operation now, is clearly ineffective [...] the Iraq Fatalities Investigations do have some worth, but they’re really slow, it’s a case by case basis; [Judge] Newman has got limited resources; and years later, there’s no accountability. [...] The ICC is clear about criminal accountability and command responsibility. So, I think the fact that the systemic issues wouldn’t be aired by way of public inquiry meant that the only other way to ensure that the issues were analysed and that the individuals responsible were identified [...] is through the ICC.¹⁴¹

13.5.3. The Establishment and Closure of IHAT

IHAT was established by the MoD in March 2010 to investigate allegations of criminal conduct by British military personnel during operations in Iraq between 2003 and 2009 as a way to comply with Britain’s obligations to undertake independent investigations under human rights law.¹⁴² This followed an application for judicial review filed by PIL in February 2010 in the case *Ali Zaki Mousa v Secretary of State for Defence (Mousa No. 1)* which challenged the ongoing RMP investigations in light of the government’s obligations under Articles 2 and 3 of the ECHR, and demanded a single public inquiry into all instances of killing and mistreatment in Iraq.¹⁴³ In November 2011, the Court of Appeal found that IHAT was not sufficiently independent to conduct investigations for the purposes of Articles 2 and 3 of the ECHR, because of the inclusion of RMP personnel in the investigation of matters where the RMP had been involved in Iraq, and in March 2012, the MoD announced that RMP personnel were

¹⁴¹ *Ibid.*

¹⁴² MoD, “IHAT: What it is and what it does”, in *Defence in the media*, 13 January 2016.

¹⁴³ See further *ECCHR and PIL January 2014 communication*, pp. 229–33, see *supra* note 42.

to be removed from IHAT and replaced by members of the Royal Navy Police.¹⁴⁴ However, victims pursued another judicial review, challenging the independence of the reformed IHAT in *R (Ali Zaki Mousa and others) v Secretary of State for Defence (Mousa No. 2)*, which led to a High Court ruling on 25 May 2013 that in turn resulted in some further reforms of IHAT.¹⁴⁵ It is beyond the scope of this chapter to discuss the details of how IHAT has changed over the years and why. However, it should be noted that the jurisprudence of the ECtHR has significantly impacted how British courts have approached the matter – and therefore also how IHAT has been re-structured over the years.¹⁴⁶

Whereas IHAT was set thus up prior to the ICC’s re-opening of the preliminary examination in 2014 and was not initially intended to function as a mechanism of complementarity but rather to satisfy the investigatory requirements under human rights law, it soon came to be viewed as part of the complementarity framework by politicians and others. IHAT’s own website now states that its mission includes meeting the “requirements of the ICC”,¹⁴⁷ and MoD statements explicitly note that “without IHAT’s vital work, our Armed Forces would be open to referral to the International Criminal Court – something this Government is determined to avoid”.¹⁴⁸ In February 2017, Mark Lancaster, the minister in charge of defence veterans, defended IHAT’s continued existence as follows: “It was set up for entirely the right reasons. Without having [IHAT], potentially our troops could have been subjected to inquiries by the International Criminal Court”.¹⁴⁹

Regardless of such subsequently revised justifications, IHAT investigations – costing well above £50 million and originally scheduled to last

¹⁴⁴ See further *ibid.*

¹⁴⁵ The details are discussed in Jonathan Horowitz and Steve Kostas, “Case Watch: British Judges Raise Standards for Investigating Wartime Abuses”, in *Open Society Foundations*, 29 May 2013 (available on the OSI web site).

¹⁴⁶ In *Al-Skeini v. United Kingdom*, the ECtHR held that human rights law applies to the Iraq war and occupation in situations where UK forces were an occupying force or when they had custody over an individual and that the RMP investigations were not sufficiently independent to satisfy the standards in the Convention. See ECtHR, *Case of al-Skeini and others v. the United Kingdom*, Application no. 55721/07, 7 July 2011.

¹⁴⁷ IHAT web site.

¹⁴⁸ MoD, “IHAT: What it is and what it does”, see *supra* note 142.

¹⁴⁹ Robert Mendick, “Unanswered questions behind the failed witch hunt of Iraq veterans”, 11 February 2017, in *The Telegraph*.

until 2019¹⁵⁰ – have largely failed to bring about accountability for war crimes in Iraq, raising serious questions concerning its effectiveness from a complementarity perspective. As of 31 December 2016, IHAT had received allegations of potential criminal behaviour relating to 3,392 victims. Of these, only two cases have been referred to the SPA for prosecution (the SPA decided not to proceed with either of them); two cases had been referred to the Royal Air Force police for further investigation but have been since closed; and one soldier was referred to his commanding officer for disciplinary action and was fined £3,000.¹⁵¹ Accordingly, IHAT investigations have not led to a single prosecution for war crimes in Iraq. Ironically – as frequently pointed to in media reports on IHAT – the only criminal conviction resulting from IHAT’s work to date involves an IHAT investigator who falsely impersonated a police officer in the course of his inquiries.¹⁵²

Despite critique of the slowness of IHAT investigations, the prevailing view that emerges from this research is nonetheless that it has worked independently under professional leadership.¹⁵³ However, some question whether IHAT was ever ‘fit for purpose’ from the perspective of complementarity. As Andreas Schüller of ECCHR argues, IHAT originated in the requirement to investigate under the ECHR which justifies a case-by-case approach, “but if you also want to use IHAT to make ICC cases inadmissible, then you would have to frame it differently”.¹⁵⁴ The ability of IHAT investigators – many of them private contractors (often retired police detectives working for the company Red Snapper Group) – to adequately investigate violations of international humanitarian law is disputed.¹⁵⁵ In his review of IHAT, Sir David Calvert-Smith emphasized that IHAT investigations have been carried out by investigators with “no experience of

¹⁵⁰ Lianna Brinded, “British Iraq War veterans may be prosecuted for war crimes”, in *Business Insider*.

¹⁵¹ IHAT, *The Iraq Historic Allegations Team (IHAT) Quarterly update*, October–December 2016 (<http://www.legal-tools.org/doc/f923f0/>).

¹⁵² See, for example, “Bolton West MP Chris Green welcomes closure of investigation into Iraq veterans”, in *Bolton News*, 18 March 2017.

¹⁵³ Author’s interviews (various).

¹⁵⁴ Author’s interviews (Andreas Schüller).

¹⁵⁵ See its web site for additional info: <https://www.redsnappergroup.co.uk>. Of IHAT’s 145 staff, 127 are reported to be Red Snappers. See Matt Quinton, “‘JUST APPALLING’: Firm getting rich off the back of hounding brave British troops accused of bully boy tactics”, in *The Sun*, 24 September 2016.

policing the Army and, although of course familiar with the other ordinary criminal offences, unfamiliar with the concept of a ‘war crime’”.¹⁵⁶ Bethany Shiner similarly notes: “IHAT’s criminal investigation is very different from the ICC’s investigation” in that they focus on service breaches, adding that notwithstanding SPA Director Cayley’s expertise on and commitment to international criminal law, “he’s not the one actually going through all the evidence” (implying this is done by IHAT investigators with no or limited experience in investigating war crimes).¹⁵⁷

During the debate about IHAT’s future in the Commons Defence Sub-Committee, the relevance of the ICC’s preliminary examination to this process was commented on by several key actors, raising profound questions concerning the role of positive complementarity in this examination. Importantly, the Secretary of State for Defence argued that the preliminary examination required the continuation of the IHAT investigations: “If we were unable to demonstrate that these [criminal allegations] were being properly investigated, we could have ended up [...] opening the way to the International Criminal Court. That would have got us into a far more difficult situation”.¹⁵⁸ Peter Ryan, Director of the Directorate of Judicial Engagement Policy, though expressing confidence that the IHAT investigations would uncover “little evidence of serious criminal activity”, similarly suggested that IHAT must continue its work in order to avoid an escalation of ICC intervention.¹⁵⁹ The Attorney General also addressed the likelihood of the ICC proceeding with an investigation and the role of IHAT in that regard, noting that given the huge volume of cases under consideration by IHAT, and the poor quality of evidence to support the majority of those cases, any such ICC inquiry would take “a very large

¹⁵⁶ *Review of the Iraq Historic Allegations Team*, see *supra* note 124.

¹⁵⁷ Author’s interviews (Bethany Shiner). However, SPA Director Cayley states that “we are looking at all offences, including war crimes”. Cayley further explains that four SPA lawyers are permanently based at IHAT’s offices at Upavon to advise IHAT investigators on international criminal law, adding that he personally reviews many of the cases. Author’s interviews (Andrew Cayley).

¹⁵⁸ Adding that the UK was “being watched very closely” by the ICC. See House of Commons Defence Committee, *Who guards the guardians? MoD support for former and serving personnel: Sixth Report of Session 2016–17*, 10 February 2017, para. 117 (hereinafter ‘February 2017 report by House of Commons Defence Committee’) (<http://www.legal-tools.org/doc/7a0253/>).

¹⁵⁹ Noting: “I do not believe that when the IHAT completes its investigations this by and large will be borne out, but we just do not know”. *Ibid.*, para. 118.

amount of time” and would be “an inferior process to the one that we ran ourselves”.¹⁶⁰ However, the Attorney General “did not believe that assuming the ICC would not intervene was a risk worth taking”, and consequently recommended that IHAT “had to continue its work”.¹⁶¹ Nevertheless, the Defence Sub-Committee concluded:

We are not convinced that the International Criminal Court would commit to investigate such a large case load which is based, to a great extent on discredited evidence. While due process must be seen to be done, *we recommend that the MoD presents a robust case to the ICC that the remaining cases would be disposed of more quickly and with no less rigour through service law rather than IHAT.*¹⁶²

The final report issued by the Defence Sub-Committee in February 2017 (called *Who Guards the Guardians?*) concludes that IHAT has proved to be “unfit for purpose”, and had become a “seemingly unstoppable self-perpetuating machine, deaf to the concerns of the armed forces, blind to their needs, and profligate with its own resources”.¹⁶³ The report also concludes that the “focus has been on satisfying perceived international obligations and outside bodies, with far too little regard for those who have fought under the UK’s flag”.¹⁶⁴

In short, perceptions regarding the likelihood of the ICC opening an investigation were a major factor deciding IHAT’s destiny, but even if some stakeholders viewed the risk of the ICC opening an investigation as sufficiently serious to ‘keep IHAT alive’, the Defence Sub-Committee ultimately did not. It is hard to view the Committee’s recommendations as anything but a significant blow to positive complementarity. Plainly, the political costs associated with keeping IHAT alive were seen to outweigh the risk that an ICC investigation will be opened. IHAT – seen as a ‘necessary evil’ to satisfy the procedural requirements under ECHR and later to ‘keep the ICC away’ – was never a popular enterprise among the military, many politicians and the tabloid press.¹⁶⁵ They opposed IHAT due to

¹⁶⁰ *Ibid.*, para. 119.

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*, para. 120.

¹⁶³ *Ibid.*, para. 122.

¹⁶⁴ *Ibid.*, “Summary”.

¹⁶⁵ For example, IHAT has been referred to as a “disgrace” in a Parliament petition (see petition entitled “[T]he Iraq Historic Allegations Team must be stopped as it is a national

the build-up of thousands of cases, the manner in which investigators approached service personnel deployed in Iraq, the financial costs of operating it, and – not least – the reputational damage it was seen to cause the armed forces as well as the threat it posed that British soldiers would be prosecuted. As Bob Stewart,¹⁶⁶ who sits on the Commons Defence Sub-Committee, so plainly puts it: “IHAT is irksome, irritating and upsetting for the Armed Forces”.¹⁶⁷ The ICC’s preliminary examination – albeit considered in the decision-making process – quite simply was not sufficient to prevent IHAT’s closure.

However, the above does not mean that the preliminary examination has had no impact whatsoever on IHAT. Indeed, the general view that emerges from this research is that the ICC’s preliminary examination positively – though subtly – impacted IHAT’s operations. For example, Mercer argues that the opening of the preliminary examination “energized” IHAT to take a statement from him relating to conduct of security forces that he had previously unsuccessfully sought to give.¹⁶⁸ Several other respondents noted that the preliminary examination was sometimes pointed to by decision-makers when specific operational and structural decisions were made.¹⁶⁹ Although domestic legal scrutiny appears to have been the major concern, the directors of IHAT and SPA at times emphasised the ICC preliminary examination in witness statements before UK courts.¹⁷⁰ Further, IHAT would likely have been closed at an earlier stage

scandal.”, available on Parliament’s web site, no. 118038), and the tabloid press has referred to as “rotten” or a “witch-hunt”. See David Willetts, “IRAQ PROBE TO GO: MPs to call for ‘rotten’ IHAT British troop witch-hunt to be scrapped”, in *The Sun*, 6 February 2017.

¹⁶⁶ Bob Stewart, who admitted to using techniques in Northern Ireland that would amount to torture when he served in the armed forces, recently stated that he believes torture is sometimes “justified” and can sometimes “work as an interrogation method”. See Danny Boyle, “I was kind of a torturer in Northern Ireland”, admits Conservative MP and ex-Army officer Bob Stewart”, in *The Telegraph*, 26 January 2017.

¹⁶⁷ See Sam Greenhill, “Five years of lawyers sifting through abuse claims[...] and ONE guilty soldier: Allegations team has completed just 18 cases”, in *The Daily Mail*, 11 January 2017. Prime Minister Theresa May has also expressed her frustrations with the “industrial scale” of claims lodged with IHAT. See Press Association, “British troops face investigation over ill-treatment of Iraqis”, in *The Guardian*, 16 October 2016.

¹⁶⁸ Author’s interviews (Nicholas Mercer).

¹⁶⁹ Author’s interviews (various).

¹⁷⁰ By way of example, SPA Director Cayley pointed to its existence of the preliminary examination in a witness statement to Judge Leggatt, who is providing judicial oversight of IHAT, in the context of explaining the test used by IHAT and the SPA for deciding whether

had it not been for the preliminary examination. As Carla Ferstman of Redress observes, the preliminary examination “forced them to keep [IHAT] open far longer than there was any political will to keep it open”.¹⁷¹ SPA Director Cayley’s remarks on the topic are equally interesting:

The government understood and supported our domestic obligation to address these allegations right from the start. It is true there have been pressures on our work from other quarters and for me, with a background in the international courts, the preliminary examination was a solid handrail, an impetus, so we could press on and complete this vital task in a proper and timely fashion. But the momentum is now firmly established and I would hope that the Court can now seriously look to completing its preliminary examination in the immediate future.¹⁷²

More generally, the judicial processes arising out of the Iraq claims appear to have positively impact the UK’s compliance with relevant international law regimes, though this impact appears to be mainly associated with domestic legal processes. Notably, the MoD revised its approach to the training of interrogators as a consequence of the findings of the Baha Mousa inquiry.¹⁷³

specific allegations should be further investigated, noting that whereas he was “confident that IHAT and the SPA can fulfil the requirements of article 17 of the Rome Statute”, he “would not wish to create any possible doubt about the willingness of the [UK] to investigate and prosecute cases by improperly abridging the criminal investigative process”. See UK High Court of Justice, *Al-Saadoon and Others v. Secretary of State for Defence*, 7 April 2016, [2016] EWHC 773 (Admin), paras. 268–69 (<http://www.legal-tools.org/doc/97d1d3/>).

¹⁷¹ Author’s interviews (Carla Ferstman).

¹⁷² Author’s interviews (Andrew Cayley).

¹⁷³ The MoD explains that the “interrogation course was redesigned in 2011 following the recommendations made by the Chairman of Baha Mousa Inquiry”. Whereas the MoD makes no explicit reference to the ICC preliminary examination, it notes the need for a “robust process for identifying, reviewing, and correcting areas where its doctrine, policy and training have been insufficient to prevent practices or individual conduct that breach its obligations under international humanitarian law”. See *MoD 2014 Report on Systemic Issues Identified From Investigations Into Military Operations Overseas*, see *supra* note 99.

13.5.4. How the Fall of PIL Became IHAT's Fall – Will it Become the Preliminary Examination's Fall Too?

To understand the rise and fall of IHAT, one needs to understand the rise and fall of PIL and its lead lawyer, Phil Shiner. Shiner – who was named human rights lawyer of the year in 2004 – had for years worked vigorously on bringing justice to Iraqi victims. For many, he became synonymous with the pursuit of justice for wrongdoing in the Iraq war.¹⁷⁴ PIL contributed in multiple ways to both the judicial reviews and IHAT investigations of British soldiers in Iraq. Working in tandem with another British law firm, Leigh Day, PIL also brought numerous civil suits against the MoD, many of which were settled and brought compensation to Iraqi victims.¹⁷⁵ The human rights community embraced Shiner for his passion and bravery. Many in the armed forces, the pro-military establishment and the right-wing press in turn despised him for pursuing the ‘boys in Iraq’.¹⁷⁶ PIL – a relatively small law firm based in Birmingham – quickly got in the spotlight and gained significant influence on the process of investigating alleged crimes in Iraq through its submission of thousands of allegations and victims’ statements to IHAT.¹⁷⁷ IHAT in turn depended on PIL for getting access to victims and witnesses. As the frustrations of the armed forces and its supporters grew over PIL and Shiner – often labelled ‘ambulance chasing lawyers’ and worse – so did their frustration with IHAT’s inability to simply close the cases.¹⁷⁸

The charges of misconduct brought against Shiner by the Solicitors Regulation Authority (‘SRA’) before the Solicitors Disciplinary Tribunal (‘SDT’) – and Shiner’s admission to a number of counts of misconduct and subsequent SDT conviction relating to paying Iraqi middlemen to find

¹⁷⁴ See, for example, Owen Bowcott, “Phil Shiner: steep fall from grace for leading UK human rights lawyer”, in *The Guardian*, 2 February 2017. See also interview with Shiner, Catherine Baksi, “‘I’m just a lawyer doing my job. I’ve done nothing wrong’”, in *Legal Action*, March 2015.

¹⁷⁵ Author’s interviews (Bethany Shiner).

¹⁷⁶ Author’s interviews (various).

¹⁷⁷ PIL was instrumental in passing on about two thirds of the 3,392 allegations dealt with by IHAT. See IHAT, “Allegations Under Investigation” (<http://www.legal-tools.org/doc/a3f93e/>).

¹⁷⁸ Accusations that PIL and other law firms are ‘ambulance chasing lawyers’ have been made on numerous occasions by numerous actors. By way of example, see Robert Mendick and Ben Farmer, “‘Ambulance chasing’ law firm that hounded British troops over false claims of Iraq abuse banned from public funding”, in *The Telegraph*, 2 August 2016.

claimants – hammered the nail in IHAT’s coffin.¹⁷⁹ The government’s narrative – strongly supported by the tabloid press – quickly became that IHAT had to be closed because PIL had been closed.¹⁸⁰ According to this narrative, the vast majority of cases before IHAT were spurious by virtue of Shiner’s misconduct (leaving aside the fact that one-third of IHAT’s caseload had nothing to do with PIL). In a sense, the government succeeded in turning the narrative from one of justice for crimes in Iraq to one of justice for soldiers wrongly accused of misconduct. As Defence Secretary, Michael Fallon, stated after Shiner’s conviction: “Justice has finally been served after we took the unprecedented step of submitting evidence on his abuse of our legal system. Phil Shiner made soldiers’ lives a misery by pursuing false claims of torture and murder – now he should apologise”.¹⁸¹

Though some human rights organizations have rightly made a call for differentiating between Shiner’s wrongdoing and the credibility of the allegations he took forward,¹⁸² it seems clear that the government narrative following his conviction has not only intimidated lawyers in Britain but also to a considerable extent undermined the broader support for accountability for crimes in Iraq and potentially in other contexts.¹⁸³ As Car-

¹⁷⁹ Shiner was found guilty of multiple professional misconduct charges, including dishonesty and lack of integrity, on the basis that he made “unsolicited direct approaches” to potential clients and for other grounds. See Solicitors Disciplinary Tribunal, case no. 11510-2016, SRA and Philip Joseph Shiner, Judgement, date of hearing 23 January 2017 – 2 February 2017. Proceedings were also commenced against the law firm Leigh Day, but the firm was cleared of all charges. See John Hyde, “Leigh Day and its lawyers cleared of all 19 charges”, in *Law Society Gazette*, 12 June 2017.

¹⁸⁰ It should be noted that the government’s campaign against lawyers involved in Iraqi claims had commenced earlier in the context of the publication of the Al Sweady public inquiry in December 2014, in which Sir Thyne Forbes held that vast majority of the allegations lacked credibility and were “the product of deliberate lies, reckless speculation and ingrained hostility”. On the Al Sweady inquiry and its broader impact, see further Kerr, 2018, see *supra* note 131 (noting that the inquiry “marked the beginning of the end for PIL”).

¹⁸¹ As cited in Owen Bowcott, “Phil Shiner: Iraq human rights lawyer struck off over misconduct”, in *The Guardian*, 2 February 2017.

¹⁸² Redress argues: “It is important to recall that Mr Shiner’s professional wrongdoing and serious misconduct does not mean that all the allegations of abuse by UK forces in Iraq are tainted or that there is not a need for a full investigation. To the contrary: allegations of detainee abuse do not come from a single source, the Iraq Historical Allegations Team has recorded allegations from a variety of individuals and groups”. See *ibid*.

¹⁸³ Bethany Shiner argues that the narrative of ambulance chasing lawyers has proven “really effective” in part because it “gives the tabloids a soundbite to go to town on”, adding that she has felt “very intimidated: We would receive phone calls of people shouting and

la Ferstman notes, “the whole international, the whole human rights consideration, of this matter became very quiet once Phil became a subject of interest”.¹⁸⁴ Shiner’s case may also have had a broader impact on the legal profession in the UK. Schüller observes: “This goes not only against two individual law firms, but against basically all lawyers doing this kind of work in the UK. And that’s highly problematic [...] if you try to stop representation of victims and so on at this level, that has a broader impact than on the Iraq war related cases”.¹⁸⁵

Some argue this is exactly what the government sought to achieve. Ferstman suggests that there was a “very deliberate” strategy to target lawyers involved in the processes, both to undermine the current accountability processes and to avoid lawyers pushing for new ones in the future.¹⁸⁶ Ferstman also believes that the ICC’s preliminary examination may have added to the determination of these leaders: “A negative aspect of the preliminary examination, one could argue, is that may well have been the motivating factor for the very strong line in terms of referring everything to the Solicitor’s Regulatory Tribunal. If I was being extra cynical, that strong push to connect the dots in that respect was really to discredit the persons who had been supplying information to the ICC”.¹⁸⁷ Schüller similarly explains:

I think it’s not only in relation to the ICC communication, but it certainly plays a role there because [it is] the first time you go after the higher-ups in the higher military and political levels, so it’s getting closer to those making the decisions. Whereas the inquiries [and] IHAT cases are basically on the low levels – I mean, politically for the government, you can live with it – I think with the ICC communication [...] they see the dangers that goes [to] where they don’t want to see any accountability debates [...] And that’s why the reaction is so harsh on all fronts.¹⁸⁸

swearing down the phone [...] I’ve had threats of being petrol bombed personally”. Author’s interviews (Bethany Shiner).

¹⁸⁴ Author’s interviews (Carla Ferstman).

¹⁸⁵ Author’s interviews (Andreas Schüller).

¹⁸⁶ Author’s interviews (Carla Ferstman).

¹⁸⁷ *Ibid.*

¹⁸⁸ Author’s interviews (Andreas Schüller).

It remains an open question to what extent the closure of PIL and Shiner's disbarment from legal practice will directly impact the ICC's preliminary examination. As noted above, ICC prosecutors have continuously stated they are examining the credibility of the Article 15 communication senders. If nothing else, PIL's closure and Shiner's admissions and disbarment will surely impact that assessment. It is likely to also impact the evaluation of the evidence at hand already because the Office's ability to obtain clarifications from the Article 15 communication senders is now more limited. More broadly, the developments discussed here could put the OTP 'on the defensive'. Bethany Shiner suggests: "The problem is, the OTP sees the political, the OTP is fully aware of that. But, the OTP [has] to counter the allegation that these [claims] are all vexatious and the OTP is saying, 'okay, where's the evidence to counter that?'". Bethany Shiner continues: "they [the OTP] made a really good start, and it slowed down because [...] they have to try and counter the state's allegation that these were false". According to Bethany Shiner, this creates "quite a bizarre situation" because she feels compelled to provide "counter evidence because [...] they can't provide it themselves".¹⁸⁹

In a sense, the campaign against the lawyers involved in the legal processes relating to the Iraq allegations demonstrates the efficiency with which a country with significant resources can undermine the pursuit of accountability without directly compromising its international legal obligations, as well as the challenges associated with pursuing accountability primarily on the basis of the work of a small group of lawyers that work at a relative disadvantage.

13.5.5. The Road Ahead for Accountability in the UK

The connections drawn between the closure of IHAT, the ICC's preliminary examination and the proceedings against PIL and Phil Shiner have ramifications for the new mechanism created to address the Iraq allegations, Service Police Legacy Investigations ('SPLI').

The caseload to be dealt with by SPLI is significantly smaller than IHAT's, and this largely boils down to – as Mercer so plainly puts it – that "anything that comes from PIL goes in the bin".¹⁹⁰ Immediately after

¹⁸⁹ Author's interviews (Bethany Shiner).

¹⁹⁰ Author's interviews (Nicholas Mercer). However, should such an approach ultimately be followed it would contradict the comments made by the Attorney General before the Parliamentary Defence Sub-Committee where he noted that it had *not* been demonstrated that "every

Shiner’s disbarment, an IHAT spokesperson made clear that “the evidence presented at the SDT casts serious doubt on the reliability of some of the remaining allegations”.¹⁹¹ In April 2017, Defence Secretary, Michael Fallon, stated: “Now I can confirm that IHAT will close in June and the Service Police should complete investigations into the small number of remaining cases a year earlier than planned”.¹⁹²

Exactly how small is that number then, and how is it arrived at? A statement on the MoD website of 5 April 2017 notes that the remaining cases are “expected to number around 20”,¹⁹³ a number also frequently cited in media reporting on the topic.¹⁹⁴ However, decisions as to what cases will be investigated by the SPLI assumedly does not rest with the MoD, but with investigators and prosecutors. An IHAT spokesperson explains: “We are working closely with the Service Prosecuting Authority to determine which of the remaining allegations originating from PIL should now not be investigated. We will reach decisions as quickly as we can”.¹⁹⁵ According to SPA Director Cayley, “It is in fact difficult to give an answer to anyone on the total number of cases which the SPLI will deal with as the evolution of numbers of cases is an ongoing process”. What is clear is that IHAT director Mark Warwick requested legal advice from Cayley as to how to proceed with the cases following the proceedings against PIL and Shiner, and that Cayley broadly advised that incidents should be prioritized so that all allegations which build exclusively on evidence submitted by PIL will be discontinued unless they involve the most serious

single one of the cases that Mr Shiner brought to the IHAT process was not a genuine case”, further emphasizing that: “We can’t assume—much as we might like to for administrative convenience—that everything [Shiner] brought to us is false. We cannot do that. Again, I’m afraid, the obligation to investigate still exists, even if it came from Mr Shiner and his company. The other point to make finally, of course, is that although quite a large proportion of the cases have come from him and his company, they have not all come from there, so it wouldn’t deal with everything”. See *February 2017 report by House of Commons Defence Committee*, at questions 214–17, see *supra* note 71.

¹⁹¹ Owen Bowcott, “Phil Shiner: Iraq human rights lawyer struck off over misconduct”, in *The Guardian*, see *supra* note 181

¹⁹² As cited in MoD, “IHAT to close at the end of June”, 5 April 2017.

¹⁹³ *Ibid.*

¹⁹⁴ David Willetts, “NO MORE TANK CHASING: Hated IHAT probe which hounded troops with war crime slurs FINALLY set to shut”, in *The Sun*, 6 April 2017.

¹⁹⁵ Owen Bowcott, “Phil Shiner: Iraq human rights lawyer struck off over misconduct”, in *The Guardian*, see *supra* note 181.

offences, such as homicide and rape.¹⁹⁶ It is not obvious that implementing this advice would leave only about 20 remaining cases.

At the time of writing, there is no publicly available information concerning the structure and mandate of the SPLI. According to Cayley, the new regulatory framework for SPLI was yet to be published by July 2017, but the SPLI has made it clear that until further notice it will follow the prior directions of IHAT. This also means that the Joint Case Review Panel that was in place under the IHAT set-up, where investigators and the SPA met regularly to prioritize the handling of the caseload, will continue under SPLI, at least for now.¹⁹⁷ In several other ways, SPLI appears to materialize as a ‘mini-IHAT’, though there will be some important changes in personnel. According to Cayley, 40 Royal Navy Police and Royal Air Force Police members will be included in SPLI’s work, who will be supported by 25 “experienced former civilian police officers who worked on IHAT”. Cayley explains: “What’s being done is that they are keeping very experienced retired civilian police officers in that residual number to provide support for the Navy and Air Force Police”.¹⁹⁸

At the time of writing, there are more unanswered than answered questions concerning the SPLI/SPA set-up and its operations. These will need clarification before one could provide a qualified guess concerning how ICC prosecutors will evaluate it. Key among these questions is the extent to which the SPLI will have operational independence. Human rights organizations have already expressed concerns in this regard. Redress states that it is troubled by the prospect of the Royal Navy Police taking on the remaining investigations, as “it removes any semblance of an independent investigation into any remaining cases”.¹⁹⁹ It is also unclear whether there will be any judicial oversight of SPLI, as was the case with IHAT. Government officials have reportedly committed to finalizing all remaining investigations by end 2018.²⁰⁰

¹⁹⁶ Cayley adds that these discontinued cases “generally involve minor allegations”. Author’s interviews (Andrew Cayley).

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.* At the time of writing this Article, it was not clear whether the support staff includes members of the ‘Red Snapper Group’.

¹⁹⁹ Redress, “IHAT closure threatens proper investigations into allegations of torture by UK soldiers in Iraq”, 10 February 2017 (<http://www.legal-tools.org/doc/6b0078/>).

²⁰⁰ David Willetts, “NO MORE TANK CHASING: Hated IHAT probe which hounded troops with war crime slurs FINALLY set to shut”, in *The Sun*, 6 April 2017, see *supra* note 194.

13.6. Conclusions

There is little doubt that the OTP – perhaps particularly due to the UK’s long-standing support for the Court and international standing – perceives the best-case scenario to be one where the UK takes effective measures to prosecute alleged perpetrators domestically, in ways that would render further ICC action unnecessary (that is, what has been referred to here as the ‘hand-over’ version of complementarity). Whereas the OTP is keen to make positive complementarity ‘work’, this chapter has pointed to a range of challenges for making that happen in the Iraq/UK examination. As such, to succeed, the Office must demonstrate a credible threat of proceeding with an investigation, which is seen to outweigh the political costs associated with prosecuting alleged perpetrators domestically. At the same time, it is in the interest of both the OTP and the UK to avoid direct confrontation entailed by a formal investigation. This creates a delicate situation, involving extensive consultation between the OTP and the British authorities. Among other important objectives, ICC prosecutors are trying to push for domestic proceedings to address the ‘systemic’ issues arising from the alleged crimes. Notwithstanding the absence of any on-going prosecution of commanders, the UK authorities claim they are doing exactly that, and more generally try to convince ICC prosecutors to terminate the preliminary examination on various grounds, including the claim that the Court lacks subject-matter jurisdiction as the crimes were not sufficiently large-scale or systematic.

From an accountability perspective, this approach has so far resulted in limited progress. Despite the existence of a comprehensive system to investigate and prosecute war crimes in the UK, there have been only very few successful prosecutions in domestic courts for war crimes in Iraq. Further, whereas the preliminary examination remains open, it has remained in the so-called Phase 2 for three years, meaning that ICC prosecutors continue to focus on subject-matter jurisdiction despite the extensive evidence forwarded by the Article 15 communication senders, particularly ECCHR and PIL. There are few signs that the preliminary examination will progress significantly in the near future, partly as a consequence of the events relating to PIL’s closure and Shiner’s admission of misconduct.

What is more, whereas British officials have in the past cited the ICC’s preliminary examination as a justification for IHAT’s existence, it is important to note that body was created as a response to the rulings of

domestic courts in light of the jurisprudence of the ECtHR and, arguably, was never equipped to function as mechanism addressing complementarity. Having openly speculated on the likelihood that the ICC would proceed to an investigation in the Iraq/UK situation, in early 2017, the Commons Defence Sub-Committee recommended that IHAT be dissolved. The MoD soon after announced that exactly such a decision had been made. Up till then, the existence of IHAT had been frequently cited by the UK authorities as a key reason why the preliminary examination should be closed with reference to the complementarity regime. At the time of writing, ICC prosecutors had avoided publicly commenting on IHAT's closure, and it remains to be seen how the Office will evaluate the new set-up under SPLI. In all events, it is hard to view IHAT's closure – and the decision-making process surrounding it – as anything but a significant blow to positive complementarity.

More generally, the above suggests that mainstream assumptions concerning the value of preliminary examinations for 'positive complementarity' may be overstated. Even if the UK's international standing combined with the country's long-lasting support for international justice in many ways make the dynamics surrounding this examination unique, the fact that the ICC's Iraq/UK preliminary examination has not 'triggered' a comprehensive and credible justice processes nationally, which could lead ICC Prosecutors to close the preliminary examination, is not exceptional. Indeed, none of the preliminary examinations that have been closed to date were terminated on the basis of an admissibility assessment that domestic processes rendered further ICC action unjustified.²⁰¹

Regardless of how the OTP reacts to IHAT's closure and the issues surrounding the proceedings against Shiner, the government's campaign against PIL and other law firms in the UK involved in legal processes addressing crimes in Iraq has proven highly 'effective'. Not only did it largely change the narrative from one of justice for war crimes in Iraq to one of justice for soldiers wrongly accused by 'ambulance chasing lawyers', but it also appears to more broadly have created a climate where human rights lawyers and NGOs will become excessively careful about challenging the armed forces. Prime Minister Theresa May's statement during her party's conference in Birmingham in October 2016 will hardly

²⁰¹ See *2015 Report on Preliminary Examination Activities*, see *supra* notes 45; *2016 Report on Preliminary Examination Activities*, see *supra* note 9.

encourage anyone to think otherwise: “We will never again — in any future conflict — let those activist left wing human rights lawyers harangue and harass the bravest of the brave, the men and women of our armed forces”.²⁰²

Notwithstanding all the challenges discussed in this chapter, the ICC’s preliminary examination of the Iraq/UK situation has added to the debate about accountability for ‘terror’ crimes, such as detainee abuse, committed by major powers in the context of counter-insurgencies and counter-terrorism campaigns.²⁰³ Importantly, the preliminary examination has brought with it increased scrutiny of the practices utilized by British forces in Iraq. This raises questions – which make the UK authorities uncomfortable and which would otherwise easily have been ignored – concerning the role of commanders in permitting a situation where especially detainee abuse appears to have been widespread, and even whether the military and political leadership at the time may have endorsed interrogation standards that breach international humanitarian law. Taken together with the preliminary examination of the situation in Afghanistan, involving scrutiny of US armed forces and the CIA, this suggests we may be witnessing the beginning of a move toward greater criminalization and ‘judicialization’ of counter-insurgency and counter-terrorism measures. What exactly the ICC’s role will be in that regard remains to be seen, but the opening of preliminary examinations provides a necessary basis for any further contribution.

²⁰² As cited in Andrew Williams, “A conspiracy cooked up by ‘activist left-wing human rights’ lawyers?”, in *OpenDemocracy*, 14 November 2016.

²⁰³ For a discussion of the impunity surrounding these types of crimes, specifically in the US, see, for example, Louise Mallinder, “Power, Pragmatism, and Prisoner Abuse: Amnesty and Accountability in the United States”, in *Oregon Review of International Law*, 2012, vol. 14, no 2, pp. 307–76.

The UK in Iraq and the ICC: Judicial Intervention, Positive Complementarity and the Politics of International Criminal Justice

Rachel Kerr*

The United Kingdom ('UK') Government has a strong track record of providing support to international criminal justice. However, in May 2014, it found itself the subject of a preliminary investigation by the ICC into alleged misconduct of UK forces following the March 2003 invasion of Iraq – an investigation that the UK could not publicly criticize, given that it was a strong supporter of the Court, but one that risked directly contradicting former Prime Minister Tony Blair's assurances when the UK signed up to the Rome Statute in 1998, that no UK citizen would find him or herself in the dock there. The same allegations have been the focus of a series of criminal proceedings, cases brought before the European Court of Human Rights ('ECtHR'), domestic commissions of inquiry, and the Iraq Historic Allegations Team ('IHAT'), which was still actively engaged in investigations 14 years since the events in question took place. The ICC's preliminary investigation sits in the middle of a mess of contradictory and competing concerns, highlighting the sometimes tricky relationship between international and domestic politics, pragmatics and principles. This chapter seeks to set the British response to these developments in the context of a contemporary history of the different ways in which the UK has tried to address the legacy of allegations of unlawful conduct in

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Iraq to date, against the background of a shifting domestic political landscape, and in light of wider UK policy on international justice.

14.1. Introduction

On 13 May 2014, the Prosecutor of the International Criminal Court ('ICC'), Fatou Bensouda, announced that she was re-opening the ICC's preliminary examination into allegations of war crimes committed by British forces operating in Iraq from 2003–08. The examination, previously closed in 2006,¹ was re-opened following submission of a dossier of information relating to alleged crimes by the European Center for Constitutional and Human Rights Law ('ECCHR') and the UK law firm Public Interest Lawyers ('PIL') on 10 January 2014. Four years later, the examination was still ongoing.²

Whatever the eventual outcome, this preliminary examination was highly significant in several aspects. First, the decision to re-open the examination and the way in which it was handled sheds light on the Prosecutor's interpretation of the ICC's mandate to be a site of 'positive complementarity' and her exercise of prosecutorial discretion in that regard. As we have seen in other cases, the point of preliminary examination was not always to be a precursor to an investigation, but rather to encourage activity at the national level.³ Preliminary examinations might have greater potential to be used in this way, where pressure may be exerted at critical points, rather than a full-blown investigation which, once started, may be difficult to stop, as the Kenya and Uganda cases demonstrated.

Moreover, the opening of a preliminary examination into the conduct of one of the permanent five Security Council members and a vigorous supporter of the Court was a bold move and one that could potentially have caused more harm than good to the Court's reputation, if mishandled. It undermined the frequently touted argument that the Court focused un-

¹ ICC-OTP, *OTP response to communications received concerning Iraq*, 9 February 2006 (<http://www.legal-tools.org/doc/5b8996/>).

² In her November 2016 report, the Prosecutor announced that a decision on the Afghanistan examination was 'imminent' (although six months later, one might question her understanding of imminence!), whilst the examination of Iraq remained in the Phase 2 (subject-matter jurisdiction). ICC-OTP, *Report on Preliminary Examination Activities 2016*, 14 November 2016 (<http://www.legal-tools.org/doc/f30a53/>).

³ The conduct of the preliminary examination into Colombia is a good example of this. See, Fatou Bensouda, "Reflections From the International Criminal Court Prosecutor", in *Case Western Reserve Journal of International Law*, 2012, vol. 45, no. 1, pp. 505–511.

duly on Africa and that it was a neo-imperialist institution intent on meting out justice by the strong against the weak. The examination of Afghanistan, potentially involving US, Canadian, UK and Australian forces, also helped undercut this narrative.

But there was a flip-side to this, which was that if the Prosecutor once again decided to close the examination and not proceed to open an investigation into either Iraq (or Afghanistan), she might face criticism that she has succumbed to political pressure and it will only serve to reinforce the anti-ICC rhetoric. Whilst these political questions should not be part of the Prosecutor's calculations, and there is no evidence that they have been, she must nevertheless have been aware of the potential political repercussions of her decisions.

For the UK, it was significant because it constituted evidence of failure on a number of counts. First, it stood in direct contradiction to the assurances given by then Foreign Secretary Robin Cook to Parliament in 2001, when the International Criminal Court Act was passed, that there was absolutely no risk of seeing a British citizen brought before the Court: "British service personnel will never be prosecuted by the International Criminal Court".⁴ Second, it highlighted the fact that UK investigations into alleged abuse, piecemeal and reactive as they have been, were at times seriously flawed and woefully inadequate. Third, it was motivated, at least in part, by a nebulous and as yet unfulfilled desire for 'justice' following the UK's ill-fated invasion of Iraq and its aftermath.

How concerned should the UK Government have been about all of this? The Attorney General, Dominic Grieve QC, and Director of Service Prosecutions, Andrew Cayley QC, both made it clear that they did not consider it at all likely that the examination would result in an investigation being opened at the ICC, and even more unlikely that any charges will be brought against UK citizens.⁵ They were probably right to be so confident. Nevertheless, after 14 years, £150 million, two inquiries, four courts martial, one criminal trial, hundreds of civil claims for damages, six judicial reviews, four ECtHR judgments and two misconduct hearings,

⁴ Foreign Secretary Robin Cook, International Criminal Court Bill [Lords], United Kingdom House of Commons, 3 April 2001, HC Deb 03 April 2001 vol. 366, cc. 214-79 (available in the *Hansard*).

⁵ Ian Cobain, "ICC to examine claims that British troops carried out war crimes in Iraq", in *The Guardian*, 13 May 2014.

the ongoing preliminary examination ensured that the “tortuous process”⁶ of UK-Iraq war crimes investigations continued, even as developments in the UK increased the pressure for them to be closed down.⁷

Meanwhile, the August 2016 collapse of PIL, the firm that lodged the dossier containing new allegations which prompted the opening of the preliminary examination, and the finding of professional misconduct against its head, Phil Shiner, cast considerable doubt over many of the allegations, and prompted the ICC to look again at the claims. And yet, the question that has not been adequately addressed, and which is left hanging over the military, is not whether any abuse took place – we know it did – but whether it was ‘systematic’ – in particular whether it was the direct result of the sanctioned use of the so-called ‘five techniques’ banned in 1972 (hooding, stress-positioning, noise bombardment, deprivation of food and water, and sleep deprivation), how long it went on, and how widespread it was. The Baha Mousa Inquiry, led by Sir William Gage, lambasted the Ministry of Defence’s “corporate failure” with regard to the directive given to soldiers shortly after the invasion, that interrogators in the Joint Forces Interrogation Team should adopt a “holistic approach” to interrogation and “not to get wound up in prisoners’ rights at the expense of [intelligence]”.⁸ Gage noted that there was “more than a hint” that the practice extended beyond the individual treatment of Baha Mousa. Meanwhile, others suggested that the events of summer 2003 were not an aberration but were in fact “very British”.⁹ Ian Cobain concludes his study of British interrogation practice with the sobering observation that, “far

⁶ United Kingdom, High Court of Justice, *R (Al-Saadoon and others) v. Secretary of State for Defence (No 2)*, Judgment, 17 March 2015, [2016] EWHC 773 (Admin), para. 1 (‘Al-Saadoon (No. 2) Judgment’) (<http://www.legal-tools.org/doc/d82ad0/>). In March 2015, the Daily Mail recounted the story of Kevin Williams, now 32, who was cleared by two army investigations and a collapsed criminal trial, then by IHAT and the Iraq Fatalities Inquiry, and now allegedly finds himself under the scrutiny of the ICC. Larisa Brown, “Betrayal of a Hero”, in *Daily Mail*, 23 March 2013.

⁷ In February 2017, a House of Commons Defence Sub-Committee called for UK-based investigations conducted by the Iraq Historical Allegations Team to be closed down.

⁸ Mousa inquiry, cited in Ian Cobain, *Cruel Britannia: A Secret History of Torture*, Portobello, London, 2012, p. 285.

⁹ A.T. Williams, *A Very British Killing: The Death of Baha Mousa*, Jonathan Cape, London, 2012.

from being alien, torture can be seen to be as British as suet pudding and red pillar-boxes”.¹⁰

But, if this was the problem, was the ICC the solution? Among the challenges of dealing with this issue was not only the volume of allegations – which were significant – and the time that has elapsed, but the multiple ways in which these allegations were made. The picture was complicated because it was so muddled. The question remains: whom, and what, was all of this for? Was the purpose of bringing the allegations to secure individual accountability in the form of prosecutions, or was it to force the UK to accept State responsibility? If the latter, what was the desired outcome – compensation or reform? If the former, it carried the risk that, whereas sufficient evidence suggests that such episodes of cruelty did occur, insufficient evidence existed to prove ‘beyond reasonable doubt’ an individual’s culpability. Or was it all part of an ill-defined desire to seek ‘justice’ for the invasion of Iraq? Overshadowing all of this was that war’s dubious legacy, the shifting political landscape in the UK and the tenor of public discourse, involving increasingly polarized attitudes toward two groups of professionals, human rights lawyers and the military. The ICC’s preliminary investigation thus sat in the middle of a mess of contradictory and competing concerns, highlighting the delicate relationship between international and domestic politics, law, pragmatics and principles. This chapter seeks to disentangle the mess of litigation that has followed the UK’s debacle in Iraq in order better to understand how and why we got here.

14.2. The Iraq War

In many respects, Tony Blair and the collapse of his ‘ethical foreign policy’ was at the centre of all of this. In the ‘fury of judging’ that followed the ill-fated decision in 2003 to invade Iraq, the need to hold Blair individually accountable was a recurring theme. That this remained almost impossible did not deter his opponents, including Labour Party leader Jeremy Corbyn, who expressed the view that Blair should be tried for war crimes.¹¹ In anti-war demonstrations, banners called for Tony Blair and US President George W. Bush to be indicted as war criminals, and inter-

¹⁰ Cobain, 2012, p. 309, see *supra* note 8.

¹¹ Jon Stone, “Jeremy Corbyn ‘still prepared to call for Tony Blair war crimes investigation’”, in *The Independent*, 23 May 2016.

national lawyers warned the government not to embark on what would be an ‘illegal war’ in letters to the newspapers.

Upon the release of the Report of the Iraq Inquiry in July 2016 (commissioned by Prime Minister Gordon Brown in 2009), the ICC Prosecutor felt compelled to correct a story in *The Telegraph* that not only suggested that Blair *could* be prosecuted for the crime of aggression, but condemned the ICC for having already ruled out.¹² The conflation of war crimes and aggression, the confusion over the jurisdictional parameters of the ICC and the ‘spread of inaccurate information’ to which Bensouda referred was not limited to this one article, but recurred time and again in public discourse on the Iraq War litigation. As did the sentiment, expressed most vociferously in the right-wing press, that “double standards” are being applied whereby British soldiers “who have gone out to do their best for us [...] are being hounded, and yet the guy who took them there is not being looked at”.¹³

On 19 March 2003, the UK joined the US in a “coalition of the willing”, invaded Iraq and overthrew the government of Saddam Hussein. US President George W. Bush declared “Mission Accomplished” on 1 May 2003 and there followed a period of military occupation under the governance of the Coalition Provisional Authority (‘CPA’), which formally took charge on 6 May 2003, until the new Iraqi Governing Council was formed on 28 June 2004. British troops remained in Iraq with a UN-mandate (originally under Resolution 1546, 8 June 2004) to assist with stabilization and reconstruction until 31 December 2008 (they began their formal withdrawal in 2009). They were mainly stationed in the southeast of the country with a base at Basra. The occupation was affirmed by Security Council Resolution 1483 on 22 May 2003, but the legality of the decision to invade, taken by the Prime Minister on 17 March 2003, in the absence of specific Security Council authorization, remained highly contentious. Not only was the stated justification subsequently proven to be false – Iraq’s programmes for the development of chemical, biological and nuclear weapons had been dismantled – but the invasion and its aftermath led to dire consequences for the people of Iraq – conservative estimates are 150,000 Iraqi civilian deaths and over a million displaced –

¹² ICC-OTP, “Statement of the Prosecutor correcting assertions contained in article published by *The Telegraph*”, 4 July 2016 (<http://www.legal-tools.org/doc/74578d/>).

¹³ Robert Mendick, “Outrage as war crimes prosecutors say Tony Blair will not be investigated”, in *The Telegraph*, 2 July 2016.

and for the region that are still being felt. The removal of Saddam Hussein unleashed sectarian violence that proved impossible to contain and scotched efforts to rebuild the country.

All of this is well known and rehashed elsewhere, including in the Chilcot Report. What concerns us here is not only the conflation of ‘war crimes’ and ‘aggression’ mentioned above, leading to calls for Blair to stand trial in “The Hague” (without much clarity as to which body in The Hague should try him) but the conflation of legality and legitimacy. Even setting aside arguments about strict legality, the aftermath of the invasion fuelled arguments that it was essentially illegitimate, and allegations of war crimes committed by UK forces both fed into that narrative, and were fed by it. The sense of injustice and the sense that there was a ‘rotten smell’ at the core of the operation had enormous impact both on the tenacity of those bringing the claims and on the ambivalence with which they were received and dealt with.

The Chilcot Inquiry sits in the midst of the Iraq War’s legacy of litigation. Chilcot was focused on (a) whether it was right and necessary to invade Iraq in March 2003; and (b) whether the UK could – and should – have been better prepared for what followed.¹⁴ As such, it involved consideration of political and legal questions. It did not give an opinion on whether or not the invasion was legal but its conclusions were damning nonetheless: that military action in this case “was not the last resort”, judgments as to the severity of the threat posed by Saddam’s alleged weapons of mass destruction were unjustified, planning and preparations for the post-invasion period were “wholly inadequate” and the Government failed to achieve its stated objectives.¹⁵ Other inquiries addressed the failure of the intelligence community and the media’s role in presenting the material (the Butler and Hutton Inquiries), and the UN’s Oil for Food programme (the Volker and Cole Inquiries). A handful of cases were brought before the courts questioning the legality of the war, and seeking compensation for those injured and killed in its prosecution,¹⁶ including a

¹⁴ “Statement by Sir John Chilcot”, 6 July 2016 (<http://www.legal-tools.org/doc/db3836/>).

¹⁵ Cabinet Office and Iraq Inquiry, “Report of the Iraq Inquiry: Executive Summary”, 6 July 2016 (<http://www.legal-tools.org/doc/79425c/>).

¹⁶ United Kingdom, House of Lords, *R v. Jones and others v. Director of Public Prosecutions*, Appellate Committee, 29 March 2006, [2006] UKHL 16. The defendants were all protesters against the War against Iraq in 2003 and had taken part in direct action involving damaging, or attempting to damage, military vehicles and property. During their trial for

private prosecution seeking a criminal trial of Blair, Foreign Secretary Jack Straw and Attorney General Lord Goldsmith for launching an aggressive war.¹⁷

The other way in which the legitimacy of the war was challenged was focused on the conduct of the war itself and the conduct of UK forces in post-war occupation and stabilization operations. The Chilcot Report does not address this aspect, except in a passing reference to inadequate training and preparation for handling civilian detainees. Allegations of war crimes involving use of prohibited weapons, dubious targeting practice and unlawful killing in shooting incidents were overlaid with an ever-increasing pile of allegations of abuse and ill-treatment of Iraqi civilians detained by UK forces. It was these allegations that prompted two separate inquiries to be established – the Baha Mousa and Al-Sweady Inquiries (to be discussed below) – and which formed the bulk of the January 2014 dossier submitted to the ICC, prompting the Prosecutor to re-open the preliminary examination into the UK-Iraq situation.

14.3. War Crimes

The first allegations of misconduct were made by non-governmental organizations on the basis of their own investigations on the ground in Iraq into Iraqi civilian deaths. In December 2003, Human Rights Watch published a report, *Off Target*, which expressed “serious concerns” about some practices adopted by coalition forces, including the use of cluster munitions in residential neighbourhoods, “unsound” targeting methodology in attacks on Iraqi leadership targets, and attacks on dual-use targets such as power distribution facilities.¹⁸ HRW did not allege that war crimes had been committed, since the determination of whether a crime had been committed would require a more careful balancing of military necessity

criminal damage and cognate offences, the accused sought to defend themselves on the basis that they were seeking to prevent international crimes, namely war crimes in Iraq, and the crime of aggression. See Antonio Cassese (ed.), *Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, p. 1274.

¹⁷ A private prosecution was brought by Iraqi General Abdul-Wahid Shannan ar-Ribat seeking a trial of Tony Blair, Jack Straw (Foreign Secretary) and Lord Goldsmith (Attorney General) was dismissed in November 2016 on the grounds of immunity of state officials but the claimants are seeking to challenge this decision. Vikram Dodd, “UK attorney general in bid to block case against Tony Blair over Iraq war”, in *The Guardian*, 16 April 2017.

¹⁸ Human Rights Watch, “Off Target: The Conduct of War and Civilian Casualties in Iraq”, 11 December 2003 (<http://www.legal-tools.org/doc/9c35c6/>).

and proportionality. Moreover, cluster munitions, whilst widely condemned, were not explicitly unlawful. Rather, they sought to highlight “cause for concern”.

A second set of allegations concerned incidents in which Iraqi civilians were killed by UK forces on patrol. In a May 2004 report, Amnesty International alleged that in several documented cases, “UK soldiers opened fire and killed Iraqi civilians in circumstances where there was apparently no threat of death or serious injury to themselves”.¹⁹ Amnesty presented nine cases of alleged unlawful killing, in which Iraqi civilians were killed at the scene or fatally injured and died later. Some of these were investigated at the time, others have been since, and still others appeared among civil claims for damages and/or judicial review. None of these situations is manifestly unlawful – a court would need to determine whether the soldiers were acting in line with their rules of engagement and whether they applied due care and attention, and this would need to be done with consideration of the context and immediate circumstances of the incident. All were reported as shooting incidents and a decision taken whether or not to investigate first by the Commanding Officer and then by the Royal Military Police. None of these incidents was investigated further at the time.

The third set of allegations focused squarely on the treatment of Iraqi civilians in British custody and on acts that, if proven, were manifestly unlawful, such as beating, sexual assault and other ill-treatment. In February 2004, the International Committee of the Red Cross expressed concern at “serious violations of international humanitarian law” being committed by the coalition forces, including: brutality against protected person upon capture and initial custody, sometimes causing death or serious injury; physical or psychological coercion during interrogation to secure information; prolonged solitary confinement in cells devoid of daylight; excessive or disproportionate use of force against persons deprived of their liberty resulting in death or injury during their period of internment; seizure and confiscation of private belongings.²⁰ The report

¹⁹ Amnesty International, “Killings of Civilians in Basra and Al-Amara”, 10 May 2004, Index number: MDE 14/007/2004 (<http://www.legal-tools.org/doc/d76394/>).

²⁰ International Committee of the Red Cross, *Report of the International Committee of the Red Cross (ICRC) on the Treatment by the Coalition Forces of Prisoners of War and Other Protected Persons by the Geneva Conventions in Iraq During Arrest, Internment and In-*

noted especially the use of hooding, beatings and humiliating and degrading treatment such as being forced to spend considerable amounts of time naked and in “stress positions”. The allegations of mistreatment of detainees by UK forces were corroborated in a report published by the REDRESS Trust in October 2007, which highlighted concerns that during the period of occupation, British forces were using previously banned “techniques” of hooding, sleep-deprivation and stress-positioning.²¹

14.4. Trials and Tribulations

These allegations of serious mistreatment and of unlawful killing gave rise to three sets of legal consequences, which made up different parts of the jigsaw of domestic Iraq War litigation discussed below: (i) the responsibility of the State to investigate and prosecute alleged war crimes discharged through criminal and military courts (prosecutions); (ii) the duty of the State to investigate alleged violations of Articles 2 and 3 (and possibly 5) of the European Convention on Human Rights (‘ECHR’) as set out in the 1998 Human Rights Act (judicial reviews); and (iii) individual claims for damages brought by victims and their families (not discussed in detail in this chapter). It presented a complex picture, with overlapping chronologies in separate jurisdictions, but dealing with either very similar or identical cases in different fora. The IHAT, established in 2010, was seized with all three sets of overlapping claims although it was aimed at satisfying only the first two; the legal firm PIL was at the heart of the last two.

14.4.1. Prosecutions

As already stated, the killing of civilians, whilst clearly regrettable, does not always constitute a war crime. In Iraq, standard operating procedure was that where the death of a civilian occurred, a report was made to the Commanding Officer, who made a judgment as to whether or not the soldier involved acted with their rules of engagement. If they did, that was the end of the matter and no further action was taken. If there was any doubt, the situation was referred to the Special Investigations Branch (‘SIB’) of the Royal Military Police (‘RMP’) to investigate. Notably, in

terrogation, January 2004. Although the Report was confidential, significant extracts were published in the *Washington Post* in May 2004 (<http://www.legal-tools.org/doc/e5324c/>).

²¹ REDRESS, *UK Army in Iraq: Time to Come Clean on Civilian Torture*, London, October 2017.

April 2004, a decision was taken that all shooting incidents involving British forces were automatically to be referred to the SIB.

From the invasion of Iraq in March 2003 to January 2008, it was reported that 229 allegations of criminal activity were investigated by the RMP, including shooting incidents, traffic accidents, fraud and other crimes. Of these, 20 led to further consequences, either summarily dealt with in the chain of command or resulting in courts martial. One, unusually, resulted in a criminal trial.²² Four resulted in courts martial.²³ All four cases related to incidents in South-East Iraq between May and September 2003 when the UK was an occupying power. In two other cases investigations were undertaken but no charge brought.²⁴ A handful of the proceedings related to conduct that could be considered outside the course of normal military operations and, according to Brigadier Jonathan Aitken in his 2008 report, “could not be mitigated by decisions made by British soldiers ‘in the heat of the moment’ or in the face of an immediate threat to their own safety, but rather which appeared to have been committed in a deliberate or callous manner”.²⁵

In the *Evans* case, charges were dropped and the military investigation heavily criticized by the Judge Advocate General Jeff Blackett. Blackett also accused some Iraqi witnesses of deliberately making false statements in hope of financial gain: “In their own admission these Iraqis saw an opportunity to seek financial advantage from the British Army.

²² Trooper Kevin Williams of the Royal Tank Regiment was charged with the murder of Iraqi civilian Hassan Said on 3 August 2003 in Ad Dayr. Said was killed in the course of a struggle in which Williams said he was trying to grab his colleague’s gun. The initial determination of the CO was that Williams was acting within the RoE. However, the Army Prosecuting Officer passed the case to the Attorney General who referred it to the Crown Prosecution Service. A criminal trial began at the Old Bailey in September 2004 but was stopped in April 2005 after the CPS reviewed the case and determined there was no case to answer.

²³ I have discussed these cases in detail elsewhere in Rachel Kerr, *The Military on Trial: The British Army in Iraq*, Wolf Legal Publishers, Nijmegen, 2009. See also, Christine Byron, “British Prosecutions Arising Out of the War in Iraq”, in Antonio Cassese (ed.), *Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, pp. 602–4.

²⁴ These related to the death by drowning of Saheed Shabram on 24 May 2003 and alleged beatings of Iraqi youths by British soldiers in Al Amarah in April 2004, captured in video footage.

²⁵ “The Aitken Report: An Investigation into Cases of Deliberate Abuse and Unlawful Killing in Iraq in 2003 and 2004”, 25 January 2008, p. 2 (<http://www.legal-tools.org/doc/9c175a/>).

They frequently spoke of *fasil*, or blood money, and compensation in relation to what were patently exaggerated claims.”²⁶ In July 2005, following the collapse of the *Williams* case, former Chief of the General Staff Lord Guthrie accused solicitors of “touting for business on the streets of Iraq”.²⁷

Most controversial was the case concerning Baha Mousa. On 15 September 2003, Baha Da’oud Salim Mousa, an Iraqi civilian, died whilst in British custody at a military base in Southern Iraq. In the days and hours leading up to his death, Mousa was subjected to numerous assaults, resulting in 93 separate injuries. The post mortem reported that the precise cause of death was unknown but was either the net result of those injuries or postural asphyxia.²⁸ Seven soldiers were charged with manslaughter and inhuman treatment, including the commanding officer, Colonel Jorge Mendonca. Of these, only one was convicted – Corporal Donald Payne, who pleaded guilty to inhumane treatment. No one was held individually criminally responsible for Mousa’s death.²⁹ The Judge Advocate attributed this to a “more or less closing of ranks”.³⁰

Whilst for some these cases indicated serious failings in the military justice system, for others they represented show-trials – an attempt to find scapegoats for the Government’s disastrous war and an effort to shield those at higher levels. Meanwhile, sections of the right-wing press were apoplectic about the decision to charge Colonel Mendonca, a decorated “war hero”. However, perhaps the most serious implication was that the case lifted the lid on what many saw as a systematic pattern of abuse and a climate of impunity. During the trial, the situation in the detention unit where Mousa and others were held was described by the prosecution as “an apparent free for all with soldiers acting in the belief of total impunity”.³¹ The court heard how the detainees were referred to as “the choir” as

²⁶ Owen Bowcott and Richard Norton-Taylor, “Paratroopers cleared of murdering Iraqi after judge says there is no case to answer”, in *The Guardian*, 4 November 2005.

²⁷ “Retired top brass claim Forces are under siege”, in *The Times*, 15 July 2005.

²⁸ Rachel Kerr, “The UK in Basra and the Death of Baha Mousa”, in David Lovell (ed.), *Investigating Operational Incidents in a Military Context: Law, Justice, Politics*, Brill, Leiden, 2015, pp. 71–85.

²⁹ Mousa’s family were offered £2.83 million in compensation by the British Government in 2008.

³⁰ *R v. Payne*, Transcript, 13 February 2007.

³¹ *R v. Payne*, Transcript, 2 February 2007.

each was struck in turn and called out in pain. They were also subjected to inhumane and degrading treatment including being forced to drink a soldier's urine and being kept in the toilet area for three hours. In his opening statement, the prosecuting barrister made clear the open and systematic nature of the abuse: "We are not dealing in this case with an isolated incident of ill-treatment carried out behind closed doors. We are dealing [...] with the systematic ill-treatment [...] over a period of at least 36 hours done quite openly".³² Most damningly, evidence brought forward in the trial pointed to the sanctioned use of techniques such as stress positions, hooding, sleep and food deprivation, four of the "five techniques" banned in 1972 following revelations of their use in Northern Ireland.³³ These were used to maintain the "shock of capture" and apparently cleared at Brigade level and discussed with Mendonca, according to the testimony of Major Royce, who served as Battle Group Internment Review Officer in July–August 2003.³⁴ Apparently, specific direction not to use the 'five techniques', given in 1972 by then Prime Minister Edward Heath and reiterated by the Attorney General during proceedings at the ECtHR in 1977, somehow came to be 'lost' in Iraq in the summer of 2003.³⁵

In 2005, Brigadier General Sir Mike Jackson, Chief of the General Staff, appointed Brigadier Jonathan Aitken to look into how allegations of abuse had been dealt with, assess the measures taken to date and make further recommendations.³⁶ The Aitken Report, published in January 2008, reviewed six cases that were investigated by the RMP, including the four that resulted in court martial proceedings set out above, and two that did not result in any prosecution. The report considered two main aspects: (1) arrest, detention and interrogation policy; and (2) the military criminal justice system. On the latter, Aitken found the system to be "fit for purpose", with some "weaknesses" in the system now corrected. Moreover, "[t]he absence of a single conviction for murder or manslaughter for deliberate abuse in Iraq may appear worrying but is explicable". He went on to explain how evidence must be gathered and the case proven "beyond

³² *R v. Payne*, Opening statement by Mr Julian Bevan for the prosecution. Transcript, 22 September 2006.

³³ The fifth, subsection to loud and continuous noise, is alleged to have been used on other occasions.

³⁴ *R v. Payne*, Transcript, 13 February 2007.

³⁵ REDRESS, 2017, p. 22, see *supra* note 21.

³⁶ Aitken Report, 2008, see *supra* note 25.

reasonable doubt”. This was, as he says, a “stiff test” but not an insurmountable one, surely.

Whilst Aitken raised concerns about how the directive not to use the “five techniques” was “lost” in Iraq in 2003, and highlighted serious shortcomings in training and preparation for deployment in Iraq, he concluded that the incidents of abuse were few and far between, the work of a few “rotten apples”. Aitken also concluded that the incidents were limited to a relatively short period in 2003–04 and there was no evidence of abuse after around May 2004. In some quarters, this led the report to be dismissed as simply a ‘whitewash’. It is somewhat incongruous in that whilst it discussed some very serious shortcomings – the loss of the direction not to use the ‘five techniques’, the inadequacies of training and preparation pre-deployment – also noted in the Chilcot Report – and the inability of the RMP properly to investigate allegations without undue delay, largely due to overstretch, the conclusions were that nothing was really all that wrong. However, coupled with the censure of the RMP investigation in the *Evans* court martial and the hint that something was amiss regarding some of the claims made, the seeds of what was to continue to be a problem were already clearly identified.

Aitken also neatly side-stepped the key issues arising from the abuse allegations, focusing on the steps taken since September 2003 to rectify the issue, with clear guidance promulgated and widely disseminated on what was deemed inappropriate conduct in detainee handling,³⁷ although it did acknowledge that some areas were to be investigated further. In its response to the report, the REDRESS Trust, responsible for bringing some of the abuse allegations to light, stressed the need for a full independent and public inquiry.³⁸ Subsequent developments, including the cases seeking judicial review discussed below, have brought us closer to

³⁷ These are set out in detail in the Appendix to the Aitken Report. The adequacy of these measures are disputed. The European Center for Constitutional and Human Rights (‘ECCHR’) and Public Interest Lawyers (‘PIL’) allege that abuses continued beyond 2003/4 and that the guidance was questionable. See, ECCHR and PIL, Communication to the Office of the Prosecutor of the International Criminal Court, *The Responsibility of Officials of the United Kingdom for War Crimes Involving Systematic Detainee Abuse in Iraq from 2003-2008*, 10 January 2014 (‘ECCHR and PIL Communication, 2014’). Ian Cobain similarly argued that training was inadequate post-2004 in Cobain, 2012, see *supra* note 8.

³⁸ REDRESS, Memorandum to the UK Ministry of Defence on the Aitken Report: An investigation into cases of deliberate abuse and unlawful killing in Iraq 2003 and 2004, 31 January 2008.

this outcome, but key questions remained unanswered, even as the volume of litigation increased.

14.4.2. Inquiries

The second set of cases were aimed not at ensuring *individual* criminal responsibility but at ensuring *institutional* accountability at the level of the State. Specifically, these cases sought to force the Government to conduct inquiries into alleged unlawful killing, abuse and mistreatment of Iraqi civilians. The claims were brought by PIL acting for Iraqi civilian claimants under the 1998 Human Rights Act, which incorporates the ECHR into English law.³⁹ Article 2 of the Convention protects the right to life and Article 3 prohibits torture and inhuman or degrading treatment. In both cases, there is an obligation on the State to investigate alleged breaches. The claimants in these cases contended that the Secretary of State for Defence was in breach of this obligation by deciding not to conduct inquiries and sought judicial review of the decision.

The first step in this long and “tortuous process”⁴⁰ was the *Al-Skeini* case. In 2004, relatives of six Iraqis killed by British soldiers in Iraq, including Baha Mousa’s family, brought a claim against the British Government seeking judicial review of the Secretary of State’s March 2004 decision not to conduct independent inquiries into their deaths, accept liability or pay compensation, in violation of Articles 2 and 3 of the ECHR. The UK Government, for its part, argued that there was no such duty in this case because the ECHR did not apply extra-territorially.

The UK courts ruled in the Government’s favour, finding that the ECHR applied only to Mousa since he was physically in the custody of British forces whereas the other alleged incidents occurred outside the ‘legal space’ of the ECHR’s jurisdiction. Unsatisfied with this judgment,

³⁹ The cases are set out in Appendix 3. I have not included here the claims for judicial review brought by PIL on behalf of Campaign for Nuclear Disarmament and on behalf of relatives of British soldiers killed in Iraq who sought an inquiry into the legality of the Iraq War. United Kingdom, High Court of Justice, *Campaign for Nuclear Disarmament v. Prime Minister*, Judgment, 17 December 2002, (2002) EWHC 2777 (Admin); United Kingdom, House of Lords, *R (on the application of Gentle and another) v. The Prime Minister and others*, Opinion of the Lords of Appeal, 9 April 2008, [2008] UKHL 20 (<http://www.legal-tools.org/doc/659cf3/>).

⁴⁰ United Kingdom, High Court of Justice, *Al-Saadoon & Ors v. Secretary of State for Defence (Rev 1)*, Judgment, 7 April 2016, [2016] EWHC 773 (Admin), para. 1 (‘*Al-Saadoon (Rev. 1) Judgment*’) (<http://www.legal-tools.org/doc/97d1d3/>).

the families took their case to the ECtHR in Strasbourg, which made the landmark ruling in July 2011 that the ECHR did in fact apply on the basis that the UK in Iraq assumed the exercise of “public powers normally [...] exercised by a sovereign government”.⁴¹ Given that the UK exercised authority and control over these individuals, there was a jurisdictional link. The Court also found that the UK’s investigations had thus far been inadequate. The immediate result of this ruling was the setting up of a public inquiry into Mousa’s death, the Baha Mousa Inquiry. Chaired by Sir William Gage, the Inquiry was established in 2008 to “investigate and report on the circumstances surrounding the death of Baha Mousa and the treatment of those detained with him [...] in particular where responsibility lay for approving the practice of conditioning detainees” and to make recommendations.⁴² The Inquiry issued its Report on 8 September 2011.⁴³

The Report was damning. It gave a detailed account of the events of 14–16 September, from the point at which Baha Mousa was taken into custody to the moment of his death on 15 September 2003 and its immediate aftermath. It was, in the words of Sir William Gage, an “appalling episode of serious, gratuitous violence” and a “very serious breach of discipline”. Mousa, together with six others, were arrested by a group of soldiers from A Company, 1 Queen’s Lancashire Regiment, during a raid on the Hotel Ibn Al Haitham in Basra on 14 September 2003. On arrival at headquarters, the men were searched, handcuffed and hooded and placed in the temporary detention facility, where they were made to adopt stress positions and kept in “extreme heat and conditions of some squalor”. It condemned the “cowardly and violent” behaviour of British soldiers who, over the course of 36 hours, had subjected Mousa to numerous assaults inflicting 93 visible injuries, resulting eventually in his death. Corporal Payne was singled out, and others were also deemed to bear a “heavy responsibility”, including Lieutenant Craig Rodgers (commander of A Company), Major Michael Peebles (Battle Group Internment Review Officer), and Colonel Jorge Mendonca (Commanding Officer), who should

⁴¹ ECtHR, *Al Skeini v. UK*, Judgment, 7 July 2011, Application no. 55721/07. For discussion, see Wells Bennett, “The Extraterritorial Effect of Human Rights: the ECHR’s Al-Skieni Decision”, *Lawfare*, 12 July 2011; Marko Milanovic, “European Court Decides Al-Skeini and Al-Jedda”, *EJIL: Talk!*, 7 July 2011.

⁴² *Report of the Baha Mousa Inquiry*, 8 September 2011, Part XVII Summary and Findings (<http://www.legal-tools.org/doc/3398de/>). For detailed discussion, see Williams, 2012, see *supra* note 9.

⁴³ *Ibid.*

have known what was going on in that building long before Baha Mousa died, and the Regiment's Chaplain and Medical Officer, Father Peter Madden and Dr. Derek Keilloh who turned a "blind eye" to the abuse.⁴⁴

The Report demonstrated how the infamous 'five techniques' had come to be used by British forces in Iraq in 2003. As already discussed, the techniques, designed to prolong the 'shock of capture', were effectively banned from use in 1972 as a result of an inquiry into their use in Northern Ireland. The inquiry blamed their coming back into circulation on a "corporate failure" at the MoD. It also found that the use of such techniques, which was "unjustified and wholly unacceptable" had led inexorably to the death of Mousa in so far as it had created an environment in which the abuse took place. Gage concluded that there was "more than a hint" that hooding, if not other conditioning practices, was more widespread than just this incident, but he was unable to investigate how widespread.⁴⁵

A second investigation was established in 2009 following claims brought by the relatives of Iraqi civilians who were alleged to have been taken into custody by British forces and killed or mistreated between May and September 2004, in the wake of the Battle of Danny Boy. In *R (Al-Sweady and others) v. Secretary of State for Defence*, the claimants sought judicial review of the decision not to investigate and in the course of proceedings, the Secretary of State conceded. The Hon. Sir Thyne Forbes was appointed to lead the Al-Sweady Inquiry, which commenced its hearings on 4 March 2013 and issued its report in December 2014. The Inquiry found that the conduct of some soldiers "fell below the high standards normally to be expected of the British Army" and echoed the Mousa Inquiry by questioning some of the procedures adopted for dealing the detainees which amounted to "actual or possible ill-treatment".⁴⁶

However, it found the vast majority of the allegations, including the most serious involving torture and murder to be "wholly without foundation and entirely the product of deliberate lies, reckless speculation and ingrained hostility".⁴⁷ Both PIL and Leigh Day, the other law firm in-

⁴⁴ Keilloh was later subject to disciplinary proceedings by the General Medical Council. Ian Cobain, "Baha Mousa doctor Derek Kelliogh struck off after repeated dishonesty", in *The Guardian*, 21 December 2012.

⁴⁵ Baha Mousa Inquiry, 2011, see *supra* note 42.

⁴⁶ *Report of the Al-Sweady Inquiry*, 17 December 2014, para. 735.

⁴⁷ *Ibid.*, para. 740.

involved, were subsequently referred to the Solicitors Disciplinary Tribunal to answer complaints about its handling of the claims. This marked the beginning of the end for PIL. The *Al-Sweady* findings are also notable because they echoed some of the earlier court martial proceedings and the Mousa Inquiry about the quality of investigations and the veracity of claims. They also echoed concern regarding the procedures used by British forces when dealing with people in custody: “serious” allegations of torture and murder were set aside, but allegations of ill-treatment were substantiated.

Meanwhile, litigation rumbled on in the UK courts. Justice Leggatt described the process as “tortuous”.⁴⁸ He was right. And to what end? The aim of all of this litigation was to force the government to convene a broadly-mandated public inquiry into British conduct in Iraq.⁴⁹ However, neither the Iraq Inquiry, nor the Baha Mousa and Al-Sweady inquiries has yet managed to satisfy this goal.

14.4.3. IHAT and the Iraqi Civilians Litigation

The third major set of litigation related to claims brought by a number of Iraqi citizens in February 2010 seeking orders for the Secretary of State to investigate allegations that they, or the relatives, were subject to serious ill-treatment or unlawfully killed by British forces. At the outset, there were 190 such claims, but in 2014, another 875 claims were added, and a further 165 in 2015, bringing the total number of claims to 1,230 by March 2015. The majority of claimants were represented by PIL with the exception of two individuals, Yunus Rahmatullah and Amanatullah Ali, who were represented by another legal firm, Leigh Day.⁵⁰ Many of these claimants (over 1,000) brought separate actions for compensation from the Ministry of Defence, but here we are primarily concerned with the judicial review proceedings.

In these cases, two key issues were in question. The first was whether the alleged incidents fell under the UK’s jurisdiction for the purposes of the ECHR. Whilst it was accepted, following the *Al-Skeini* case, that individuals in the custody of British forces at the time of their death

⁴⁸ Al-Saadoon (Rev. 1) Judgment, see *supra* note 40.

⁴⁹ *British Forces in Iraq: The Emerging Picture of Human Rights Violations and the Role of Judicial Review*, Public Interest Lawyers, 30 June 2009 (on file with the author).

⁵⁰ Al-Saadoon (No. 2) Judgment, see *supra* note 6.

or alleged ill-treatment were within the UK's jurisdiction, the Secretary of State for Defence continued to challenge the extent to which it applied to other individuals killed or injured by British forces in Iraq.⁵¹ In March 2015, the Supreme Court followed the logic of the decision of the ECtHR in the *Al-Skeini* case that where British forces exercised public powers and physical power and control over individuals, those individuals were deemed to be under UK jurisdiction.⁵² The second major issue was the extent of the duty to investigate and whether investigations undertaken to date were (a) independent, (b) prompt, (c) transparent and (d) sufficiently involving the victim's next of kin.

In March 2010, the Ministry of Defence decided to establish the IHAT. IHAT began work in November 2010 with a mandate to "investigate as expeditiously as possible those allegations of criminal conduct by HM forces in Iraq [...] in order to ensure that all those allegations are, or have been, investigated appropriately".⁵³ It had two separate functions: (1) to discharge the responsibility of the State to investigate individuals alleged to have committed crimes; and (2) to discharge the responsibility of the State to investigate alleged violations of Articles 2 and 3 of the ECHR. IHAT encountered some early difficulties, compounded by difficulties in recruiting experienced staff and "performance issues" resulting from the "cocktail" of service personnel, police investigators and contractors.⁵⁴ It was initially expected to take two years but in June 2011, it was dismissed

⁵¹ There is an additional set of issues revolving around the application of Article 5 regarding conditions of detention. The current position of the Government, upheld by the Supreme Court in January 2017, is that of United Nations Security Council Resolution 1546, 8 June 2004, S/RES/1546 (2004) (<http://www.legal-tools.org/doc/6c586c/>), which authorizes the UK to take all necessary measures to contribute to the maintenance of security and stability and specifically to intern where that was necessary for imperative reasons of security means that IHL applied and not IHRL so there is no obligation to investigate except in cases of 'enforced disappearance' which may fall under the UN Convention on Torture. United Kingdom Supreme Court, *Al-Waheed v. Ministry of Defence*, Judgment, 17 January 2017, [2017] UKSC 2 (<http://www.legal-tools.org/doc/977ebb/>).

⁵² *Al-Saadoon* (No. 2) Judgment, see *supra* note 6. Upheld in United Kingdom, Court of Appeal, *Al-Saadoon & Ors v. The Secretary of State for Defence & Ors*, Judgment, 09 September 2016, [2016] EWCA Civ 811 (<http://www.legal-tools.org/doc/564c51/>).

⁵³ IHAT Terms of Reference.

⁵⁴ Attorney General's Office, Ministry of Defence, "Review of the Iraq Historic Allegations Team by Sir David Calvert-Smith", 15 September 2016.

as “shambles” as news emerged that only one person had been interviewed in its first six months of operation.⁵⁵

Meanwhile, IHAT was the focus of “considerable judicial scrutiny”.⁵⁶ Following its establishment in March 2010, the focus of the *Ali Zaki Mousa (No. 1)* proceedings switched to seeking judicial review of (a) whether IHAT was sufficiently independent and (b) whether a public inquiry was needed because of the wider systemic issues. In 2011, the Court of Appeal held that IHAT was not sufficiently independent because of the involvement of members of the RMP who were involved in operations in Iraq.⁵⁷ RMP personnel were replaced with personnel from the Royal Naval Police and in May 2013, the High Court was satisfied that this new constitution met the requirements for impartiality.⁵⁸ However, it found investigations into deaths in custody to be inadequate. The Court noted undue delay in investigating cases, lack of accessible information for the public or the victim’s families and the failure to investigate any wider issues of State responsibility.⁵⁹ It did not order a full inquiry, but directed that there should be a “new approach” and ordered what approximated to coroner’s inquiries in individual cases where investigations were concluded by no prosecution was brought. Mr. Justice Leggatt was appointed to have overview of the inquiries and to deal with issues arising.

Justice Leggatt, concerned at the lack of up-to-date information on IHAT’s website and the slow progress of its investigations, held a hearing in April 2015. The information provided to the hearing by IHAT, the Director of Service Prosecutions (‘DSP’), Andrew Cayley QC, and the Ministry of Defence showed that IHAT had concluded its investigations in only 19 of 53 cases of alleged unlawful killing in its original caseload and only two inquiries had been established.⁶⁰ In his order of 26 June 2015, Leggatt granted permission to proceed with claims for judicial review of

⁵⁵ Angus Crawford, “Iraq Historic Allegations team probe ‘is a shambles’”, in *BBC News*, 14 June 2011.

⁵⁶ Review of the Iraq Historic Allegations Team, 2016, see *supra* note 54.

⁵⁷ United Kingdom Court of Appeals, *R (Ali Zaki Mousa) v. Secretary of State for Defence*, Judgment, 22 November 2011, [2011] EWCA Civ 1334 (AZM).

⁵⁸ United Kingdom, High Court of Justice, *R (Ali Zaki Mousa) v. Secretary of State for Defence (No. 2)*, Judgment, 24 May 2013, [2013] EWHC 1412 (Admin).

⁵⁹ *Ibid.*, para. 14.

⁶⁰ United Kingdom, High Court of Justice, *Al-Saadoon & Ors v. Secretary of State for Defence*, Judgment, 26 June 2015, [2015] EWHC 1769 (Admin) (‘Al-Saadoon Judgment’) (<http://www.legal-tools.org/doc/97c5a7/>).

the decision not to conduct inquiries in five other cases.⁶¹ The slow progress was attributed to the “extreme difficulty of investigating events that took place in Iraq many years ago”.⁶² Leggatt also noted the huge expansion of IHAT’s caseload as an inhibiting factor.⁶³

And here was the crux of the problem. Not only was it an immensely difficult task to investigate historical allegations; the difficulties were compounded by the massive increase in IHAT’s caseload. It was flooded with new allegations in 2014–15. At the same time as the increase in public law claims described above, between November 2014 and April 2015, IHAT’s caseload increased from 165 cases involving 279 victims to 762 claims with 1,000 more notified but not yet formally submitted.⁶⁴ Although some of these resulted from IHAT’s own investigations, the vast majority were submitted by PIL, and were the same as those in the *Ali Zaki Mousa* proceedings, which by April 2015 numbered 1,268 and by the following year, 1,386.⁶⁵ In April 2016, Justice Leggatt stated that “it is simply quite impossible for IHAT to investigate in any depth with anything approaching a reasonable timescale all the allegations of killing and ill-treatment which have so far been allocated to it – let alone any more which may yet be added”.⁶⁶

As of 30 September 2016, IHAT had received allegations relating to some 3,368 victims. 1,555 were not pursued for various reasons (duplicates, not within the jurisdiction of the Service Justice System, not a criminal offence, and so on, including four that were returned to PIL with a request for a witness statement) and 127 were still to be screened. This left 1,686 potential allegations comprising 325 of unlawful killing and 1361 of alleged ill-treatment. As of 23 November 2016, when IHAT issued its latest quarterly update, it was in the process of closing 192 allegations, of which 105 were of unlawful killing and the remaining 87 were of

⁶¹ In April 2016, the High Court ordered inquiries in two of these cases but not in the other three on the basis that there were slim prospects of obtaining evidence so the cost was unjustifiable and ruled that the DSP should be able to apply this test to other cases. In respect of one of these cases (Muhji), Justice Leggatt noted misconduct on the part of PIL: “I cannot let the matter pass without recording my concerns about the way in which this claim has been handled”, *Al-Saadoon* (Rev. 1) Judgment, para. 128, see *supra* note 40.

⁶² *Ibid.*, para. 15.

⁶³ *Al-Saadoon* Judgment, para. 36, see *supra* note 60.

⁶⁴ *Al-Saadoon* (Rev. 1) Judgment, para. 18, see *supra* note 40.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, para. 261.

ill-treatment. Of these, one case of unlawful killing was referred to the DSP and another to the RMP for further investigation, one soldier was fined for ill-treatment and one soldier referred to the DSP. In both of the cases referred to him, the DSP decided not to proceed with prosecution.⁶⁷ As at 30 September 2016, IHAT was dealing with 1494 remaining allegations, involving 1724 victims (the figures are hard to pin down – see table).

⁶⁷ *The Iraq Historic Allegations Team (IHAT) Quarterly Update*, 23 November 2016 (on file with the author).

Case load	Date	Details	Number of victims (as at 30 September 2016)			Current caseloads (as of 31 Mar. 2016)			
			Unlawful killing	Ill-treatment	Terminated	Not allocated	Cases	Victims	
1	1 Mar. 2010–18 Nov. 2014	Original IHAT caseload	63	218	281	46	166	281	
2	18 Nov. 2014–	Allegations identified in civil claims		156	156	33	93	158	
3	Aug.–Oct. 2014	PIL	108	207	315	16	315	315	
4	18 Nov. 2014–	Identified by IHAT investigation teams	3	20	23		4	5	
5	Oct.–Dec. 2014	PIL	18	393	411	15	411	411	
6	Jan. 2015–	PIL	80	257	337	21	337	337	
7	Mar 2015.	PIL from Al-Sweady Inquiry			9	9	9	9	
8		Identified in claim register			36	36	-	-	
9	Apr. 2015–	PIL and others	6	30	36	8	36	36	
10	10 Sep. 2015–	Identified by IHAT investigation teams		4	4		1	4	
11	22 Oct. 2015–	PIL	37	75	112	3	2	2	
12	23 Mar. 2016	PIL			4	4	-	-	
Total			315	1,360	1,724	142	49	1,374	1,558

Table 1: IHAT caseload

The task before IHAT was immense. In April 2016, IHAT employed 140–150 people and the scale of its operations “mirrors that of a major domestic police force”. Total funding committed to the end of 2019 was £57.2 million.⁶⁸ The investigations themselves were challenging and suffered severe setbacks, such as the limits on the numbers of ‘Operation MENSA’ interviews (with vulnerable complainants in third countries). Sir George Newman, the Inspector appointed to conduct the inquisitorial inquiries established to date, expressed the view that, however desirable it may be to give close attention to these allegations, “some regard has to be paid to the practical difficulties and the likely time it will take” to investigate all incidents.⁶⁹ He also pointed out duplication of efforts by IHAT and a potential inquiry, and suggested that IHAT’s work might be expedited by the Service Prosecuting Authority making an earlier assessment of the likelihood of prosecution.

The tone of judicial oversight appeared to be focused on speeding up IHAT’s work where possible and some changes in procedure were recommended that might allow more boldness in dismissing allegations at an early stage, where justified. It was also noted that whilst the earlier submissions to IHAT comprised letters of claim and a first witness statement, which allowed investigators to identify the date and location of the relevant incident, later submissions by PIL lacked this information and in many cases only contained the claim summary. Filling the gaps added significantly to IHAT’s workload. It was also noted by the DSP that in some cases, the information provided by the complainant when interviewed by IHAT was “starkly different” to that in the summary of claim.⁷⁰ As a result, Justice Leggatt considered that IHAT could properly decline to investigate allegations that were brought solely on the basis of a claim summary, and lacking any witness statement, thus separating out allegations that were reported as criminal misconduct from those seeking damages and potentially reducing the number of claims IHAT would need to investigate.

However, hanging over any efforts to make IHAT’s work more expeditious was the added complication of the ICC’s preliminary investigation. The DSP said that while he remained confident that IHAT and the

⁶⁸ Al-Saadoon (Rev. 1) Judgment, para. 8, see *supra* note 40.

⁶⁹ *Ibid.*, para. 263.

⁷⁰ *Ibid.*, para. 286.

Service Prosecuting Authority could fulfil the requirements of Article 17 of the Rome Statute (on admissibility), “he would not wish to create any possible doubt about the willingness of the United Kingdom to investigate and prosecute cases by improperly abridging the criminal investigation process”.⁷¹ In his September 2016 Review, Sir David Calvert-Smith, former Director of Public Prosecutions, concluded that “the processes now employed would certainly satisfy the requirements of civilian investigation and prosecution organizations in England and Wales, and [I] would be very surprised therefore if an international tribunal were to take a different view”.⁷²

IHAT was scheduled to complete its work by the end of 2019 but in April 2017 it was announced that it would be shut down in a matter of months following a scathing report by the House of Commons Defence Sub-Committee in February 2017, which concluded that IHAT had become “a seemingly unstoppable self-perpetuating machine, deaf to the concerns of the armed forces, blind to their needs, and profligate with its own resources”.⁷³ The report also echoed concerns highlighted in both Calvert-Smith’s report and by Justice Leggatt that “both the MoD and IHAT have focused too much on satisfying the accusers and too little on defending those under investigation”. The shadow of the ICC loomed large: “The focus has been on satisfying perceived international obligations and outside bodies, with far too little regard for those who have fought under the UK’s flag”.⁷⁴ Which brings us, finally, back to the ICC.

14.4.4. The ICC’s Preliminary Examination

As already discussed, on 13 May 2014, the ICC Prosecutor announced that she was re-opening a preliminary examination of the situation in Iraq, previously closed in 2006, following the submission of new information relating to alleged crimes committed by UK forces in Iraq from 2003 to 2008. The examination was conducted pursuant to Article 15(2) of the Rome Statute to determine whether or not there is a “reasonable basis” to

⁷¹ *Ibid.*, para. 268.

⁷² Review of the Iraq Historic Allegations Team, 2016, Section 14, para. 14.22, see *supra* note 54.

⁷³ *Who guards the guardians? MOD support for serving and former personnel*, House of Commons Defence Committee Report, 10 February 2017 (<http://www.legal-tools.org/doc/7a0253/>).

⁷⁴ *Ibid.*

proceed to the next stage, which is to request a Pre-Trial Chamber to authorize an investigation. In accordance with Article 53(1) of the Rome Statute, in making this determination, the Prosecutor must consider (a) jurisdiction; (b) admissibility (complementarity and gravity) and (c) the interests of justice. In relation to (a) there are two aspects. The first is clearly met: the UK deposited its instrument of ratification with the Court on 4 October 2001, so the ICC has jurisdiction over UK nationals, regardless of where the crimes were committed. But the Office of the Prosecutor ('OTP') has yet to determine whether there is "reasonable basis" to believe that alleged crimes were committed that fall within the Court's jurisdiction. The second and third criteria will involve a qualitative judgment as to the adequacy and 'genuineness' of national investigations, the nature of the alleged crimes and what is deemed to be 'in the interests of justice'. The Prosecutor's determination on the second criteria concerning the genuineness of national investigations will likely be the most contentious in this case, given the catalogue of litigation and investigations underway in the UK, and will shed some light on how aggressively positive complementarity is interpreted.

The first examination was closed by the previous Prosecutor, Luis Moreno-Ocampo, on the basis that the required threshold for ICC jurisdiction was not met.⁷⁵ Many of the allegations related to the legality of the war, over which the ICC did not have jurisdiction whilst those involving allegations of crimes against humanity and genocide lacked indicia relating to the widespread and systematic nature, or requisite intent for genocide, and allegations of war crimes involving civilian deaths in the course of military operations were without reasonable basis. It was only with regard to allegations of wilful killing and inhuman treatment of Iraqi civilians that the Prosecutor found reasonable basis to believe that crimes had been committed under the jurisdiction of the Court, but they did not meet the gravity threshold. The number of alleged victims was relatively small: somewhere between 4 and 12 victims of wilful killing and a limited number of victims of inhuman treatment, making a total of less than 20 persons.

So, what changed in 2014? The decision to re-open the preliminary examination was based on an initial assessment of "substantial" new information in a dossier transmitted by the ECCHR and PIL to the OTP on

⁷⁵ OTP response to communications received concerning Iraq, *see supra* note 1.

10 January 2014. The initial dossier contained numerous allegations of systematic detainee abuse involving 412 victims.⁷⁶ Later submissions brought the total allegations to 1,390, of which 391 related to alleged unlawful killings and 1,071 to alleged ill-treatment.⁷⁷ What was different this time around was that, first, the dossier focused exclusively on allegations of wilful killing and ill-treatment of Iraqi detainees, not the crime of aggression, or genocide, or allegations of war crimes relating to the conduct of military operations. Second, it alleged *systemic* abuse, with culpability reaching to the highest levels of political and military leadership. This appeared to be the primary motivation behind the submission of the dossier; the demands for accountability contained therein were directed up the chain of command from the soldiers responsible for meting out the abuse, to those bearing the “greatest responsibility” in the political and military chain of command.⁷⁸ It was alleged that not only was the abuse widespread, but that it was “ordered, sanctioned or enabled by higher level officers in the military chain of command, and with the knowledge of higher level civilian officers”.⁷⁹ And third, it alleged many more victims than the relatively small handful of cases assessed in 2006. On this basis, it may be concluded that it met the gravity threshold since they would meet the criteria of Article 8 of the Rome Statute: “The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or *as part of a large-scale commission of such crimes*”.

As of November 2016, the OTP had analysed 831 victim accounts from which they had identified 841 incidents involving 2,350 separate allegations of abuse against detainees between 2003 and 2009. The alleged victims were mostly male, and over two-thirds were between 18 and 34 years of age. The OTP categorized the most frequently reported methods of abuse including beatings, restraints, sensory deprivation or overstimulation, deprivation of clothes, water, food, medical care privacy, sleep, toilet, forced exertion, harsh environments, isolation, stress positions, sexual assault and humiliation, electrocution and burning, suspension, waterboarding and verbal threats and abuse. The OTP also analysed 204 of 319 witness statements in relation to unlawful killing and identified 133 separate incidents, including 20 incidents resulting in the death of

⁷⁶ ECCHR and PIL Communication, 2014, see *supra* note 37.

⁷⁷ ICC-OTP, *Report on Preliminary Examination Activities 2016*, see *supra* note 2.

⁷⁸ ECCHR and PIL Communication, 2014, see *supra* note 37.

⁷⁹ *Ibid.*, p. 250.

two or more people. The majority of these incidents occurred in the course of conventional military or counter-insurgency operations in air attacks, crossfire incidents, search and arrest operations, non-combat vehicle accidents, and escalation of force. In the remaining 35 cases, the OTP cited a lack of information on the circumstances.

In its November report, the OTP noted the ongoing proceedings against PIL and Leigh Day by the Solicitors Regulation Authority and the closing down of PIL following withdrawal of legal aid funding. It also noted that it was “mindful” that domestic proceedings were underway, involving judicial review of IHAT.⁸⁰ The former had a bearing on the OTP’s decision as to whether there is a reasonable basis to believe that alleged crimes were committed that fall within the Court’s jurisdiction and all the cases already considered by the OTP will need to be reviewed in this light. The latter related to admissibility as noted above, and it remains to be seen what the implications of IHAT’s closure might be, although the shadow of the ICC was surely a significant factor in ensuring that a legacy team was established to continue IHAT’s work.

What tests will the OTP apply to determine the adequacy of UK investigations? Article 17 of the Rome Statute sets out the rules for admissibility. Because of the complementary function of the Court, the onus is on the Prosecutor to prove admissibility with the assumption that cases will be inadmissible unless it can be shown that (a) the State is unwilling or unable genuinely to carry out the investigation or prosecution; or (b) where an investigation has been carried out and a decision has been made not to prosecute, this has resulted from unwillingness or inability. The third criteria rules out double jeopardy by requiring that the person concerned has not already been tried for the *same conduct*. And the fourth criteria relates to gravity – the case is inadmissible if not of sufficient gravity to justify the Court’s intervention. In other cases, the Court has applied a two-step process to determining admissibility, asking first, whether there are ongoing investigations or investigations that have resulted in a decision not to prosecute, which is an objective or factual test, and second, whether such investigations have been genuine, which could be understood as more of a qualitative or subjective test.⁸¹

⁸⁰ ICC-OTP, *Report on Preliminary Examination Activities 2016*, see *supra* note 2.

⁸¹ For discussion see, Paul Seils, *Handbook on Complementarity*, International Center for Transitional Justice, New York, 2016.

If the two-step test is applied to the UK case, the answer to the first question is yes. The answer to the second question is more debatable. If the British courts were satisfied that the State was discharging its duty to investigate under the ECHR, will that also suffice to satisfy the ICC that the UK is both “able” and “willing” to prosecute, even if no prosecution resulted? ECCPR and PIL think not. They argue that the record of RMP investigations and small number of courts martial demonstrated unwillingness on the UK Government’s part properly to investigate, especially higher ranking officials,⁸² and that the few investigations that did occur were undertaken “in a limited and deeply reluctant manner” and designed to shield those at higher levels from responsibility.⁸³ In this regard, the dossier echoed Shiner’s earlier criticisms of the *R v. Payne* court martial, which he labelled a “travesty”.⁸⁴

For its part, if it were to challenge admissibility, the UK Government would need to show that national proceedings are “progressive, concrete and tangible”.⁸⁵ The potential weakness in the UK’s case is that whilst they can show convincingly that serious crimes that might fall within the Court’s jurisdiction have been investigated, and in some cases prosecuted, at the national level, those investigations have focused only on low- and mid-level perpetrators, not high-ranking officials and further that the investigations have not resulted in an overall picture.⁸⁶ Rather, the picture has emerged piecemeal from the different prosecutions and inquiries, specifically in the *Mousa* case.

The OTP appears unlikely to come to a decision anytime soon in any case, not least because it did not have enough people to commit to the examination and it had a large volume of allegations through which to wade through for a second time. Any decision it does take will have enormous political repercussions, although it is not suggested that it is being held back on that basis. Unlike Afghanistan, there is no sign that a decision is “imminent”.

⁸² ECCHR and PIL Communication, 2014, p. 221, see *supra* note 37.

⁸³ *Ibid.*, p. 236.

⁸⁴ Phil Shiner, “A cover-up of torture, racism and complicity in war crimes”, in *The Guardian*, 23 April 2007.

⁸⁵ Seils, 2016, p. 71, see *supra* note 81.

⁸⁶ As such, they fall short of what the ICTJ suggests a national prosecutor might do to forestall an ICC investigation. See *ibid.*, pp. 78–81.

14.5. The Fallout: Law(yers), Politics and War (Crimes)

And so, 15 years after the initial invasion, the “tortuous process” of dealing with the Iraq legacy looked set to continue. The cost of all of this has been huge. To date, the litigation has cost the UK Government £150 million (see table). But the costs are not only financial. The process has also imposed damages to the credibility of the legal profession, the army, and the State.

	£ million
Settlements to Iraqi complainants	£21.8
Government legal costs	£13.1
IHAT	£59.7
Mousa Inquiry	£25.0
Al-Sweady Inquiry	£31.0
Total	£150.6

Table 2: Costs.

Public discourse in the UK has been polarized on the issue for many years. At one end of the spectrum were those that argued that soldiers were being used as scapegoats to ‘cover up’ systematic abuse and evade responsibility on the part of the MoD; at the other end are those who argued that ‘brave soldiers’ were being subjected to a ‘witch-hunt’ by ‘ambulance chasing lawyers’ at huge cost. In a 2013 report, the right-wing think tank Policy Exchange stated that Britain’s armed forces were under threat from a “sustained legal assault that could paralyse the effectiveness of the military with catastrophic consequences for the safety of the nation”.⁸⁷

The first group presented the proven allegations as just the ‘tip of the iceberg’ whereas the second group maintained it was simply the actions of a few ‘rotten apples’. The latter group, represented most vociferously in right-wing newspapers such as *The Daily Mail* and *The Telegraph*, seemed to have gained the upper hand following the disgrace of PIL, the decision to close IHAT and the announcement that the UK would seek to

⁸⁷ *The Fog of Law: An Introduction to the Legal Erosion of UK Fighting Power*, Policy Exchange, London, 18 October 2013.

derogate from the ECHR in times of war in order to prevent the armed forces being “crippled” by bogus claims.⁸⁸

For those on the left, the allegations represented something rotten at the core of the establishment. *Guardian* journalist Ian Cobain said that there was something “very British” about torture and linked the abuse in Iraq to a legacy of torture stretching back to the Second World War and played out in colonial wars in Aden, Malaya and Kenya (the latter two have been subject of recent claims). For this camp, these were not “isolated tragic incidents”⁸⁹ but evidence of an endemic problem. PIL, writing in 2009, cast it as a deeper moral issue: “Ultimately, the Courts will decide the legal questions, but the Government has yet to meet the moral challenge presented by these cases”.⁹⁰ So, for some the litigation has cost the army’s reputation, in particularly its ability to police itself. Whereas for others, it has imposed huge costs to the integrity of the legal profession, compounded by the misconduct of PIL and Leigh Day.

In February 2015, the MoD sent a dossier to the Solicitors Regulation Authority alleging misconduct relating to evidence submitted to the Al-Sweady Inquiry. In December 2014, the Inquiry found that the most serious allegations were “wholly without foundation and the product of deliberate lies, reckless speculation and ingrained hostility”. Leigh Day was also accused of professional misconduct in nine cases, but cleared in June 2017. Martyn Day said they were “hoodwinked” by “fantastic Iraqi liars”. Both were accused of delaying disclosure of contradictory evidence, and Shiner was accused of using an agent to “tout for business” in Iraq (Abu Jamal). Shiner since admitted paying more than £25,000 in “referral fees”. In August 2016, PIL announced that it would close. It lodged a statement that it had ceased to act for the 187 Iraqi claimants in cases at the High Court. The immediate catalyst was the termination of their legal aid contract which ensured that the firm was no longer financially viable. The contract was terminated following allegations that PIL had breached contractual requirements by paying claimants. In February 2017, Phil Shiner was struck off by the Solicitor’s Regulation Authority for misconduct.

⁸⁸ “A great day for British justice”, in *The Daily Mail*, 2 March 2013.

⁸⁹ Brigadier Geoffrey Sheldon, cited in the Aitken Report, 2008, see *supra* note 25.

⁹⁰ *British Forces in Iraq: The Emerging Picture of Human Rights Violations and the Role of Judicial Review*, Public Interest Lawyers, 30 June 2009 (on file with the author).

There were earlier hints that some of the witnesses might be unreliable in the *R v. Evans* court martial, but the most damning criticism came as a result of the findings of the Al-Sweady Inquiry. According to A.T. Williams: “The Inquiry findings gave a fillip to the MoD’s argument long-maintained that there was no need for any wide-scale scrutiny into the army or the government’s planning for and conduct in Iraq”. It justified resisting every case at each stage of the legal process. And it re-directed the story to one of fat-cat lawyers and dubious Iraqi claims. Though the proven cases of unlawful killing and ill-treatment still stood (Baha Mousa, Camp Breadbasket, Ahmed Ali and others) and were still being uncovered, the Al-Sweady findings changed the atmosphere.

Then, in April 2016, Justice Leggatt questioned PIL’s integrity as he dismissed one of the claims for an order to institute an inquiry in *Al-Saadoon* on the basis that the evidence submitted was not credible. The claim concerned the death of a 13-year-old boy, Jaafar Majeed Muhyi, in May 2003. Muhyi’s father claimed that he was killed by unexploded munitions that blew up when he was playing nearby. PIL had apparently failed to notice that the inconsistency between the witness statement obtained from the father of the victim in June 2004 and the later witness statement, obtained in 2013, for the purposes of making a civil damages claim, which alleged that he was killed by a bomb dropped from a helicopter and in another statement he alleged that “a British plane bombarded the house”, and so had failed to inform IHAT of the inconsistency, leading to wasted effort investigation on unexploded munitions. More seriously though, even after the inconsistency was pointed out by counsel acting for the claimant, PIL proceeded with the claim and in so doing misled the court and “caused the Secretary of State for Defence to incur the trouble and expense of preparing evidence and argument in response to a claim for which there was no proper basis”.⁹¹ The incident appeared to be isolated, however, and Leggatt praised the “dedicated and responsible way in which [PIL] have represented the interests of their clients and ensured that important issues are raised and argued”, an observation that made the “serious failure to observe essential ethical standards” in this instance all the more “disappointing”.⁹² In similar vein Williams concluded in his book that, “With hindsight, Shiner got it wrong, but equally, serious alle-

⁹¹ *Al-Saadoon* (Rev. 1) Judgment, para. 130, see *supra* note 40.

⁹² *Ibid.*, para. 131.

gations needed investigation and some were not spurious”. PIL should be credited for some very important work without which none of the allegations would have come to light, including notably the *Mousa* case. But something went very wrong in the process to the extent that the entire corpus risks being discredited and delegitimized, allowing *The Daily Mail* and *The Telegraph* to score a win in the battle of competing narratives.

The situation was also potentially costly for the ICC. Given that the dossier on which the preliminary examination was based was compiled by PIL on the basis of claims that have now been judged to have been largely spurious, the ICC Prosecutor might have been expected to close the examination. But she found herself in a bind given the broader politics of the ICC. Closing the examination might have been another nail in the coffin of African support for the ICC. Even if entirely justifiable on legal grounds, the impression would have been given that the ICC shied away from investigation one of the permanent five, on whose support the Court relied. On the other hand, proceeding with an investigation, notwithstanding the difficulties of so doing, would have harmed the Court in other ways. The UK might have been expected to be less vocal in its support and to seek alternatives to the ICC as a mechanism for accountability. The UK’s public commitment to international criminal justice and accountability was unlikely to be reversed, and indeed was reinforced with regard to Syria, but we might see is a retreat to a more pragmatic stance. Indeed, the stance that informed the UK position at Rome until it was persuaded by the ‘Singapore compromise’ to migrate to the Like-Minded Group. At such a difficult time for the Court, it did not need this particular headache.

Nor did the UK, for that matter. There is little doubt that the UK remained committed in principle to international criminal justice but that was somewhat undermined by its conduct. Ian Cobain and Laura Newbury both traced a lineage from British conduct in the context of counter-insurgency and colonial operations (Aden, Malaya, Kenya, Northern Ireland) to some of the alleged abuse in Iraq. In particular, there was a direct link between the “loss” of the banning of the “five techniques” following their use in Northern Ireland and the treatment of Iraqi detainees in British custody. Even if steps were taken since to rectify the loss and new training explicitly ruled out these techniques, one of the big questions that remained unanswered is how the MoD had ‘lost the fact’ that certain tech-

niques had been banned somewhere between the 1970s and 2003.⁹³ How did this “corporate failure” identified by the Mousa Inquiry happen and who was responsible? What were the consequences, beyond the tragedy of Baha Mousa’s death? As a result, there remained deep suspicion regarding UK conduct in Iraq that did not serve the majority of soldiers well. Moreover, the fact that abuse was alleged to have continued as late as 2008 suggested that new procedures and training were not wholly successful. Even if there was not widespread and systematic abuse, the muddled and “tortuous” process of dealing with the allegations was problematic. As David Whetham noted in relation to allegations of unlawful killing, “There is a difference between killing an innocent person accidentally and deliberately targeting them. However, if such accidents become routine and are seen to be taking place with impunity, it is difficult to see how anyone is supposed to tell the difference, least of all those who have lost loved ones”.⁹⁴

If the problem at the heart of this sorry mess was (a) the illegitimacy of the Iraq War and the desire to hold Blair accountable and/or (b) the systemic abuse that may have resulted, in part, from (a), the ICC was not the answer to either. But in the absence of a way of getting the answer, PIL pursued every avenue and may, in the end, have defeated their own objectives by flooding IHAT and the courts with claims and getting so carried away with the idea that they were a force for good that they forgot to adhere to ethical standards. The result is that all their work now risks being discredited, whereas in reality, they did a great service in pursuing these cases in the first place. We would not know about Mousa and others without Shiner. But no one has yet been held responsible for his death either. Not Corporal Payne, not his comrades in arms and certainly not Blair. It seemed unlikely that the ICC preliminary examination was going to help with any of that and in the current climate it may simply make things worse.

It was potentially very politically sensitive for the ICC, too. The Prosecutor had to take care not to be drawn into a public spat with the MoD, via the right-wing press and a firm of human rights lawyers. She needed to be careful to ensure that the case did not have wider ramifica-

⁹³ *Who guards the guardians? MOD support for serving and former personnel*, House of Commons Defence Committee Report, see *supra* note 73.

⁹⁴ David Whetham, “Killing Within the Rules”, in *Small Wars and Insurgencies*, 2007, vol. 18, no. 4, p. 727.

tions internationally either in terms of UK support for the court, which was withstanding, but might have buckled, and in terms of its public image problem as a court of the strong against the weak. These political questions fall outside the remit of the Prosecutor but nevertheless presented great risks. In those circumstances, it may well be that *no* decision was the least worst of the available options.

Appendix 1: Amnesty Report (2004)

Victim	Details	Case?
Wa'el Rahim Jabar	Killed by UK forces in al Amara on 26 May 2003. Carrying a rifle over his shoulder. Shot by a UK patrol from a distance of around 6m. Victim was armed so no warning given.	RMP investigation
Hassan Hameed Naser	Killed by UK forces in Basra on 10 August 2003 during violent demonstration. Part of a group who had thrown stones at UK armoured vehicle upon which British forces opened fire.	
Hazam Juma Kati and Abed Abd al Karim Hassan	Killed by UK forces on 4 August 2003 in al Majdiyeh when they went out to investigate gun fire. Unarmed but UK soldiers said it looked like they were carrying weapons.	Al-Skeini
Hanan Saleh Matrud	8-year old girl killed on 21 August 2003 by UK soldier. Military say that she was hit by a warning shot fired into the air; her family say the soldier aimed and fired at her family.	
Walid Fayay Muzban	Killed by UK forces at a checkpoint on 24 August 2003 after warnings to stop were ignored.	RMP investigation; <i>Al-Skeini</i>
Assad Kadhem Jasem	Killed by UK forces at a checkpoint north of Basra on 4 September 2003, having approached at speed and refused to stop at the first checkpoint he was shot at the second. The passenger said that it had been too dark to see the first barrier.	
Hilal Finjam Salman	Killed by UK forces on 4 October 2003 when he fired a warning shot into the air to disperse a riot. He was authorized to carry a weapon but was not wearing his orange jacket.	
Ghanem Kadhem Kati	Killed by UK forces in Basra on 1 January 2004. Fired upon from a distance even though unarmed. Shots were fired earlier to celebrate a wedding.	RMP investigation

Victim	Details	Case?
Mohammed Jaseem Jureid, Rahim Hanoun Adion and Maher Abd al Wahid Muften	Killed by UK forces during an unauthorized demonstration in al Amara on 10 January 2004.	

Appendix 2: Courts Martial

Date	Details	Outcome
2005	<i>R v. Kenyon, Larkin and Cooley</i> (Osnabruck, Germany) Soldiers from the Royal Regiment of Fusiliers accused of abuse of Iraqi civilian detainees at a UK base in May 2003. Photographs came to light of Iraqis being forced to simulate oral and anal sex and a man being tied up and suspended from a forklift truck.	Three soldiers were convicted of conduct to the prejudice of good order and military discipline and disgraceful conduct of a cruel kind, contrary to Sections 69 and 66 of the Army Act, and the criminal law offence of battery or of aiding and abetting such conduct, dismissed from the army and sentenced to between 140 days and 2 years imprisonment. A fourth soldier had earlier pleaded guilty to taking the pictures.
2005	<i>R v. Evans and others</i> (Colchester, UK). Seven soldiers of the 3 rd Battalion, Parachute Regiment were charged with a “joint enterprise” of murder and violent disorder in relation to an alleged unprovoked attack on several Iraqi civilians in Al-Ferkah, north of Basra, in May 2003, resulting in the death of one man, 18-year old Nadhem Abdullah.	The Judge Advocate General, Jeff Blackett, stopped the case and ordered the prosecution to drop the charges on grounds of insufficient evidence.
2006	<i>R v. Selman, McCleary and McGing</i> (Colchester, UK). Three soldiers from the Irish Guards and one from the Coldstream Guards accused of manslaughter and aiding and abetting manslaughter in relation to an incident in which an Iraqi civil-	All four were acquitted on all charges. The court determined that the practice of “wetting” constituted minimum force in the circumstances.

Date	Details	Outcome
	ian, 15-year old Ahmed Jabber Kareem, was allegedly forced into a canal and drowned.	
2006–07	<i>R v. Payne</i> (Bulford, UK). An Iraqi civilian, Baha Mousa, died whilst in the custody of UK forces in Basra. He and eight others suffered varying degrees of abuse. Seven soldiers were charged with inhuman treatment as a war crime under Section 51 of the International Criminal Court Act and assault occasioning actual bodily harm.	The case against six of the accused collapsed and the seventh, Corporal Donald Payne, pleaded guilty to a charge of inhumane treatment and was sentenced to 12-months imprisonment.

Appendix 3: Judicial Review Cases

Case	Details	Outcome
<i>R (Al-Skieni and others) v. Secretary of State for Defence</i>	6 claimants, relatives respectively of Iraqi citizens who have died in provinces of Iraq where and at a time when the United Kingdom was recognized as an occupying power (<i>viz</i> between 1 May 2003 and 28 June 2004). The first five claimants' relatives were shot in separate armed incidents involving British troops. The sixth claimant's son, Mr Baha Mousa, died in a military prison in British custody.	UK courts ruled that ECHR only applied to Mousa as in custody of British forces. ECtHR made landmark ruling in July 2011 (<i>Al-Skieni v. UK</i>) that ECHR applied to all six.
<i>R (Al Jedda) v. Secretary of State for Defence</i>	The claimant is an Iraqi who made a successful claim to asylum in the United Kingdom in the 1990s and now holds dual British and Iraqi nationality. He was detained in October 2004 on a visit to Iraq. Challenged the lawfulness of his detention by British forces in Iraq and the	His claim was denied by UK courts on the basis that they were acting in accordance with the UNSC mandate in Resolution 1546 so IHL applied not ECHR but in July 2011 this was overruled by the ECtHR in <i>Al Jedda v. UK</i> (2011).

Case	Details	Outcome
	refusal by the Secretary of State to return him to the United Kingdom. Said his detention was in breach of his rights under Article 5 of the ECHR.	
<i>R (Al Sweady and others) v. Secretary of State for Defence</i>	Alleged that members of the British army killed or ill-treated Iraqis, whom they had taken prisoners on 14 May 2004, following a battle near to a permanent vehicle checkpoint known as Danny Boy. In 2009, relatives sought judicial review.	Because of difficulties meeting disclosure obligations, Secretary of State agreed to set up an independent inquiry and proceedings were put on hold while that happened. The Al Sweady Inquiry, which ran from 2009-2014, concluded that the allegations of torture and murder were ‘wholly without foundation and entirely the product of deliberate lies, reckless speculation and ingrained hostility.’
<i>R (Khadim Hassan) v. Secretary of State for Defence</i>	Tarek Resaan Hassan was detained by UK forces in Iraq on 22 April 2003 and taken to Camp Bucca, regarded as a US facility. On 1 September, his dead body was found in the countryside with both hands tied with plastic wire and evidence of bruises. According to UK records he was released from custody in May 2003. His brother, Khadim Hassan brought judicial review proceedings against the UK seeking an independent inquiry.	In February 2009, the High Court decided that the ECHR did not extend to this case. The case was taken to the ECtHR which upheld the High Court’s decision (<i>Hassan v. UK</i> (2014)). It found no evidence to suggest that Tarek Hassan had been ill-treated while in UK detention such as to give rise to an obligation under Article 3 to carry out an official investigation. Nor was there any evidence that the United Kingdom authorities were responsible in any way, directly or indirectly, for his death, which had occurred some four months after his release from Camp Bucca, in a distant part of the country not controlled by United Kingdom forces.

Case	Details	Outcome
<i>R (Ali and others) v. Secretary of State for Defence</i>	Relates to alleged abuse at Camp Breadbasket which was the subject of a 2005 Court Martial (<i>R v. Kenyon, Larkin and Cooley</i>). In October 2008, Ra'aid Ali and another Iraqi civilian held at the camp and subjected to sexual humiliation and other abuse lodged judicial review proceedings seeking an investigation.	Subsumed under <i>Ali Zaki Mousa</i> proceedings (see below).
<i>R (Abdul-Razzaq and others)</i>	Concerns alleged beatings of Iraqi civilians by UK forces in Al Amarah captured in a video made public in 2006. RMP investigation closed on basis of insufficient evidence. Judicial review sought.	Put on hold pending Al-Sweady Inquiry.
<i>R (Al Far-toosi) v. Secretary of State for Defence</i>	Alleged abuse whilst in custody of UK forces from 2004-7. RMP investigation conducted.	
<i>R (Khazaal and others) v. Secretary of State for Defence</i>	Alleged mistreatment of 4 Iraqi civilians in UK custody 2005-7. Letters of notice before action served.	
<i>R (Kammash and others) v. Secretary of State for Defence</i>	Alleged abuse including beatings when arrested in 2007. Judicial review proceedings commenced in 2009.	
<i>R (Al-Saadoon and Mufdhi) v. Secretary of State for Defence</i>	Challenged transfer into Iraqi custody for murder of two British soldiers in 2003 to be put on trial by the Iraqi High Tribunal.	ECtHR in <i>Al-Saadoon and Mufdii v. UK</i> (2010) said that the UK were in breach of its obligations by transferring the men to a jurisdiction with the death penalty (reintroduced in Iraq in 2005).

Case	Details	Outcome
<i>R (Ali Zaki Mousa and others) v. Secretary of State for Defence</i>	Iraqi citizens claiming abuse by British forces or relatives of those killed by British forces. Sought judicial review of IHAT claiming it was not sufficiently independent and seeking a more wide-ranging public inquiry.	High Court denied claim but Court of Appeal found that IHAT was not sufficiently independent. RMP were replaced with RNP following the 2010 ruling. In subsequent case, the High Court upheld IHAT's independence but some further reconsideration must be given to a new approach given the very large number of deaths occurring at different times and in different locations as well as the need to assess wider systemic issues and take account of lessons learned. Ordered inquisitorial form of inquiry rather than full public inquiry.
<i>R (Haider Hussain) v. Secretary of State for Defence</i>	Iraqi national arrested in April 2007 and questioned. Alleged ill-treatment, including being shouted at.	Denied (2013).
<i>R (Al-Saadoon and others) v. Secretary of State for Defence</i>	Continuing review process of investigation into numerous claims brought by Iraqi civilians.	

The Situation of Palestine in Wonderland: An Investigation into the ICC's Impact in Israel

Sharon Weill*

“Would you tell me, please, which way I ought to go from here?”

“That depends a good deal on where you want to get to”, said the Cat.

“I don't much care where—” said Alice.

“Then it doesn't matter which way you go”, said the Cat.

“—so long as I get SOMEWHERE”, Alice added as an explanation.

“Oh, you're sure to do that”, said the Cat, “if you only walk long enough.”

Lewis Carroll, *Alice's Adventures in Wonderland*, 1865

15.1. Introduction

Just like the Cat in *Alice's Adventures in Wonderland*, the International Criminal Court ('ICC') has continuously appeared and disappeared from the Israeli legal and political agenda. Since the ICC's first appearance on the scene in January 2009, when the Palestinian Authority submitted its first *ad hoc* declaration to the ICC Prosecutor in the aftermath of the Gaza war, until now, with the preliminary examination starting its fourth year, the ICC has interchangeably been both present and absent in its actual function as well as in its symbolic representation in Israel. As we trace the appearances and disappearances of the ICC, it becomes possible to start evaluating the effects of the preliminary examination on Israel, namely: has the ICC contributed to deterrence, prevention, or complementarity so

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far? What unintended consequences and detrimental outcomes has it produced?

This chapter raises reflections on these questions and investigates the way Israeli actors have engaged with the ICC. While it does not aim to provide a full assessment of the ICC's impact on Israel, it suggests several avenues for further research. Section 15.2. examines the role played by the ICC in shaping political debates during the legislative process of the Settlement Regulation Law and addresses the Court's deterrent function. The ICC's unintended impact on Israeli NGOs, which resulted in far-reaching consequences on both professional and personal levels, is discussed in Section 15.3. Section 15.4. deconstructs the economic pressures imposed on the Palestinian Authority following its accession to the Rome Statute in 2015 and reflects on its political limitations. Section 15.5. traces the ICC's representation in Israeli press to illustrate the issues at stake and the nature and frequency of the ICC's presence in the Israeli public debate. Finally, the positive complementarity process triggered by the ICC considering ongoing Israeli domestic investigations is assessed.

15.2. On Deterrence: The Saga of the Settlement Regulation Law

One of the purposes of international criminal law is deterrence. The assumption is that law and its enforcement institutions will deter political and military leaders from committing crimes. However, when it comes to settlement activity, this assumption has not proven to be true.¹ Despite the ICC's examination on Israel's policy in this regard, the "Law for the Regulation of Settlement in Judea and Samaria" was adopted in February 2017.² At the same time, a closer look at the parliamentary debates and

¹ Clearly, the scope of this chapter does not allow a full analysis of the question of the settlement. For recent academic writings see Michael G. Kearney, "The Situation in Palestine and the War Crime of Transfer of Civilians into Occupied Territory", in *Criminal Law Forum*, 2017, vol. 28, no. 1, pp. 1–34; and the articles published in the Symposium Revisiting Israel's Settlements by the *American Journal of International Law* (vol. 111, 2017).

² The occupying power's transfer of own population into the occupied territories is defined as a war crime in Article 8(2)(b)(viii) of the Rome Statute. This article is probably the main reason why Israel has never ratified the Rome Statute, although it signed it and an Israeli delegation had participated in the 1998 States Assembly: "Mr. Nathan (Israel) said that, although his country had long called for the establishment of an international criminal court as a vital means of ensuring that criminals who committed heinous crimes, such as the Holocaust, would be brought to justice, he had reluctantly voted against the Statute. His country had actively participated in the preparation of the Statute at all stages, not imagining that it would ultimately become a potential tool in the Middle East conflict. Article

legislative process reveals that the ICC process was not absent from the agenda as one might have expected. This was an occasion on which the ICC re-appeared and was manifestly present to serve quite an unexpected goal: as a tool for waging domestic political struggles between different actors along the political spectrum.

On 14 November 2016, in The Hague, the ICC prosecutor published her annual report, in which she recounted the progress of her preliminary investigation into the situation in Palestine. Several paragraphs were dedicated to the settlements.³ The very same day, in the Israeli Parliament in Jerusalem, right-wing parliamentary members submitted a bill. Following the initiative of settlers' groups, the bill called for the retroactive legalization of the settlements built on private Palestinian land without explicit government authorization (known as out-posts).⁴ Adopted four months later, the law starts by stipulating that: "The objective of this law is to regularise settlement in Judea and Samaria, and to enable it to continue to strengthen and develop".⁵ Apparently, no one could have bet-

1 of the Statute clearly referred to the most serious crimes of concern to the international community as a whole. The preamble spoke of unimaginable atrocities and of grave crimes which deeply shocked the conscience of the whole international community. He questioned whether it could really be held that the action referred to in article 8, paragraph 2 (b) (viii), ranked among the most heinous and serious war crimes. Had that provision not been included, he would have been able to vote in favour of adopting the Statute". United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 15 June–17 July 1998, Official Records, vol. II, Summary records of the plenary meetings and of the meetings of the Committee of the Whole, United Nations, New York, 2002, p. 123.

³ See ICC OTP, *Report on Preliminary Examination Activities 2016*, 14 November 2016, para. 130 (<http://www.legal-tools.org/doc/f30a53/>). See also paras. 131–32.

⁴ Israeli governments make a distinction between 'legal' settlements, which are approved by the governments and usually built on a territory considered as 'public land', and illegal outposts, which are built on private Palestinian land by the settlers, following their own initiatives and without prior State permit. There are over 100 outposts of this kind. For more information on these illegal outposts see the excellent official report of Talia Sasson, "Summary of the Opinion Concerning Unauthorized Outposts" (available on the web site of the Israeli Ministry of Foreign Affairs).

⁵ A translation of the law is available at <http://www.legal-tools.org/doc/908988/>. The law provides a number of definitions such as: "State's consent" – explicit or implicit, in advance or after the fact, including assistance in laying infrastructure, granting incentives, making plans, issuing publications aimed at encouraging construction or development or participation in cash or in kind; "Settlement" – including a neighbourhood or expansion of the settlement, all of the residences in it, the facilities, the agricultural land that serves its needs, public buildings that serve the residents, means of production, as well as access roads and infrastructure for water, communication, electricity and sewage.

ter set out the elements of the war crime of the transfer by the occupying power of parts of its own civilian population into the territory it occupies as defined in Article 8(2)(b)(viii) of the Rome Statute.

15.2.1. The Legislative Process and ICC Appearance

In the first parliamentary discussion that took place in November 2016, a Parliament member of the opposition party, Tsipi Livni, requested a confidential discussion about the anticipated response from the ICC.⁶ The transcripts of the Parliament discussions show that participants were asked to shut their phones. During these early stages of the law's negotiations, the highest government officials, including Prime Minister Netanyahu and Foreign Minister Lieberman, were of the position that "if the 'Regulation Bill' passes then the ICC prosecutor could decide to accept the Palestinian complaint at the end of her preliminary inquiry, and open a full investigation against Israeli leaders for their involvement in decisions concerning settlement construction".⁷ It was further signalled that the Security Council might decide to intervene. Also, the State legal advisor and the legal advisor to the Parliament firmly opposed the law. It was reported that, "they believe the bill may lead to claims against Israel at the International Criminal Court".⁸ Although this opposition was widely reported in Israeli media, a few days later, the first vote in favour of the bill (out of three votes required) was adopted with the support of the Prime Minister and the Foreign Office. Their initial opposition was transformed into support for the bill due to internal political pressure and interest.

⁶ Jonathan Lis, "The Attorney General is against the legalization law" (*Hebrew version*). The English version omitted the fact that it was a confidential meeting see Jonathan Lis, "Attorney General slams proposal to legalize settlements built on private Palestinian land", in *Haaretz*, 23 November 2016.

⁷ Further in the same article it was reported: "At one stage, Lieberman made a cynical comment to Bennett on the matter of his continued refusal to stop promoting the Regularization Bill. 'So what are you telling us? That you would be happy to see us in the Hague?' said Lieberman". Barak Ravid and Chaim Levinson, "Netanyahu warns cabinet: outpost legalization bill could lead to international probe against Israeli officials", in *Haaretz*, 28 November 2016.

⁸ Shlomo Cesana, "Outpost bill may do more harm than good, attorney general warns", in *Israel Hayom*, 29 November 2016. Their opposition was not because of the illegality of the settlement policy in light of international humanitarian law – all Israeli governments have carried out this policy since the 1970s. Their primary objection to the bill was that it violates the Israeli constitutional law and the jurisprudence of the High Court of Justice, according to which international humanitarian law and military order are applied to Palestinians for the confiscation of their land (and not retroactive Israeli law).

Among the bill's drafters were Israeli Minister of Education Bennett and Justice Minister Shaked, both members of the extreme right-wing party Habayit Hayehudi (Jewish Home) – a growing and influential party that constitutes a political threat to Prime Minister Netanyahu among right-wing voters. By supporting the bill, the Prime Minister appealed to those right-wing voters. This was how, within less than a week, the ICC's deterrence role vanished in the face of the opportunistic national political ends.⁹

The parliamentary debates during that first vote are revealing. Palestinian Knesset member Ayman Odeh of the Joint List (a joint parliamentary list composed of four Israeli-Palestinian parties – Hadash, Raam, Balad and Taal – which is the third largest party in Israel) said:

I think of the sin of vanity, of the mechanism of self-destruction. Perhaps this is the first time that I agree with the Prime Minister, who said that this law will bring us to The Hague. I think, Mr. Prime Minister, that you are right. This law will still bring you, and some of the ministers, to The Hague, because it is a crime against international law.¹⁰

Other Palestinian members of the Joint List made similar declarations.¹¹ References to the ICC were not limited to Palestinian parliamentary members, however, and also included statements by members of the main opposition party, such as Tsipi Livni, who was the Minister of Justice during the 2014 Gaza war: “It is a lie that this government cares about IDF [Israel Defense Forces] soldiers, and if it cares about IDF soldiers, it would not send them – God forbid, but it could happen – to the International Criminal Court in The Hague, to international courts, through this irresponsible legislation that will bring them there”.¹² In a paternalistic

⁹ Yuval Karni, Tova Tzimuki and Moran Azulay, “Netanyahu, Bennett reach compromise on Regulation Bill”, in *Ynetnews*, 12 May 2016.

¹⁰ Knesset Proceedings, Third Session, Meetings of the 5–7 December 2016, booklet 6, p. 74 (in Hebrew) (<http://www.legal-tools.org/doc/012183/>).

¹¹ See also Jamal Zahalka of the Joint List party: “So this is a bill that was born in sin, so much so that even the prime minister says: adopting this bill will lead us to The Hague. I say to him: This is correct, and I propose that he hire lawyers, because international law on this matter is clear, and that this bill is political, it is in fact a clear message: This government does not want peace, it is interested to maintain the conflict”. Knesset Proceedings, 2016, see *supra* note 10, p. 45.

¹² *Ibid.*, p. 41. While Knesset Member Livni was concerned of soldiers being prosecuted in The Hague, ironically the adoption of this bill threatens especially lawmakers.

tone, the Minister of the Environment reacted: “To stand here and call the International Criminal Court in The Hague to settle accounts with the Israeli leadership only because we have a political dispute [...] shame on you”.

President Obama, in the last days of his administration, firmly opposed the bill. On the 23 December 2016, as a riposte to the first vote, the UN Security Council adopted Resolution 2334 (2016) condemning the settlement activities in Israel and recognizing their illegal status under international law; 14 delegations voted in favour and the United States abstained. Immediately after that, a major Israeli analyst wrote in *Haaretz* that the resolution “could influence the preliminary investigation and could provide cause for the ICC prosecutor to order a full investigation of Israel settlement construction”.¹³ Another similar headline was provided by journalist Amira Hass: “The fresh support from the Security Council could cause the prosecution in International Criminal Court to dare to move ahead from a preliminary examination to an investigation on the settlements”.¹⁴ Thus, although this resolution says nothing new, Israeli journalists followed up with the narrative that the resolution may influence the ICC prosecutor to move from the examination phase and open an investigation.

In the aftermath of the Security Council resolution, the Israeli government paused to gauge the views of the newly-elected US President. It is not a mere coincidence that the final vote on the Settlement Regulation Law was set as soon as Trump entered office. And a few days before the vote, it was reported that the American consulate instructed the Palestinian Authority – via a phone call – not to collaborate with the ICC, at the risk of suppressing US aid.¹⁵ This was among the first official communications reported between the Trump administration and the Palestinian Authority.

The Regulation Bill was finally adopted on 6 February 2017. A couple of days later, the NGO Adalah, along with other 16 petitioners, submitted a petition to the Israeli High Court of Justice challenging the

¹³ Barak Ravis, “Understanding the UN Resolution on Israeli settlements: what are the immediate ramifications?”, in *Haaretz*, 24 December 2016.

¹⁴ Amira Hass, “The Hague: the reason the Palestinians are jubilant and Israel is spooked”, in *Haaretz*, 25 December 2016.

¹⁵ Jack Khoury, “Palestinian officials say U.S threatens “severe steps” if leaders sue Israel in world Court”, in *Haaretz*, 1 February 2017.

constitutionality of the law. Unlike the parliamentary debates, journalist and politician accounts, the human rights lawyers chose not to make any reference to the ICC in their petition.¹⁶ Perhaps it seemed safer as a matter of legal strategy, as it was still unknown how the preliminary investigation would progress. Interestingly, because the State legal advisor opposed the bill and the law, in a rare move, a private law firm represented the government in connection with Adalah's petition.

This case will lead the High Court of Justice to rule on the constitutionality of this law. It will also shed light on the political limits of the Israeli judiciary's capacity to intervene in matters related to the settlement policy and may redefine the boundaries of the High Court's role within the Israeli governmental system more generally. As deputy Defense Minister Eli Ben-Dahan stated unequivocally in the Knesset:

The Regulation Law will pass today in the Knesset. It is an historic law that is expected once and for all to stop the terrorism of the extreme left and the petitions of the Israeli High Court of Justice [...] With all due respect, we came here to build in the Land of Israel.¹⁷

Similar sentiment was expressed by Knesset member Bezalel Samotritz of The Jewish Home:

I want to warn on the tyranny of the judiciary. [...] This law will be adopted, because [...] the public voted for this agenda; it chose Judea and Samaria, it chose the settlement. We do what we have been elected for and the High Court of Justice shall not intervene, because the High Court of Justice shall respect the sovereignty of the Knesset and the elected members of the Knesset to shape the policy of the State of Israel.¹⁸

The prolonged settlement policy, which has imposed a complex system of separation between populations, will not be radically affected by this new legislation. It is another cog in the occupation machinery. Yet, the fact that it has been adopted under the ICC's shadow suggests that Israel

¹⁶ Israel High Court of Justice ('HCJ'), *Silwad Municipality, et. al. v. The Knesset, et. al.*, 8 February 2017, case no. 1308/17. The petition is available in English at <http://www.legal-tools.org/doc/9fc1db/>.

¹⁷ Knesset Proceedings, 2016, p. 40, see *supra* note 10.

¹⁸ *Ibid.*, pp. 203-208.

has chosen to reinforce its national sovereignty and resist international justice and scrutiny rather than succumb to processes of deterrence.

15.3. The (Unintended) Impact on NGOs

With the presence of the ICC, NGOs have found both a legal and political framework for mobilization. However, the involvement of the ICC has also imposed a negative impact on NGOs.

15.3.1. The Shrinking Space

NGOs have observed shrinking operational space.¹⁹ All persons interviewed have pointed out that the ICC has had a negative impact on their work in terms of dynamics, effects, and interactions with government officials. Interestingly, such impact has been observed at both the national and international levels. A negative impact on local dynamics was expressed by one NGO after it issued a report related to the ICC. After submitting its views to the State Ministry of Foreign Affairs, the official who would usually comment and conduct a dialogue, refused to get into contact with the NGO or carry out any report-related work, apparently following higher instructions. Thus, a standard practice of consultation was infringed, if not blocked entirely, by the government in connection with an issue related to the ICC. Such paralysis was noticed not only at a local level but also internationally. Another NGO, long involved with previous UN fact-finding missions and follow-up mechanisms established by the UN Human Rights Council, observed that their international exchange and dialogue with the UN bodies has diminished; it has been all placed within the hands of the ICC.

15.3.2. De-legitimization and Personal Attacks

NGOs are finding themselves increasingly under massive pressure not to co-operate with the ICC. Most important, they have become targets of strong de-legitimization campaigns coming directly from the government and right-wing movements. The discourse is structured as such: Palestinians are engaged in a ‘lawfare’ against Israel and the free world (that is, the

¹⁹ This section is largely based on a number of phone interviews conducted in May 2017 with leading Israeli NGOs workers. As most of the persons preferred to remain anonymous, there is no direct reference to any NGO nor person, unless the information is in the public domain.

war on terror), in which the ICC is complicit, and ICC supporters are in the enemy's camp.²⁰

The most notable examples are the campaign against B'Tselem and Breaking the Silence. B'Tselem is one of the oldest Israeli NGOs observing violations in the West Bank and Gaza. In 2016, B'Tselem expressed a policy of non-co-operation with government investigations: "there is no longer any point in pursuing justice and defending human rights by working with a system whose real function is measured by its ability to continue to successfully cover up unlawful acts and protect perpetrators".²¹ This policy was based on the grounds that such inquiries were not genuine, stating that, "investigations continue to serve as a façade intended to block international criticism rather than uncover the truth",²² concluding that Israel employs a sophisticated "whitewash mechanism" of investigations and prosecution.²³

Breaking the Silence is an Israeli organization of veteran combatants that collects and disseminates direct testimonies from former soldiers.²⁴ In May 2015, it published a report entitled, "This is How We Fought in Gaza: Soldiers' testimonies and photographs from Operation Protective Edge (2014)". It contains anonymous testimony from over 100

²⁰ See Benjamin Netanyahu: "[...] those who support the indiscriminate rocketing of civilians, which is a war crime, while hiding behind civilians and children, which is another war crime, they and their supporters are taking Israel to the international court. This is something that all Israelis should unite against and all supporters of Israel and justice and truth should unite against because it is unjust. It is untrue. And it is very bad for peace". Benjamin Netanyahu, "PM Netanyahu addresses the Herzliya Conference" (<http://www.legal-tools.org/doc/0e7075/>).

²¹ B'Tselem, *The Occupation's Fig Leaf: Israel's Military Law Enforcement System as a Whitewash Mechanism*, 2016.

²² See, for example: "Both past experience and the fundamental structural flaws in Israel's law enforcement system, including the Military Advocate General Corps, reaffirm Israel's lack of capacity and lack of will to conduct effective investigations into alleged violations of international humanitarian law [...] Repeated statements made by officials and the dry figures clearly indicate that, as has always been the case, the current façade of investigations led by the Military Advocate General into Operation Protective Edge is not focused on the policy regarding use of force, but on incidents the military views as 'exceptional'". B'Tselem, "ICC jurisdiction cannot be denied based on Israel's façade of investigation", 16 July 2015. See discussion below in Section 15.6.

²³ B'Tselem, "Whitewash Protocol: The So-Called Investigation of Operation Protective Edge", 2016.

²⁴ See the video within the article of Anshel Pfeffer, "Why Breaking the Silence became the Most Hated Group in Israel", in *Haaretz*, 17 December 2015.

soldiers on alleged crimes that occurred during the 2014 Gaza war, including examples of permissive rules of engagement and indiscriminate uses of force.²⁵

These two organizations have been portrayed as traitors and enemy collaborators. In May 2017, the Israeli Prime Minister refused to meet with the German Minister of Foreign Affairs, after the latter met with B'Tselem and Breaking the Silence. The Prime Minister explained that he “will not meet with those who lend legitimacy to organisations that call for the criminalisation of Israeli soldiers”.²⁶ This aggressive diplomatic move was widely criticised by and in Germany.

In addition, members of parliament have threatened bills criminalizing co-operation with the ICC. These threats are becoming increasingly intimidating, especially when coupled with recent laws adopted on banning the political activities of the BDS (Boycott, Divestment, Sanctions) movement²⁷ and the investigation of NGOs’ financial sources coming from foreign countries,²⁸ which imposed an immense pressure on Israeli NGOs. As political and legal actors within the Israeli society aiming to bring changes from within, some NGOs prefer not to lose Israeli public opinion and their lines of communication with government officials. In order not to be labelled as traitors, they therefore refrain from directly referring to the ICC and related examination/investigation.

15.4. Economic Pressure and Its Limits

Despite important political and economic pressures imposed by Israel and the US, the Palestinians joined the ICC and a preliminary examination was opened.²⁹ Following their accession to the ICC, Israel withheld the

²⁵ The report is available at <http://www.legal-tools.org/doc/4a3692/>.

²⁶ See Ian Fisher, “Israeli Leader Cancels Meeting After German Official Visits Protest Group”, in *New York Times*, 25 April 2017.

²⁷ The BDS movement is a global campaign that aims at increasing economic and political pressure on Israel for the purpose of ending the occupation. The Israeli government has passed several laws trying to ban the BDS; laws that include imposing civil responsibility for supporting the organization and a very recent law prohibiting BDS supporters to enter Israel (Israel Travel Ban, approved by the Knesset on 6 March 2017).

²⁸ NGO Transparency Law, passed by the Knesset on 11 July 2016. It requires NGOs that receive more than half of their annual budget from foreign sources to publicly report on it.

²⁹ “The Palestinians have faced reprisals from the United States and Israel for various international initiatives, including informal congressional holds that occasionally delay disbursement of U.S. aid and temporary Israeli unwillingness to transfer tax and customs rev-

income from tax collections that belonged to the Palestinian Authority for more than three months. Israel eventually transferred the money to the Palestinian Authority, because of security concerns as well as US and European pressure.³⁰ In 2003, the US entered into bilateral non-surrender agreements with Israel, in order to protect Israeli and US nationals from being extradited to The Hague.³¹ A recent US legislation has attempted to block Palestinian engagement with the ICC. The “Consolidated Appropriations Act”, which defines the yearly expenses approved by Congress, prohibits the US Economic Support Fund from providing assistance to the Palestinian Authority if “the Palestinians initiate an International Criminal Court (ICC) judicially authorized investigation, or actively support such an investigation, that subjects Israeli nationals to an investigation for alleged crimes against Palestinians”.³² A Congressional report clarifies that the Fund’s assistance provided via grants and contracts “for the Palestinian people, as opposed to for the benefit of the Palestinian Authority”, would not be deemed “for the Palestinian Authority”.³³ Oddly, the law refers to supporting an investigation and not a preliminary examination. A Congressional report further clarifies the precise meaning of that law, while pointing out the fact there are three ways through which the US has economically supported the Palestinian Authority: (1) The United Nations Relief and Works Agency for Palestine Refugees in the Near East; (2) a special account dedicated for security, criminal law, and rule of law reform; and lastly, (3) the Economic Support Fund that funds NGOs and humanitarian assistance,³⁴ a portion of which is dedicated to support the

venues due the PA”. Jim Zanotti, *The Palestinians: Background and U.S. Relations*, Congressional Research Service, February 2015, p. 49.

³⁰ Barak Ravid, “Israel releases withheld tax revenues to Palestinian Authority”, in *Haaretz*, 27 March 2015.

³¹ On 4 August 2002 Israel signed the Agreement regarding the surrender of persons to the International Criminal Court, which entered into force on 27 November 2003. A copy of the agreement is available at <http://www.legal-tools.org/doc/d75873/>.

³² See Section 7041(j)(2)(A)(i)(II) of the Consolidated Appropriations Act, 2016 (Public Law 114–113). During his first days in office, Trump, the newly elected US President, signed a continuation order. This law, which has taken effect under Trump administration in May 2017, was already force in 2016 under the Obama Administration.

³³ Jim Zanotti, *U.S. Foreign Aid to the Palestinians*, Congressional Research Service Report, December 2016, p. 8.

³⁴ According to the US Foreign Assistance reference guide at p. 6: “The Economic Support Fund (ESF) promotes the economic and political foreign policy interests of the United States by providing assistance to allies and countries in transition to democracy, supporting

Palestinian Authority (which is, in fact, used for paying the debt to Israeli energy companies and hospitals). This last portion is the one that may be affected if the legislation is triggered.

As mentioned, Israel eventually transferred the money to the Palestinian Authority, because of security concerns as well as US and European pressure.³⁵ Here is the trap: the US and Israel want to prevent further Palestinian moves at the ICC, using means of economic pressure; at the same time, they want to ensure that the Palestinian Authority, which is crucial maintaining the *status quo* and with whom security agreements have been made, does not collapse.³⁶ This is probably the reason why, although the US has been threatening to cut the financial aid through legislation, they have not carried out the threat.³⁷ Thus, the ICC is now an active actor involved in the Israeli-Palestinian conflict, with impact on the ground, despite the opposing will of the US and Israel. Moreover, since the US is not financing the ICC, its economic power to impose its will in The Hague is rather limited.

15.5. The ICC in the Israeli Press

As can be observed, the ICC has appeared in and disappeared from the local press and public debate following related developments since 2015, but as time passes, the ICC's representation in the press has faded.³⁸

the Middle East peace negotiations, and financing economic stabilization programs, frequently in a multi-donor context. The U.S. Agency for International Development (USAID), with overall foreign policy guidance from the Department of State, implements most ESF-funded programs”, The United States Department of State and U.S. Agency for International Development, *U.S. Foreign Assistance Reference Guide*, Washington, D.C., 2005 (<http://www.legal-tools.org/doc/2c2399/>).

³⁵ Barak Ravid, “Israel Releases Withheld Tax Revenues to Palestinian Authority”, in *Haaretz*, 27 March 2015.

³⁶ Barak Ravid, “Obama Aims for Another Mideast Peace Push by End of Term, White House Officials Say”, in *Haaretz*, 6 March 2015.

³⁷ As it has been well observed, “[t]he United States and Israel may be reluctant to adopt drastic or permanent measures because of concerns regarding the PA’s financial fragility and a lack of Israeli appetite for stepping in to fill the void or calm the disorder that could result from undermining the self-rule institutions of Palestinians”. Zanotti, 2015, p. 20, see *supra* note 29.

³⁸ This part examines all press articles published by daily Israeli newspaper Haaretz during the Preliminary Examination phase (January 2015 – June 2017) in its online version (in Hebrew and in English) while searching by key word “international criminal court”.

Israeli press articles dealing with the ICC may be framed into four categories or topics:

1. The accession of Palestine to the Rome Statute and the opening of the preliminary examination – legal and political implications provided by journalists, analysts, and legal experts;
2. The interactions of the different actors as provided by official sources. These include the interactions of political actors with the ICC, as well as the interactions of the different political actors between themselves, while acting under the ICC's influence such as:
 - a. Exchanges and moves of Israeli and Palestinian officials with the ICC (the ICC Prosecutor's office visit, declaration of change of Israeli position and its communication with the ICC, statements of the ICC prosecutors, appointment of an Israeli official working on the issue, the appointment of a special Palestinian committee, preparation of cases);
 - b. The interaction of Israeli and Palestinian officials and related political moves (Israeli reaction to the accession through the freezing of tax incomes);
 - c. The interaction of foreign governments, mainly the US, with Israeli and/or Palestinian officials; and
 - d. The interaction of the Israeli government with non-governmental organizations (NGOs) and other actors in support of the ICC (arrest of a Palestinian parliament member);
3. The Israeli settlements; and
4. Israeli investigations in the aftermath of the 2014 Gaza war – follow-up and update. These articles are based on official sources, such as the army, as well as NGOs and UN reports.

As expected, the peak of the ICC's presence in the press was at the beginning of 2015 following the Palestinian accession to the Rome Statute. Dozens of press articles were published, analysing the political and legal impact of the accession, the opening of the preliminary examination, the Statute's entry in force in April 2015, and the reaction of the Israeli government of freezing the transfer of tax incomes.³⁹ Following the publica-

³⁹ See, for example, Barak David, "Israel to Halt Transfer of Tax Revenues to Palestinians Following ICC Bid", in *Haaretz*, 3 January 2015. The Associated Press, "Abbas Requests Arab Aid After Israeli Tax Revenue Freeze", in *Haaretz*, 15 January 2015. Haaretz Editori-

tion of the UN fact-finding report⁴⁰ and the ICC decision in the *Mavi Marmara* case,⁴¹ in mid-2015, the ICC reappeared again quite often in articles on Israeli investigations. On 9 July 2015, the government declared a change in its policy, according to which it would start a dialogue with the ICC.⁴² In the second part of 2015, fewer articles referred to the ICC; the few publications there dealt mainly with Palestinian interaction with the ICC – such as when the Palestinian NGOs submitted their report to the ICC prosecutor in November 2015. During 2016, the ICC was more absent than present, with fewer than 20 news articles published, most of them at the end of the year. These included the October announcement of the ICC delegation’s visit to Israel and Palestine⁴³ and the saga around the legislation of the Settlement Regulation Law (as discussed in Section 15.2.). During the first half of 2017, a dozen articles were published, most of them still related to the Settlement Regulation Law adopted in February 2017, and in June a couple of items referred to the question of military

al, “Israel’s Suspension of Tax Transfer Is Perverse Revenge for Palestinians’ ICC Bid”, in *Haaretz*, 5 January 2015. Barak Ravid, “EU Foreign Policy Chief: Israel Violating Oslo Accords by Freezing Palestinian Tax Revenues”, in *Haaretz*, 6 January 2015.

- ⁴⁰ UN Human Rights Council, Report of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, UN Doc. A/HRC/29/52, 23 June 2015. See, for example, Amos Harel, “Heavy Charges in UN Report Warrant a Probe, Not Self-righteousness”, in *Haaretz*, 22 June 2015; Barak Ravid, “UN Gaza war report brings Israel’s top leaders closer to the Hague”, in *Haaretz*, 23 June 2015; Amira Hass, “UN’s Gaza war report bolsters the Palestinian ICC camp”, in *Haaretz*, 23 June 2015; Barak Ravid, “Head of UN Gaza probe tells Haaretz: main message is Israel can’t drop one-ton bomb on a neighbourhood”, in *Haaretz*, 23 June 2015; Jack Houry, “Following UN Gaza probe, Palestinian authority to present documents to ICC on Thursday”, in *Haaretz*, 24 June 2015; Thomas Escritt, “Palestinian authority submits first document on alleged Israeli war crime to ICC”, in *Haaretz*, 25 June 2015; Barak Ravid, “UN Human Rights Council to condemn Israel over Operation Protective Edge, but not demand sanctions”, in *Haaretz*, 1 July 2015.
- ⁴¹ On the ICC Marmara decision, see Victor Kattan, “The ICC and the Saga of the Mavi Marmara”, in *Palestinian Yearbook of International Law*, 2015, vol. 18, p. 53.
- ⁴² See Barak Ravid, “Exclusive: Israel decides to open dialogue with ICC over Gaza Preliminary Examination”, in *Haaretz*, 9 July 2015. A couple of months prior to that, a statement of the ICC Prosecutor was published in which it was said that “without cooperation, Gaza war probe will rely on evidence from just one side”: The Associated Press, “ICC Prosecutor: Without Cooperation, Gaza War Probe Will Rely on Evidence From Just One Side”, in *Haaretz*, 13 May 2015.
- ⁴³ Barak Ravid, “ICC Delegation Arrives in Israel for Five-day ‘Educational Visit’, Won’t Conduct Evidence Collection”, in *Haaretz*, 5 October 2016.

investigation following a decision not to investigate a major incident involving severe allegations of war crimes, labelled the ‘Black Friday’.⁴⁴

15.6. Positive Complementarity?

The international interest in the Israeli investigation started with the UN fact-finding mission into the Gaza Conflict in 2009. The resulting ‘Goldstone Report’⁴⁵ was the first international report to address the issue of Israeli and Palestinian domestic investigations of war crimes allegations, and it found that Israeli military investigations did not comply with international standards. Two UN follow-up reports published in 2010 and 2011 also reaffirmed that position and stated that the Israeli investigative system lacked the necessary structural independence, and that its investigations were not sufficiently transparent and prompt.⁴⁶ At that time, Israel mandated a State-appointed commission, the Turkel Commission, to examine whether Israel’s investigation mechanisms were consistent with international law.⁴⁷ It published multiple and detailed reports on internal

⁴⁴ On the events of 1 August 2014, see Amnesty International, *Black Friday: Carnage in Rafah during 2014 Israel/Gaza Conflict*, 2015 (<http://www.legal-tools.org/doc/2c2399/>); and Amnesty International, *Time to Address Impunity: Two Years After the Gaza/Israel War*, 2016, p. 4 (<http://www.legal-tools.org/doc/15492b/>). See also ICC OTP, *Report on Preliminary Examination Activities 2016*, 2016, para. 126, see *supra* note 3. Hareetz article: Haaretz Editorial, “Investigate 2014 Gaza War’s ‘Black Friday’”, in *Haaretz*, 24 June 2017.

⁴⁵ Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN Doc. A/HRC/12/48, 25 September 2009.

⁴⁶ Human Rights Council Resolution 13/9: Follow-up to the report of the United Nations Independent International Fact-Finding Mission on the Gaza Conflict, UN Doc. A/HRC/RES/13/9, 14 April 2010; Report of the Committee of Independent Experts in International Humanitarian and Human Rights Law Established Pursuant to Council Resolution 13/9, UN Doc. A/HRC/16/24, 5 May 2011.

⁴⁷ The Public Commission to Examine the Maritime Incident of 31 May 2010, known as the Turkel Commission, made up of four Israeli members and two international observers, was set up by the Israeli government in June 2011, in the aftermath of the flotilla incident, to examine, *inter alia*, “whether the investigation and inquiry mechanism that is practiced in Israel in general [...] is consistent with the duties of the State of Israel pursuant to the rules of international law”. During April 2011 the Israeli panel heard testimonies from the military and political echelons – including the Military Advocate General, the Attorney General, the head of the General Security Services and the head of the Military Police – as well as representatives of leading Israeli non-governmental organisations and distinguished Israeli international law professors. The Commission’s report was released in 2013, see Turkel Commission, *Second Report: Israel’s Mechanisms for Examining and Investigating Complaints and Claims of Violations of the Laws of Armed Conflict According to International Law*, February 2013 (hereinafter ‘Report of the Turkel Commission’) (<http://www.legal-tools.org/doc/e8437b/>).

military investigations conducted in the aftermath of Operation Cast Lead in December 2008–January 2009 in Gaza.⁴⁸ During that period, the ICC prosecutor had to decide whether the initial Palestinian declaration recognizing the ICC’s *ad hoc* jurisdiction submitted according to Article 12(3) of the Rome Statute in January 2009 was admissible.⁴⁹ Therefore, these reports were already produced and read in light of the complementarity principle. On 23 July 2014, during the 2014 Gaza war, the second UN fact-finding mission into the Gaza conflict was commissioned. It released its report in 2015;⁵⁰ this time, the ICC had jurisdiction over the allegation of war crimes committed during this round of hostilities, and Israel, following the Turkel recommendation, established a fact-finding mechanism, which has been reporting on the progress of its internal military examinations.

⁴⁸ Following the Goldstone Report, Israel has produced five long reports: 1. Israel Defense Forces, *Conclusion of Investigations into Central Claims and Issues in Operation Cast Lead*, parts 1–2, April 2009 (<http://www.legal-tools.org/doc/556602/>; <http://www.legal-tools.org/doc/754bc5/>); 2. The State of Israel, *The Operation in Gaza: Factual and Legal Aspects*, July 2009 (<http://www.legal-tools.org/doc/2db273/>); 3. Israel Ministry of Foreign Affairs, *Initial Response to the Fact Finding Mission on Gaza pursuant to Resolution S9/1 of the Human Rights Council*, 24 September 2009 (<http://www.legal-tools.org/doc/3483fd/>); 4. The State of Israel, *Gaza Operation Investigations: An Update*, January 2010 (<http://www.legal-tools.org/doc/7febfe/>); 5. The State of Israel, *Gaza Operation Investigations: Second Update*, July 2010 (<http://www.legal-tools.org/doc/804f04/>). For an analysis see Sharon Weill, “The follow up to the Goldstone report in Israel and beyond”, in Chantal Meloni and Gianni Tognoni (eds.), *Is There A Court for Gaza?: A Test Bench for International Justice*, Asser/Springer, The Hague, 2012, p. 105–20 ; Sharon Weill and Valentina Azarova, “Israel’s Unwillingness? The Follow-Up Investigations to the UN Gaza Conflict Report and International Criminal Justice”, in *International Criminal Law Review*, 2012, vol. 12, no. 5, pp. 905–35.

⁴⁹ On 21 January 2009, the Palestinian Minister of Justice submitted a declaration to the ICC under Article 12(3) of the Rome Statute in an attempt to trigger the Court’s jurisdiction for the incidents that took place during Israel’s Operation Cast Lead. Palestinian Minister of Justice, *Declaration Recognizing the Jurisdiction of the International Criminal Court*, 21 January 2009 (<http://www.legal-tools.org/doc/d9b1c6/>). After more than three years, in April 2012, the Prosecutor decided that his Office is not the body to provide such a determination and deferred the question to the UN and the Rome Statute’s Assembly. OTP, *Situation in Palestine*, 3 April 2012 (<http://www.legal-tools.org/doc/f5d6d7/>).

⁵⁰ UN Human Rights Council, Report of the detailed findings of the independent commission of inquiry established pursuant to Human Rights Council resolution S-21/1, UN Doc. A/HRC/29/CRP.4, 24 June 2015, para. 619 (hereinafter ‘The UN Fact Finding Report, 2015’).

15.6.1. From the Duty to Investigate and Prosecute to the Duty to Examine and Re-examine

Israeli institutions and their numerous procedures have avoided rendering clear instructions on when to open a criminal investigation. The Turkel Commission found that there is a legal obligation to undertake an investigation “to those acts that constitute serious violations of international humanitarian law otherwise known as ‘war crimes’”,⁵¹ including illegal superior orders and the political echelons. But what kind of investigation?

15.6.1.1. Criminal Investigation

The narrative of Israeli authorities, be it the army, political leaders, or different commissions, is that only *absolute prohibitions of international law* shall immediately trigger a criminal investigation. Yet, these are interpreted as only illegal acts committed by individual soldiers, such as looting or killing a civilian in violation of the rules of engagement and Israeli military law.⁵²

15.6.1.2. Effective Investigation

According to the Turkel Commission, where a credible accusation is made and there is reasonable suspicion that a war crime was committed, an effective investigation is required.⁵³ The Commission noted that “there is no restriction on the source of a complaint or allegation, and it may come from State authorities, a private citizen, non-governmental organizations, etc.”.⁵⁴ However, although a reasonable suspicion was arguably raised by the UN fact-finding mission into the 2014 Gaza conflict,⁵⁵ an effective

⁵¹ Report of the Turkel Commission, p. 99, see *supra* note 47.

⁵² See, for example, the view of the Minister of Defence Ya’alon that crimes such as looting and rape shall be criminally investigated and prosecuted, whereas the case of the killing of civilians as part of the collateral damage is not among these cases. Israel Law Center, Transcript of the Defense Minister Moshe Ya’alon’s Closing Address and Q&A at “Towards a New Law of War”, 5 May 2015. pp. 4–6.

⁵³ Report of the Turkel Commission, p. 100, see *supra* note 47: “[W]here a credible accusation is made or a reasonable suspicion arises that a war crime has been committed”. See also Micheal. N. Schmitt, “Investigating Violations of International Law in Armed Conflict”, in *Harvard National Security Journal*, vol. 2, no. 1, p. 83.

⁵⁴ Report of the Turkel Commission, p. 100, see *supra* note 47.

⁵⁵ The UN Fact Finding Report, 2015, para. 672, see *supra* note 50: “The commission’s investigations also raise the issue of why the Israeli authorities failed to revise their policies in Gaza and the West Bank during the period under review by the commission. Indeed, the fact that the political and military leadership did not change its course of action, despite

investigation of the high level of military commanders and the political echelons has yet to be opened.

15.6.1.3. Examination

When the ‘reasonable suspicion’ threshold is not attained, a fact-finding assessment shall be conducted in order to evaluate whether a reasonable suspicion of a war crime exists. To this end, the Turkel Commission recommended that “a *separate* mechanism shall be established in order to conduct a fact-finding assessment”.⁵⁶ This recommendation led to the establishment of the military Fact Finding Assessment Mechanism in September 2015.⁵⁷ It was designed to conduct examinations of *exceptional incidents* that took place during military operations, so as to provide the Military Advocate General with sufficient factual information to determine whether allegations give rise to a reasonable suspicion of criminal misconduct.⁵⁸ It does not assess policy or command responsibility, nor does it evaluate the legality of orders. This may explain why the few criminal investigations opened so far relate only to soldiers of lower ranks.⁵⁹ Thus, the newly-established mechanism is yet another example of a system that reproduces the same structural flaws, as also observed by the UN fact-finding mission.⁶⁰ On the one hand, it appears as if it is actively in-

considerable information regarding the massive degree of death and destruction in Gaza, raises questions about potential violations of international humanitarian law by these officials, which may amount to war crimes. Current accountability mechanisms may not be adequate to address this issue”.

⁵⁶ Report of the Turkel Commission, p. 382 (recommendation no. 5), see *supra* note 47.

⁵⁷ Israel Defense Forces Military Advocate General’s (‘IDF MAG’), “Operation Protective Edge: Examinations and Investigations”, 10 September 2014 (<http://www.legal-tools.org/doc/13b81d/>).

⁵⁸ In an Israeli state report, its mandate has been described as follows: “The FFA Mechanism is tasked with examining exceptional incidents (such as an attack resulting in significant, unanticipated civilian casualties) in order to assist the MAG’s decision whether to open a criminal investigation and also to inform the IDF’s ‘lessons-learned’ process so that steps may be considered to minimise the risk of such incidents in the future [...]. To encourage full disclosure of relevant information, Israeli law treats the materials and findings of the FFA Mechanism as privileged. State of Israel, *The 2014 Gaza Conflict: Factual and Legal Aspects*, May 2015, paras. 425, 427 (available on the web site of the Israeli Ministry of Foreign Affairs).

⁵⁹ IDF MAG, “Operation Protective Edge: Examinations and Investigations”, see *supra* note 57, paras. 411–12.

⁶⁰ The FFA Mechanism appears to have replaced the operational debriefings for the purposes of informing the MAG. This mechanism may be useful for the purpose of internal exami-

vestigating, while on the other hand, the same mechanism ensures that these examinations will not mature to criminal investigations and possible prosecution against the State and army interests.

15.6.1.4. Israeli Narratives for Closing Examination

Avoiding the opening of criminal investigations in cases which deal with excessive civilian deaths and damage is done through two main narratives.⁶¹

15.6.1.4.1. The ‘Regrettable Mistake’ Paradigm

This refers to where, while mistakes and evaluation errors may have been made, the criminal intent is lacking, and thus the examination does not justify the opening of a criminal investigation. In fact, the high threshold for *mens rea* is hardly attainable. Yet, the recurrence of such apparent errors raises concerns about the nature of the Israeli military’s target verification process and precautionary measures taken.⁶² Officially, it has been formulated thus:

The professional assessment at the time of the attack – that civilians would not be harmed as a result of the attack – was not unreasonable under the circumstances. Although seemingly civilians were harmed as a result of the attack, this is indeed a regrettable result, but it does not affect its legality *post facto*. (Allegation Concerning Two Female Casualties at the ‘Alambra Association’ in Bet Lehia, 12 July 2014);⁶³

At the time of the incident, the forces had believed that the likelihood of civilians being harmed as a result of the fire was low. (Allegation Concerning the Deaths of 31 Individuals as a Result of Strikes on the House of the Al-Salak Family and Its Surroundings in Shuja’iyya, 30 July 2014);⁶⁴

nation and ‘lesson learnt’ but not as an effective investigation tool, as already noted in the Goldstone report, The UN Fact Finding Report, 2015, para. 620, see *supra* note 50.

⁶¹ This analysis is based on reading the decision of the FFM and the Military Advocate General in the examination phase.

⁶² Sharon Weill and Valentina Azarova, “The 2014 Gaza War: reflections on *ius ad bellum*, *ius in bello* and accountability”, in Annysa Bellal (ed.), *The War Report: Armed Conflict in 2014*, Oxford University Press, Oxford, 2015, p. 360, at p. 373.

⁶³ IDF MAG, “Protective Edge”.

⁶⁴ *Ibid.*

The fact that in practice there occurred an unforeseen failure, which resulted in it going off-trajectory and causing harm to civilians and to property, is regrettable, but does not affect the legality of the attack *post facto*. (Allegation Concerning the Deaths of Members of the Abu Dahrouj Family in the Al-Zuwayda Village, 23 August 2014).⁶⁵

15.6.1.4.2. The ‘Proportionality and Life Calculation’ Paradigm

The principle of proportionality requires protecting civilians during attacks on military targets, while accepting that some civilian deaths are not unlawful, if they are not “excessive” in relation to the “anticipated” military gain.⁶⁶ The principle is closely linked to the obligation to take all feasible precautions, active and passive, to minimize harm to civilians, which implies a duty not to put the civilian population unnecessarily at risk during attacks.⁶⁷ The indeterminate nature of this principle, coupled with the difficult access to the facts, allows for an important margin of interpretation for military legal advisors that involves major ethical questions of life calculation. This is far beyond the scope of the chapter to address how this principle is applied in practice. While, obviously, the proportionality equation largely depends on which facts are included in the calculation, one controversial example is worth mentioning here. According to Israeli military legal advisers: “if an airstrike is planned on an apartment on the third floor, but is expected to damage apartments used for civilian purposes on the floors beneath it, the expected damage need not be factored into any proportionality analysis, nor need measures be taken to avoid causing it pursuant to the precautions in attack require-

⁶⁵ *Ibid.* See also a report released by the UN Headquarters Board of Inquiry into certain incidents that occurred in the Gaza Strip between July and August 2014, analyses various incidents of fire at UNRWA (United Nations Relief and Works Agency) schools, which had caused the death of 44 civilians and at least 227 injuries. Here again, in at least one of the incidents, the Israeli military claimed that it had made a mistake: it fired an aerial-launched missile at a motorcycles carrying fighters, and was unable to divert it by the time it realised that the strike would coincide with the motorcycle passing by the UNRWA school gate. UN Security Council, Letter dated 27 April 2015 from the Secretary-General addressed to the President of the Security Council, S/2015/286, 27 April 2015, Annex, paras. 43-44.

⁶⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of international armed Conflicts (Additional Protocol I), 8 June 1977, Articles 51(5)(b) and 57(2)(a)(iii).

⁶⁷ Article 57(2)(a)(i) Additional Protocol I.

ment”.⁶⁸ Needless to say that when this position is applied in an urban combat zone as dense as Gaza, many civilian lives are at risk.

15.6.2. Main Structural Deficiencies

15.6.2.1. Independency and Impartiality

The Military Advocate General is appointed by the Israeli Minister of Defence, upon the recommendation of the Chief of Staff, to whom he is subordinate in rank. In August 2015, a new Military Advocate General was appointed, who was in charge of pursuing the investigations related to the 2014 Gaza conflict.⁶⁹ The process of his nomination points out the procedural flaws that would inherently impair his independency and impartiality: he was nominated by the Israeli Defense Minister Moshe Ya’alon, who was among the highest political authorities/decision-makers during the conflict.⁷⁰ Ya’alon’s position on criminal investigations has been openly hostile; he said on a number of occasions that criminal investigations should be strictly reserved to “absolute crimes” such as looting.⁷¹ The Military Advocate General is generally nominated by the Minister of Defence upon the recommendation of the Chief of Staff. The latter was appointed in February 2015, by both Defence Minister Ya’alon and Prime Minister Benjamin Netanyahu, who were in office during the 2014 Gaza war. Indeed, the United Nations fact-finding mission⁷² and the Israeli Tur-

⁶⁸ Michael N. Schmitt and John J. Merriam, “The Tyranny of Context: Israeli Targeting Practices in Legal Perspective”, in *University of Pennsylvania Journal of International Law*, vol. 37, no. 1, 2015, p. 120.

⁶⁹ Judah Ari Gross, “New military advocate general prepared for ICC fight”, in *Times of Israel*, 18 August 2015.

⁷⁰ Amos Harei, “Israel’s next military attorney general to be chosen early”, in *Haaretz*, 27 April 2015.

⁷¹ Israel Law Center, Transcript of the Defense Minister Moshe Ya’alon’s Closing Address and Q&A at “Towards a New Law of War”, pp. 4–6, see *supra* note 52: “In certain cases, of course, there is room for criminal investigations. But we should put the line very clearly. If we are talking about crime, like looting or raping [...] then there is room to launch a criminal investigation. [...] The [morale] of our soldiers might be harmed if we will allow a criminal investigation in cases in which we should avoid [...] So we should be very delicate in deciding when [and] where [a] criminal investigation is needed, a few cases, not automatically opening a criminal investigation because civilians were harmed”. See also Gili Cohen, “Defense Minister Ya’alon: No Place for Criminal Probe of Gaza’s ‘Black Friday’”, in *Haaretz*, 8 January 2015.

⁷² The UN Fact Finding Report, 2015, para. 619, see *supra* note 50: “The involvement of the MAG in policy discussions concerning the hostilities, and the role of MAG Corps legal advisors in decisions taken by the IDF during combat continue to raise questions about the

kel Commission⁷³ found that the Israeli Military Advocate General, the principal body for carrying out investigations over the Gaza 2014 conflict, is not sufficiently independent and impartial.

15.6.2.2. Civilian Supervision and the Israeli High Court of Justice: From Abstention to Deference

Proper, independent, and impartial investigation of the army's actions should be delegated to civilian authorities. In Israel, however, the civil authorities delegated most of their responsibilities concerning Israel's obligations under international humanitarian law to the army itself. In fact, the military is exclusively entrusted by the State to define the rules of conduct of hostilities, the guidelines for investigations, and the criteria for initiating prosecutions⁷⁴ – which means that the Military Advocate General operates in what Eyal Benvenisti refers to as a “quasi-constitutional vacuum”.⁷⁵ A report issued in 2011 by a group of Israeli international law experts confirms that the “Israeli military legal system concentrates too much power in the hands of a single body that is only minimally supervised by civilians”.⁷⁶ The position of the State of Israel with regard to the question of external supervision is that the military justice system is well-subordinated to civilian oversight, namely that of the Israeli High Court of Justice.⁷⁷ Yet, this judicial institution is unable to provide an effective and systematic review over the army's internal investigations and subsequent decisions.

Although the Israeli High Court of Justice has residual competence to review the Military Advocate General's decisions as a form of civilian

MAG's ability to carry out independent and impartial investigations, particularly with regard to cases where soldiers may be following commands authorized by the MAG [...], but nonetheless may be suspected of having violated international humanitarian law or international human rights law”.

⁷³ See the Report of the Turkel Commission, p. 394–95, see *supra* note 47.

⁷⁴ Yuval Shany, Amichai Cohen and Ido Rosenzweig, *Response to the Military Advocate General's Position Paper on the Investigation of Allegations of Violations of International Humanitarian Law, submitted to the Turkel Commission in February 2011*, 2011, paras. 91–102.

⁷⁵ The duty of the State of Israel to investigate violations of the law of armed conflict, Expert opinion of Eyal Benvenisti submitted on 13 April 2011 to the Turkel Commission, p. 25 (hereinafter ‘Benvenisti's report to the Turkel Commission’).

⁷⁶ Shany, Cohen and Rosenzweig, para. 64, see *supra* note 74.

⁷⁷ State of Israel, *The 2014 Gaza Conflict: Factual and Legal Aspects*, May 2015, pp. 228–30, see *supra* note 62.

supervision, in practice the Court – whose role of review is procedurally intended only for exceptional cases – is an organ that neither can, nor should, conduct thorough routine supervision of the work of the system of military investigations.⁷⁸

Among the main reasons for the Court's practice of not reviewing decisions over whether or not to open investigations for alleged crimes, is the inadequacy of its procedure. The Israeli High Court of Justice does not undertake its own fact-finding but relies solely on affidavits submitted by the parties involved. In the *Thabit* case, the Court itself affirmed the view that it is not the suitable forum for such determinations.⁷⁹ Further, the protracted nature of the Court's proceedings often creates a serious delay, which has an irreversible impact on the ability of establishing the facts required for a criminal trial. This delay also increases court fees, thereby augmenting the victims' financial burden.

Constitutionally, the authorities benefit from a wide margin of appreciation in deciding whether to open an investigation or to indict the alleged perpetrator. The Israeli High Court of Justice has only a limited scope of review over the Military Advocate General's and the Attorney General's decisions and, in practice, has always deferred this task to the executive power. As stated by Deputy Chief Justice Rivlin in 2008:

[The State's decision] normally falls within the 'margin of appreciation' that is afforded to the authorities and restricts, almost completely, the scope of judicial intervention. I was unable to find even one case in which this court intervened

⁷⁸ According to Benvenisti, the High Court of Justice does "too little, too late" as it depends on the knowledge available to the public. Benvenisti's report to the Turkel Commission, p. 24. See also Report of the Turkel Commission, p. 407, see *supra* note 47: "[...] the MAG's decision not to open an investigation is of course subject to the review of the Supreme Court within the framework of petitions submitted to the Court. In practice, however, the ability of the Court to review such decisions is rather limited. This is because, *inter alia*, a petition to the Supreme Court is usually submitted long after the incident in question. The Court's function as a review mechanism of the MAG's decision not to open an investigation is therefore limited".

⁷⁹ The Court held that it "is not the suitable forum with the necessary means to examine the circumstances of the case in which the deceased was killed". The Supreme Court of Israel (sitting as the High Court of Justice), *Thabit v. Attorney General*, Judgment, 30 January 2011, H CJ 474/02. See also Shany, Cohen and Rosenzweig, paras. 95 ff., see *supra* note 74.

in a decision of the Attorney General not to issue an indictment on the basis of a lack of sufficient evidence.⁸⁰

For the Israeli High Court of Justice to intervene in a State decision, it should establish that the decision not to open an investigation was “extremely unreasonable”, based on flawed motives, or the fact that it was made in bad faith – criteria that impose a remarkably burdensome evidential threshold.⁸¹ Other considerations limit the Court’s willingness to intervene in the State authorities’ decision: “the unique characteristics of active operations sometimes constitute considerations negating the presence of a public interest in the instigation of criminal proceedings, even if criminal liability is present”.⁸²

The Israeli High Court of Justice’s deference to the executive is also revealed by a general practice that refrains from scrutinizing policies devised by the political or military echelons, but instead focuses on the practice that arises from the implementation of these policies.⁸³ In the *Atrash* case,⁸⁴ for instance, the Israeli High Court of Justice refused to order the Military Advocate General to indict the soldiers responsible for the death of a Palestinian civilian. The decision confirmed the State’s position that the soldiers were acting in accordance with the relevant military protocols when confronted with a life-threatening situation, and accepted the reasonableness of the Military Advocate General’s decision on this basis. The

⁸⁰ The Supreme Court of Israel (sitting as the High Court of Justice), *Jane Doe (A) v. The Attorney General*, 26 February 2008, HCJ 5699/07.

⁸¹ The High Court of Justice intervention is “limited to those cases in which the Attorney General’s decision was made in an extremely unreasonable matter, such as where there was a clear deviation from considerations of public interest, a grave error or a lack of good faith”. The Supreme Court of Israel (sitting as the High Court of Justice), *Shtanger v. The Attorney General*, 16 July 2006, HCJ 10665/05. See also Amnon Rubinstein and Barak Medina, *The Constitutional Law in the State of Israel: Government Authorities and Citizenship*, Shoken, 2005, Vol. 2, pp. 1020, 1024.

⁸² The Supreme Court of Israel (sitting as the High Court of Justice), *Anonymous v. Attorney-General et al.*, HCJ 4550/94, Piskei Din 49(5) 859, cited in The Supreme Court of Israel (sitting as the High Court of Justice), *Yoav Hess et al. v. Judge Advocate General et al.*, HCJ 8794/03. Response on Behalf of the State Attorney’s Office.

⁸³ See UN Fact-Finding Report, 2015, para. 619, *supra* note 50: “there is a need to ensure the robust application of international humanitarian law in the MAG’s decisions as to whether to open or close criminal investigations. For example, the definition of “military objectives” has implications both for the MAG’s operational guidance of troops on the ground and his later assessment of whether or not to refer a case for criminal investigation”.

⁸⁴ The Supreme Court of Israel (sitting as the High Court of Justice), *Ayman Atrash v. The Chief Military Prosecutor*, 18 July 2007, HCJ 10682/06.

Israeli High Court of Justice refused the petitioners' request to obtain the information that the army possessed about the circumstances of the death. Similarly, in the *Alhams* case,⁸⁵ in which Israeli soldiers wilfully killed a 13-year-old girl who had unknowingly entered a 'special security zone' near a settlement in the southern Gaza Strip, the Israeli High Court of Justice refused to order the investigation of the soldiers for carrying out illegal orders, and only recommended a review of their compliance with the army's rules of engagement and oral orders given by high ranking officials.

To date, the Israeli Supreme Court has never issued any order to the Military Advocate General to open a criminal investigation or to indict any individual regarding alleged suspicions of war crimes in Gaza.⁸⁶ It is unlikely that it will change its attitude. In the *Adalah* case, which demanded investigations into the killings and injury of civilians and the extensive damage to homes in the Gaza Strip in 2004, the Court rejected the petition and reiterated its previous decisions in ruling in 2011 that intervention in the decisions of the chief military prosecutor is rare, and should occur only in very exceptional circumstances.

Since the 2008–09 Gaza war and until today, Israeli authorities – whether the army or the Ministry of Foreign Affairs – have been producing a vast amount of reports on the investigations undertaken. Yet, these investigations have brought very few prosecutions, all on minor crimes committed by individual soldiers, without addressing the responsibility of political and military superiors. More recently, the UN fact-finding mission to the 2014 Gaza conflict stated in 2015 that the “commission is concerned that impunity prevails across the board for violations of international humanitarian and human rights law allegedly committed by Israeli forces [...] Those responsible for suspected violations of international law at all levels of the political and military establishments must be brought to justice”.⁸⁷ Moreover, war crimes legislation in Israeli domestic penal code is lacking and no legislation exists to impose direct criminal liability on military commanders (and political leaders) for international humanitarian law violations.

⁸⁵ The Supreme Court of Israel (sitting as the High Court of Justice), *Alhams et al. v. IDF Chief Military Prosecutor et al.*, 14 December 2006, HCJ 741/05, para. 37.

⁸⁶ One of the rare cases in which the HCJ intervened was the Abu Rame case that occurred in the West Bank.

⁸⁷ UN Fact Finding Report, 2015, para. 640, see *supra* note 50.

For all these reasons, as mentioned, the NGO B'Tselem declared that it would not assist the Military Advocate General in any matter concerning the criminal investigation in light of their “experience with previous military actions in Gaza, which shows that investigations led by the Military Advocate General Corps do not promote accountability among persons responsible for such violations or reveal the truth”.⁸⁸

15.7. Conclusion

The threat of joining the ICC was portrayed as the Palestinians’ ‘nuclear option’. The ironic comparison with nuclear weapons is that it is the threat of their use, and not their actual use, that has the most effective impact. The fall-out of the ICC’s role and impact in Israel is mixed. Yet one thing may be affirmed: the ICC is far from being an irrelevant actor. It may not serve the immediate goal one would expect, but its presence with impact on the ground is affirmed despite US and Israeli opposition.

What can be proposed for the ICC in the course of its preliminary examination? First, the need to maintain a time limit for the examination phase. Since 2009 and the aftermath of Operation Cast Lead and the first UN fact-finding mission, Israel has been subjected to a variety of sophisticated local inquiries that have not generated effective accountability at higher levels. If the ICC preliminary examination does not advance to deliver a decision to move to an investigation, what kind of example is being given to local proceedings? The risk is that instead of positive complementarity that encourages investigations and accountability at the local level, the ICC may contribute to a contrary, negative effect of prolonging procedures, avoiding opening investigations and taking decisions.

Second, while positive complementarity and deterrence are the desired impact during the examination phase at the local level, this does not always come to be. Unintended and reverse effects may well be produced locally. As described, the Settlement Regulation Law was adopted despite the ICC’s manifest presence. Rather than being dissuaded by the ICC, the Israeli parliament affirmed its sovereignty and authority in opposition to that pressure, choosing to disregard both international criminal law and the International Criminal Court. The external threat of the ICC ended up strengthening the walls of separation between local law and international

⁸⁸ B’Tselem, *Investigation of incidents that took place during recent military action in Gaza: July-August 2014*, Letter sent to Lt. Col. Ronen Hirsch on 4 September 2014, in response to his letter of 11 August 2014.

law and justice. It has also resulted in diminishing space for NGOs to operate.

Third, the presence of the ICC in Israeli public debates is declining along with its reputation. In fact, it can be observed that not only is deterrence at the local level questioned, but also the role of international criminal justice in general. If the ICC ensures accountability only for certain States, and not for others, it ends up reflecting an uneven structure of power, which is not the envisioned role of an international criminal court. Legal decisions have to be made, even with the risk of not being respected. It will be up to politics (and the people) to resolve the problem of effectiveness, not the Court. After all, justice is not a ‘nuclear option’, but an ethical value.

Quality Control in the Preliminary Examination of the Georgia Situation

Nino Tsereteli*

16.1. Introduction

The Office of the Prosecutor ('OTP') of the International Criminal Court ('ICC') made public its preliminary examination into the situation of Georgia on 14 August 2008.¹ Seven years later, on 13 October 2015, the Prosecutor sought the Pre-Trial Chamber's authorization for initiating an investigation.² On 27 January 2016, the Pre-Trial Chamber authorized the Prosecutor to proceed with an investigation of crimes within the jurisdiction of the Court, committed in and around South Ossetia, between 1 July and 10 October 2008.³

This chapter explores the OTP's preliminary examination in the Georgia situation with a focus on mechanisms of controlling the quality of prosecutorial activities. It begins with clarifying the standards for assessing the quality of prosecutorial activities at the stage of preliminary examination. Then it reflects on the meaning and appropriate modalities of control over the quality of prosecutorial activities and identifies audiences that are entitled to exercise control.

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¹ ICC OTP, The Prosecutor's Statement on Georgia, 14 August 2008 (<http://www.legal-tools.org/doc/5bcdc2/>).

² ICC, Situation in Georgia, Pre-Trial Chamber I, Request for Authorisation of an Investigation Pursuant to Article 15, 13 October 2015, ICC-01/15-4 (<http://www.legal-tools.org/doc/460e78/>).

³ ICC, Situation in Georgia, Pre-Trial Chamber I, Decision on the Prosecutor's Request for Authorisation of an Investigation, 27 January 2016, ICC-01/15-12 (<http://www.legal-tools.org/doc/a3d07e/>); see also ICC, Situation in Georgia, Separate Opinion of Judge Péter Kovács, 27 January 2016, ICC-01/15-12-Anx-Corr (<http://www.legal-tools.org/doc/28b159/>).

There may be disagreement as to what kind of control is appropriate and by whom, due to differences in views on the source of the OTP's legitimacy. Some would derive the OTP's legitimacy from the delegation of powers by States, which are consequently entitled to exercise control over it. According to an alternative logic, however, whoever is affected by the decisions of the institution has a legitimate interest in knowing how and why that institution makes those decisions. This contribution displays how these two modes of logic empower different sets of actors and apply in practice, with emphasis on the preliminary examination into the Georgian situation. This chapter will show that some of the existing mechanisms of control rely predominantly on delegation, while others on the justifiability of giving voice to those affected by the decisions made by the institution in question.

The understanding of 'control' adopted in this contribution does not presume a hierarchical relationship between the entity that exercises control and the entity that is subject to control, where the latter follows the preferences of the former. Instead, it is suggested that the existing mechanisms of control (for example, persuasion, criticism or contestation) are capable of influencing the quality of prosecutorial activities, without necessarily threatening prosecutorial independence.

This chapter identifies three sets of actors entitled to control the OTP and, consequently, three types of control – political, social and judicial. Mechanisms employed may be formal or informal. They may operate *ex ante* (to prevent certain developments by signalling dissatisfaction) as well as *ex post* (to sanction misconduct). It is essential to address risks and benefits of involving a multiplicity of controlling entities, the ways in which they constrain the OTP as well as the ways in which they check and balance one another.

The focus here is on external control, but not on internal control or self-control by the OTP. Also, this chapter will examine quality control as regards decision-making in specific situations and does not cover quality control as regards formulation of general policies and strategies of the OTP.

One of the key aims is to understand the role of transparency in securing control. This chapter looks at how the degree of transparency varies (in terms of the type and information that the institution makes available and in terms of the size and identity of permitted audience) and how that affects the respective abilities of various audiences to exercise control.

Below, in Section 16.2., this chapter will first unpack the notions of quality and control, before identifying the existing standards for assessing the prosecutorial activities as well as the existing mechanisms of controlling their quality. Section 16.3. goes on to examine how those mechanisms function in practice, taking the situation in Georgia as an example, followed by some concluding remarks in Section 16.4.

16.2. Unpacking the Notion of ‘Quality Control’

16.2.1. Defining ‘Quality’

‘Quality’ is associated with responsible, acceptable, desirable behaviour of the Prosecutor. It is difficult to come up with standards of behaviour that would be acceptable for all relevant stakeholders. This is, at least partly, due to the absence of agreement on the values or goals of the ICC, both in general and at specific stages of proceedings. Depending on whether one views a preliminary examination as means of deciding whether to open an investigation or as an instrument of encouraging and stimulating national jurisdictions,⁴ one will expect either a detached, passive presence of the Prosecutor for a short period of time or a more proactive and prolonged engagement. When the Prosecutor’s goals are ambiguous, it is difficult to understand the choices he or she makes (especially in the absence of explanations). It invites accusations of lack of consistency in the Prosecutor’s decision-making and speculations about improper motivations.

Generally, standards for assessing prosecutorial activities may be *substantive* (related to the quality of decisions, namely their legal appropriateness and their practical feasibility) and *procedural* (related to the qualities of the decision-making process, such as its fairness, transparency and inclusiveness, as well as both the decision-maker’s responsiveness⁵ and the timeliness of engagement).

⁴ Carsten Stahn, “Damned If You Do, Damned If You Don’t: Challenges and Critiques of Preliminary Examinations at the ICC”, in *Journal of International Criminal Justice*, 2017, vol. 15, no. 3, pp. 413–34 (highlighting two competing ways of approaching preliminary examinations, a gateway approach and consequentialist approach; under the former approach, preliminary examinations are only aimed at determining whether the initiation of an investigation is warranted; the latter approach accepts other rationales for preliminary examinations, such as positive complementarity and deterrence).

⁵ Mirjan R. Damaška, “What is the Point of International Criminal Justice?”, in *Chicago-Kent Law Review*, 2008, vol. 83, no. 1, p. 349 (noting as regards the *ad hoc* tribunals that “little effort was made to explain to the local public and legal profession the unfamiliar as-

While the Prosecutor should ideally fulfil all these standards, this may prove difficult in practice. The Prosecutor may have to prioritize, keeping in mind implications of the choices she makes for the social legitimacy of the institution. In this relation, allowing greater participation and intensive engagement with relevant stakeholders and being responsive to their concerns is desirable and appropriate. It increases the procedural legitimacy of prosecutorial decision-making. The ICC's audiences will also be more likely to accept unfavourable decisions when the decision-maker listens to them.⁶ From this perspective, prolonging preliminary examinations so that the Prosecutor can engage with relevant stakeholders may be justified. However, such inclusive decision-making processes will inevitably cause delays.

Ideally, the Rome Statute should contain precise, objective legal rules governing prosecutorial decision-making in all stages of proceedings. The Prosecutor is expected to act in accordance with the requirements of the treaty. Aware of this expectation, the Prosecutor routinely justifies its actions and defends its choices by reference to the relevant legal provisions. She seeks to create appearance of legality, reassuring the relevant audiences that she is acting in accordance with the pre-agreed rules and thereby strengthening the perception of the legal legitimacy of her decisions. This is not difficult due to the numerous gaps in the Rome Statute, which does not specify the modalities and intensity of the Prosecutor's engagement with national authorities in the course of preliminary examination.

Similarly, the Statute does not impose time limits for the completion of preliminary examination. While one may argue that the OTP has to make a decision on opening an investigation within a reasonable time, it is rather difficult to determine what is reasonable in each specific situation. Consequently, in the absence of precise time limits, it is difficult to call the Prosecutor to account for delays. If national authorities claim to be

pects of international criminal procedure” and “even less effort has been spent in dispelling unrealistic local expectation that all episodes of atrocity will be prosecuted, which then became a source of widespread and often unfounded perceptions of bias towards one or another ethnic group”).

⁶ Eva Brems and Laurence Lavrysen, “Procedural Justice in Human Rights Adjudication: The European Court of Human Rights”, in *Human Rights Quarterly*, 2013, vol. 35, no. 1, pp. 176–200 (applying social psychology theory of procedural justice to human rights adjudication and emphasizing fundamental importance of procedural fairness in shaping citizens' satisfaction and compliance with the outcome of a legal process).

conducting investigations, preliminary examinations are inevitably longer than otherwise. Due to the shortage of information, it is difficult to see whether the state of national proceedings would have allowed the Prosecutor make the same determination earlier.

Article 53(1) of the Rome Statute envisages criteria for the initiation of investigation (jurisdiction, admissibility and interests of justice). The Prosecutor enjoys considerable discretion in applying these criteria, due to the substantive flexibility in the article.⁷ Uncertainty privileges prosecutorial discretion and independence over accountability.⁸ On the one hand, such discretion is essential for smooth operation of the system, as it enables necessary flexibility and adaptability to change.⁹ It is seen as an indispensable element of prosecutorial independence and thus of the integrity and quality of legal proceedings.¹⁰ On the other hand, it also involves risks.¹¹ Policy papers and reports issued by the Prosecutor to demystify the process of prosecutorial decision-making only partly alleviate the concerns connected to absence of control over the exercise of prosecutorial discretion. One may doubt whether such general guidelines could fully adapt to the complexity of each situation and narrow the Prosecutor's range of choices.¹² This broad discretion may give rise to suspicions about improper external influences over prosecutorial decision-making. The predominantly informal nature of communications at the

⁷ Maria Varaki, "Introducing a Fairness-Based Theory of Prosecutorial Legitimacy before the International Criminal Court", in *European Journal of International Law*, 2016, vol. 27, no. 3, p. 776; William A. Schabas, "Prosecutorial Discretion v. Judicial Activism at the International Criminal Court", in *Journal of International Criminal Justice*, 2008, vol. 6, p. 735; Kaveri Vaid, "Discretion Operationalized Through Law: Proprio Motu Decision-making at the International Criminal Court", in *Florida Journal of International Law*, 2013, vol. 25, no. 3, pp. 359, 384.

⁸ Carsten Stahn, "Judicial Review of Prosecutorial Discretion: Five Years on", in Goran Sluiter and Carsten Stahn (eds.), *The Emerging Practice of the International Criminal Court*, Brill/Nijhoff, 2009, p. 267.

⁹ Hassan B. Jallow, "Prosecutorial Discretion and International Criminal Justice", in *Journal of International Criminal Justice*, 2005, vol. 3, no. 1, p. 145.

¹⁰ *Ibid.*, 146.

¹¹ Allison Marston Danner, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court", in *American Journal of International Law*, 2003, vol. 97, no. 3, p. 518.

¹² Alexander K.A. Greenawalt, "Justice without Politics? Prosecutorial Discretion and the International Criminal Court", in *New York University Journal of International Law and Politics*, 2007, vol. 39, no. 3, pp. 655–56, 658.

stage of preliminary examinations makes it difficult to verify those suspicions. Even if they are unsubstantiated, the fact that they are raised may have implications for the social legitimacy of the Court.

Prosecutorial decisions may benefit certain actors (powerful as opposed to weak States, governments as opposed to rebel groups and civil society). However, one should not automatically attribute such decisions to external pressure. It will only be possible to make a credible case of prosecutorial bias if the Prosecutor consistently (on more than one occasion) favours a certain actor.

Further, it has to be kept in mind that not all influences are inappropriate and incompatible with prosecutorial independence. Interests and views of governments or other actors may influence prosecutorial activities at two levels – at the level of rules (through their involvement in formulating treaty norms and policies governing these activities) and at the level of decisions in specific situations/cases. The former (control at the level of rules) is generally seen as compatible with prosecutorial independence, while the latter (control at the level of specific decisions) is to be treated cautiously. DeGuzman, for one, calls for greater acceptance of political actors' input (due to their greater comparative legitimacy), so that the ICC can develop a better sense of what these actors (collectively) value and shape its decision-making accordingly to ultimately further strengthen its own legitimacy.¹³ Meanwhile, she also rightly warns about the use of the Court by political actors to “further self-interested objectives, such as increasing their powers at the expense of rivals”.¹⁴ Such concerns arise not only when governments try to ‘use’ international courts against rebel forces, but also when international courts are brought into play by one or two (self-interested) States to address one aspect of a broader political dispute they are involved in. In such instances, the inter-

¹³ Margaret M. deGuzman, “Choosing to Prosecute: Expressive Selection at the International Criminal Court”, in *Michigan Journal of International Law*, 2012, vol. 33, no. 2, p. 292; Matthew R. Brubacher, “Prosecutorial Discretion at the International Criminal Court”, in *Journal of International Criminal Justice*, 2004, vol. 2, no. 1, pp. 93–94 (arguing that the ICC should take into account extra-legal/political factors to increase chances of enforcement and that ignoring political realities would amount to “a form of suicide”).

¹⁴ DeGuzman, 2012, p. 292, see *supra* note 13.

national courts may become what Judge Bruno Simma called “ancillary theaters of conflict”.¹⁵

16.2.2. Defining ‘Control’

16.2.2.1. Rationale of Control

The Rome Statute empowers the Prosecutor to obtain and analyse information in order to determine whether there is a reasonable basis to proceed with actual investigation.¹⁶ It may request information from governments, inter-governmental and non-governmental organizations and other reliable sources.¹⁷ It also may carry out field missions.¹⁸ The determination made by the Prosecutor will have consequences for national decision-makers and affected communities. The Prosecutor may end up opening an investigation *proprio motu*, even in the absence of State Party or Security Council referral. The drafters intended to reinforce prosecutorial independence by introducing such an option.¹⁹ However, acceptance of prosecutorial empowerment hinged on the availability of mechanisms of *control*, providing governments and other stakeholders with an assurance that the prosecutor would not abuse power/discretion and act arbitrarily.²⁰

One may argue that mechanisms of control may threaten independence. First, control by external political actors should be rejected to preserve the external independence of the Prosecutor and insulate her from undue political influence. Second, one may also be cautious about judicial control in light of the division of roles between judges and the Prosecutor,

¹⁵ Bruno Simma, “Mainstreaming Human Rights: The Contribution of the International Court of Justice”, in *Journal of International Dispute Settlement*, 2012, vol. 3, no. 1, p. 16.

¹⁶ The Rome Statute of the International Criminal Court, 17 July 1998, Article 15(2) and (3) (‘ICC Statute’) (<http://www.legal-tools.org/doc/7b9af9/>); ICC, Rules of Procedure and Evidence, 9 September 2002, Rule 48 (“In determining whether there is a reasonable basis to proceed with an investigation under article 15, paragraph 3, the Prosecutor shall consider the factors set out in article 53, paragraph 1 (a) to (c)”) (<http://www.legal-tools.org/doc/8bcf6f/>).

¹⁷ ICC Statute, Article 15(2), see *supra* note 16.

¹⁸ Field missions were carried out in Colombia, Georgia and Guinea. For comments on this and other preliminary examination activities, see Morten Bergsmo, Jelena Pejić and ZHU Dan, “Article 15”, in Otto Triffterer and Kai Ambos (eds.), *The Rome Statute of the International Criminal Court, A Commentary*, 3rd edition, 2016, C.H. Beck, Hart, Nomos, p. 733.

¹⁹ Danner, 2003, pp. 515, 524, see *supra* note 11; Vaid, 2013, p. 360, see *supra* note 7.

²⁰ Jenia Iontcheva Turner, “Accountability of International Prosecutors”, in *Social Science Research Network*, 2014, at p. 6.

as well as the limits of judicial review.²¹ However, such apprehension of overreach (either by political or judicial actors) is not such as to justify rejecting control altogether. In fact, the existence of mechanisms of control (and especially judicial control) can be useful for the Prosecutor him- or herself, as approval or validation helps avoid subsequent challenges and increase overall legitimacy.²² While the need for such mechanisms is relatively undisputed, questions arise: What kind of control is appropriate? By whom? With what consequences?

16.2.2.2. The Meaning of Control

The ability to control an institution can be understood as the ability to pressure it into adopting a certain course of action, by means of threat, use of sanctions, or otherwise. Where sanctioning is neither appropriate nor feasible, control may take the form of persuasion and if that fails, contestation. This requires both the audiences' exposure to the activities of the court in question and the existence of channels of communication, both formal and informal. Importantly, one may distinguish between the *entitlement* to exercise control and the *ability* to effectively control powerful actors.²³

Control may be exercised both as regards the development of the institution and as regards decision-making in specific situations. It may be exercised *ex ante* and *ex post* – that is, it may be concerned with prevention of abuse of power as well as with holding an institution or official to account, if such abuse takes place.²⁴ In the first place, legal constraints may be introduced to ensure that the institution acts in a certain way. This makes the law an instrument of controlling behaviour.²⁵ If institutions or officials engage in improper actions, control will take the form of demanding explanations and imposing sanctions.²⁶

²¹ Stahn, 2009, p. 255, see *supra* note 8.

²² *Ibid.*, pp. 257–58.

²³ Ruth W. Grant and Robert O. Keohane, “Accountability and Abuses of Powers in World Politics”, in *American Political Science Review*, 2005, vol. 99, no. 1, p. 39.

²⁴ Turner, 2014, see *supra* note 20 (discussing accountability as means of sanctioning misconduct, but also addressing prevention of misconduct).

²⁵ Richard Mulgan, “Accountability: An Ever Expanding Concept”, in *Public Administration*, 2000, vol. 78, no. 3, p. 564.

²⁶ *Ibid.*, p. 564 (suggesting that control is broader than accountability and that the latter represents one but not the only means of securing the former); Andreas Schedler, “Conceptualizing Accountability”, in Andreas Schedler, Larry Diamond and Marc F. Plattner (eds.),

The entitlement to control (which may also be understood as an entitlement to having one's position taken seriously) emerges from the delegation of power (by States) or from being affected by the exercise of power. The entities entitled to control may include both governmental and non-governmental actors, even though the basis of their empowerment may be different. One may expect that when delegating powers to international courts, States will seek to maintain instruments of influence over judicial processes and outcomes. They can influence courts, among other ways, through influencing their composition and available resources, as well as through direct or indirect participation in proceedings and controlling the docket.²⁷ However, they may be interested in delegating authority to independent courts,²⁸ so that these courts are trustworthy for third party audiences whom they intend to convince of the legitimacy of their actions.²⁹ If that is the case, States will make courts institutionally insulated from political pressures and given them some discretionary space.³⁰ The courts in question will be legally required to resist those empowering them and consequently, deviation from the preferences of governments will not constitute abuse of powers.³¹ In the absence of formal mechanisms of influence, States may still seek to influence courts informally.

16.2.2.3. Types of Control: Political, Social, Judicial

Scholarly discussions refer to different typologies of control mechanisms, some applicable specifically to the ICC, others more generally to interna-

The Self-Restraining State, Power and Accountability in New Democracies, Lynne Rienner Publishers, Boulder/London, 1999, pp. 15–17 (highlighting two elements of account giving, answerability and sanctions).

²⁷ Erik Voeten, “International Judicial Independence”, in Jeffrey L. Dunoff and Mark A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, Cambridge University Press, Cambridge, 2013, p. 423.

²⁸ *Ibid.*, p. 426 (“all ICs continue to have control mechanisms that offer governments at least the theoretical possibility to influence judicial behavior. Yet, to make any sense of these developments in the 1990s and 2000s, it must be true that at least some governments at some times believe that delegating authority to an independent IC suits their interests just fine”).

²⁹ Karen J. Alter, “Agents or Trustees? International Courts in their Political Context”, in *European Journal of International Relations*, 2008, vol. 14, no. 1, p. 55 (disagreeing with the Principal Agent theory due to its assumption that States have special hierarchical powers over international courts and suggesting that States are not always “hidden puppet-masters” of international courts).

³⁰ *Ibid.*, pp. 39, 55.

³¹ Grant and Keohane, 2005, p. 32, see *supra* note 23.

tional courts. Some categorizations (political/social/judicial, external/internal) are centred on the identity/character of entities that seek to exercise control. Others are based on the nature of control mechanisms (formal/informal).

Stahn differentiates between formal and informal models of supervision.³² He highlights several means of control, such as political control (by the Assembly of States Parties ('ASP')), control through process-based checks and balances (enabling States, victims and NGOs to influence the process of prosecutorial decision-making) and judicial review.³³ He points out that scrutiny has essentially remained focused on political control (for example, reporting to the ASP) and informal accountability (for example, consultations with States Parties and NGOs on prosecutorial policy).³⁴ He also hints at the distinction between generalized scrutiny (exercised by the ASP, among other ways, through budgetary control) and case-specific scrutiny (for example, judicial scrutiny of specific prosecutorial decisions).³⁵

Danner distinguishes between formal accountability (exercised by the ICC judges and the ASP) and pragmatic (mostly informal) accountability (implemented by States, including non-States Parties and NGOs). She points out that through their reactions to prosecutorial decisions and their choices as to whether to co-operate with the Prosecutor, these entities can force the Prosecutor to account for its decisions in a way that will significantly enhance or hamper his/her effectiveness.³⁶ The Prosecutor will be compelled to keep State interests in mind, since their co-operation may be critical for the success of an investigation.³⁷

Turner is concerned with the 'accountability' dimension of control. She identifies internal bureaucratic mechanisms of control within the OTP (or internal oversight) and external, judicial and political mechanisms of control (including judicial and political mechanisms).³⁸ She primarily

³² Stahn, 2009, p. 248, see *supra* note 8.

³³ *Ibid.*, pp. 259–64.

³⁴ *Ibid.*, p. 248.

³⁵ *Ibid.*, pp. 259–61.

³⁶ Danner, 2003, pp. 511, 525, see *supra* note 11.

³⁷ *Ibid.*, p. 528.

³⁸ Turner, 2014, see *supra* note 20.

focuses on ways of sanctioning prosecutorial misconduct, but she also considers ways of preventing such misconduct.³⁹

Bergsmo also mentions internal, informal control and conceptualizes it as the encouragement of constant questioning and critical engagement inside the OTP.⁴⁰

Helfer and Slaughter distinguish between formal and informal/political mechanisms of control (available to the States), operating *ex ante* and *ex post*.⁴¹ Governments' formal responses may be unilateral (for example, by way of removing itself from the jurisdiction of the court) or collective.⁴² Political (mostly informal) responses may range from identifying errors to non-compliance.⁴³ According to Alter, stakeholders (governments, NGOs, legal scholars) can influence international courts by seeking to convince judges and, if rhetorical efforts fail, by challenging the sources of judicial authority, questioning their neutrality and expertise, or even ignoring their rulings.⁴⁴

Bovens distinguishes between formal/mandatory/vertical control (where an actor is legally compelled to give account) and social accountability (with no hierarchical relationship and formal obligation to render account).⁴⁵

Based on the above scholarly discussions, a few distinctions will guide this chapter's assessment of quality control. The first distinction is between several types of control: political, judicial and social. Each may rely on different standards of assessment. Each may employ both formal and informal channels of communication, even though some are predominantly formal (for example, judicial control), while others are predominantly informal (for example, the Prosecutor's interactions with governments and civil society during a preliminary examination). In some in-

³⁹ *Ibid.*

⁴⁰ Morten Bergsmo, "On 'Communitarian Scholarship' and 'Quality Control in Preliminary Examination'", 13 June 2017 (<https://www.cilrap.org/cilrap-film/170613-bergsmo/>).

⁴¹ Laurence R. Helfer and Anne-Marie Slaughter, "Why States Create International Tribunals: A Response to Professors Posner and Yoo", in *California Law Review*, 2005, vol. 93, no. 3, p. 944.

⁴² *Ibid.*, p. 951.

⁴³ *Ibid.*, p. 952.

⁴⁴ Alter, 2008, p. 47, see *supra* note 29.

⁴⁵ Mark Bovens, "Two Concepts of Accountability: Accountability as a Virtue and as a Mechanism", in *West European Politics*, 2010, vol. 33, no. 5, pp. 946–67.

stances, the Prosecutor may be mandated to account, while in other instances, no such obligation exists. Control may be generalized (involving budgetary issues or general strategies) or related to the specific situations/cases.

Political control may be exercised by States collectively (mainly through the ASP) or individually. While non-States Parties (such as the Russian Federation) are not represented in the ASP, they may seek control through individual engagement with the Prosecutor. Individual control may be secured either through formal means (for example, by contesting admissibility) or informal/pragmatic means (for example, by withholding co-operation). Social control (exercised by NGOs and/or by affected communities) can assure that the Prosecutor acts in the interest of the public/affected communities or advances values of justice or fairness, instead of pursuing the political interests of States or its own narrow institutional interest. NGOs and affected communities may also be engaged through formal and informal channels.⁴⁶ Judicial control is a form of formal control over the Prosecutor's decision-making.⁴⁷ The ICC judges perform a filtering function.⁴⁸ The Prosecutor's determination to initiate an investigation *proprio motu* (which he or she makes upon completion of preliminary examination) is subject to the authorization of the Pre-Trial Chamber. Under Article 15(3), the Prosecutor is obliged to request the Pre-Trial Chamber's authorization for opening an investigation. However, it appears that the Chamber has no power, control or information about the activities of the Prosecutor, unless a request for authorization under Article 15 is made.

While mechanisms of control are meant to improve the quality of preliminary examination, their own quality may be a matter of concern as well.⁴⁹ Political mechanisms of control may lack transparency,⁵⁰ and raise questions regarding the influence that powerful political actors seek to

⁴⁶ Danner, 2003, p. 534, see *supra* note 11.

⁴⁷ Stahn, 2009, p. 264, see *supra* note 8.

⁴⁸ ICC, Situation in the Republic of Kenya, Pre-Trial Chamber II, Dissenting Opinion of Judge Hans-Peter Kaul, 31 March 2010, ICC-01/09-19, para. 12 (<http://www.legal-tools.org/doc/338a6f/>).

⁴⁹ Schedler, 1999, p. 26, see *supra* note 26.

⁵⁰ Yannis Papadopoulos, "Accountability and Multi-Level Governance", in Mark Bovens, Robert E. Goodin and Thomas Shillemans (eds.), *Oxford Handbook on Public Accountability*, Oxford University Press, Oxford, 2014, p. 284.

exert upon the Prosecutor. There may be concerns about judicial overreach or excessive judicial deference, depending on how one understands the judicial role or scope of review. As regards social control, there may be concerns that what NGOs suggest is too premature or too aggressive.

On the one hand, involvement of multiple ‘controllers’ (entities in a position to demand explanation) supplies a range of critical perspectives and potentially improves the quality of prosecutorial decision-making.⁵¹ Mechanisms of social and judicial control may function in a mutually reinforcing manner. Victims’ submissions to the Pre-Trial Chamber under Article 15(3) may enable judicial control, providing the ICC judges with an alternative perspective to that of the Prosecutor. At the same time, information not shared by the Prosecutor in the course of preliminary examination may be disclosed when he or she files the request for judicial authorization. This means judicial control enables greater transparency and consequently, better social control.

However, a multiplicity of oversight mechanisms may unduly burden or distract the Prosecutor.⁵² This needs to be kept in mind by those suggesting the establishment of new controlling mechanisms, rather than improving existing ones. The understanding of what is legitimate and feasible, the interests as well as the preferences of different controllers will vary. They may have different expectations, depending on how much and what kind of information they have. As a consequence, the Prosecutor may face conflicting demands and pressures from a variety of entities.⁵³ Reconciling these pressures will be challenging. Consequently, the ICC is bound to disappoint some audiences.

16.2.2.4. Transparency and Control

Transparency can be defined as availability of information about how and why decisions are made within a certain institution.⁵⁴ This means that the information may be related to the substance of decisions and reasons for

⁵¹ *Ibid.*, p. 283.

⁵² Turner, 2014, see *supra* note 20.

⁵³ Danner, 2003, p. 534, see *supra* note 11.

⁵⁴ Jenny De Fine Licht, Daniel Naurin, Peter Esaiasson and Mikael Gilljam, “When Does Transparency Generate Legitimacy? Experimenting on a Context-Bound Relationship”, in *Governance: An International Journal of Policy, Administration, and Institutions*, 2014, vol. 27, no. 1, p. 113; Frederick Schauer, “Transparency in Three Dimensions”, in *University of Illinois Law Review*, 2014, vol. 27, no. 1, pp. 1344–45.

making them or to the deliberations and negotiations that form part of the decision-making process and directly feed into the decision.⁵⁵ Audience exposure to the process of decision-making can be more costly and constraining for an institution than simply giving reasons for decisions after making them.⁵⁶ A simple reason-giving requirement provides the opportunity to elucidate what was actually going on during the process.⁵⁷ Therefore, an institution may be inclined to focus on transparency through giving reasons for the decision, instead of exposing the entire process that leads up to that decision.⁵⁸

Most definitions of transparency capture accessibility of information, but not actual exposure of relevant audiences to the content of this information.⁵⁹ In practice, even if information is made accessible, it may not reach some audiences due to the lack of capacity or interest on their part.

Transparency is a matter of degree and may vary, in terms of the type and amount of information that is made available as well as in terms of the size and identity of the permitted audience.⁶⁰ The amount and type of information disseminated by an institution may be different at different stages of proceedings. Transparency may be voluntary (where an institution proactively disseminates information about its activities) or mandatory (where an institution is obliged to provide information).⁶¹ Ideally, information should be reliable, revealing how institutions actually make decisions,⁶² but in practice, this is not always the case. Where the institution proactively disseminates information about its activities, there is a

⁵⁵ De Fine Licht *et al.*, 2014, p. 113, see *supra* note 54.

⁵⁶ *Ibid.*, p. 127.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ Daniel Naurin, “Transparency, Publicity, Accountability: The Missing Links”, in *Swiss Political Science Review*, 2006, vol. 12, no. 3, p. 91 (distinguishing between transparency as accessibility of information and publicity as exposure of relevant audiences to the information that is made available); Schauer, 2014, p. 1344, see *supra* note 54 (noting that transparency does not mean the presence of interested spectators or members of the public that request documents available on demand).

⁶⁰ *Ibid.*, pp. 1345–46.

⁶¹ Jonathan A. Fox, “The Uncertain Relationship between Transparency and Accountability”, in *Development in Practice*, 2007, vol. 17, no. 4, p. 665.

⁶² *Ibid.*, p. 667.

likelihood that transparency will be selective and the institution will conceal the information that may damage its reputation.

As regards the interrelation between transparency and control, scholars diverge in their views. According to one view, transparency may facilitate control, in the sense that once information about institutional practices reaches relevant audiences, they will be in a position to demand explanations and, where appropriate, impose sanctions.⁶³ However, when an official or institution chooses what to disclose and what to keep confidential, such selective transparency may turn out to have limited value for accountability.⁶⁴ According to another view, accountability may increase transparency, since it allows asking officials or institutions what they have been doing and why.⁶⁵ According to the third view, transparency and accountability overlap, in the sense that the ability to demand information and explanations amounts to *soft* accountability.⁶⁶ Accountability may, however, additionally involve sanctions.⁶⁷

To understand how transparency works during preliminary examination, it is necessary to establish what is made available and to whom. As regards the former element, the institution may disclose how and/or why it makes decisions. A separate question is whether information sharing is voluntary or mandatory, whether the information is disseminated in a manner that it actually reaches audiences and whether the quality of the information disseminated is satisfactory.

The OTP pronounced its general commitment towards transparency, both in terms of reason-giving and in terms of allowing audiences exposure to the decision-making process, thereby enabling control. The OTP made initiation of preliminary examination public and undertook to publicize its activities through interaction with stakeholders, issuance of public statements, periodic reports, and information on high-level visits to con-

⁶³ Naurin, 2006, pp. 91–92, see *supra* note 59 (pointing out that higher risks of publicity may imply higher risks of accountability, even though this link is not automatic one; also noting that accountability involves something more than having one’s actions publicly exposed, specifically ‘paying the price’ for misconduct).

⁶⁴ Albert Meijer, “Transparency”, in Mark Bovens, Robert E. Goodin and Thomas Shillemans (eds.), *Oxford Handbook on Public Accountability*, Oxford University Press, Oxford, 2014, p. 516.

⁶⁵ Schedler, 1999, p. 20, see *supra* note 26.

⁶⁶ Fox, 2007, p. 668, see *supra* note 61.

⁶⁷ *Ibid.*

cerned States, “in order to promote a better understanding of the process and to increase predictability”.⁶⁸ It also undertook to provide reasoned decisions about initiating an investigation or not.⁶⁹

However, the commitment towards transparency is constrained by the requirement to protect confidentiality.⁷⁰ It needs to be kept in mind that despite the obvious advantages of transparency, the Prosecutor may have good reasons for not publicizing too much too early in the course of preliminary examination. This may be explained by the need to avoid unnecessary stigmatization or creating expectations that cannot be fulfilled.

16.3. Quality Control in the Preliminary Examination of the Georgian Situation

This section will assess *how political, social and judicial mechanisms of control* functioned in the course of preliminary examination in Georgia. Specific emphasis will be placed on the case-specific mechanisms of control.

16.3.1. Political Control

Both Georgian and Russian authorities cooperated with the Prosecutor throughout the preliminary examination. While the Russian Federation is not a party to the Rome Statute, its nationals can be prosecuted by the ICC for crimes committed within Georgia.⁷¹ Georgia and Russia were not in a position to preclude initiation of an investigation by the Prosecutor in view of the power of the latter to initiate an investigation under Article 15, even in the absence of referrals. The two States could, however, delay the initiation by the Prosecutor of an investigation by claiming that they were conducting genuine national investigations. It appears that both took the prospect of the ICC intervention seriously. Both tried to use existing

⁶⁸ ICC, *Policy Paper on Preliminary Examinations*, November 2013, paras. 94–95 (<http://www.legal-tools.org/doc/acb906/>); ICC, *OTP Strategic Plan June 2012-2015*, 11 October 2013, para. 86 (<http://www.legal-tools.org/doc/954beb/>); ICC, *OTP Strategic Plan 2016-2018*, 6 July 2015, para. 54 (<http://www.legal-tools.org/doc/7ae957/>).

⁶⁹ ICC, *Policy Paper on Preliminary Examinations*, 2013, para. 15, see *supra* note 68.

⁷⁰ ICC, Rules of Procedure and Evidence, 9 September 2002, Rules 46–49 (<http://www.legal-tools.org/doc/8bcf6f/>).

⁷¹ ICC Statute, Article 12(2), see *supra* note 16 (allowing exercise of jurisdiction by the ICC if the territorial state or the state of alleged perpetrators’ nationality are state parties or have recognized the ICC’s jurisdiction).

channels of communication with the OTP (visits of the OTP delegation and submission of reports⁷²) to advance certain factual/accountability narratives.

The Russian investigation focused on the alleged attacks by Georgian armed forces.⁷³ Russian authorities excluded alleged crimes by South Ossetian forces (attacks against ethnic Georgians to secure their removal from South Ossetia and destruction of their homes to prevent their return) from the scope of their investigation.⁷⁴ They limited their examination of 600 Georgian nationals' allegations against Russian military servicemen to a superficial verification, only to conclude quickly and unconvincingly that these allegations were groundless.⁷⁵

The Russian Government sought to avoid ICC intervention altogether, as demonstrated by its insistence on conducting genuine investigations into the alleged crimes by Georgian forces. However, in case the ICC did decide to step in, the Russian Government wanted to make sure that Russian nationals were beyond its reach. It overemphasized the allegations against Georgian military servicemen and downplayed the seriousness of allegations against the two other groups involved (Russian and South Ossetian forces).⁷⁶ This can be read as a warning that if the ICC did not share the Russian narrative and targeted Russian nationals (including South Ossetians), the Russian Federation would withhold cooperation. The reaction of the Russian government to the initiation of the ICC inves-

⁷² ICC, Situation in Georgia, Corrected Version of Annex J to Request for Authorisation of an Investigation Pursuant to Article 15, 18 November 2015, ICC-01/15-4-Corr, paras. 2–5, 8 (according to this document, the OTP received 12 submissions from the Government of Georgia between 6 October 2008 and 24 March 2015, including eight submissions on the status of relevant national proceedings. It also received five submissions from the Russian Federation regarding its investigation, between 2008 and 2012) (<http://www.legal-tools.org/doc/d040fd/>).

⁷³ OTP, *Report on Preliminary Examination Activities 2014*, 2014, para. 148 (<http://www.legal-tools.org/doc/3594b3/>).

⁷⁴ *Ibid.*

⁷⁵ OTP, *Report on Preliminary Examination Activities 2012*, 2012, para. 133 (referring to eighty applications from six hundred Georgian citizens) (<http://www.legal-tools.org/doc/0b1cfc/>).

⁷⁶ ICC, Request for Authorisation of an Investigation Pursuant to Article 15, 2015, para. 306, see *supra* note 2 (“The Investigative Committee informed the Prosecution repeatedly that it found no evidence of the involvement of Russian servicemen in the commission of alleged crimes committed in the context of the August 2008 armed conflict”).

tigation confirms this reading of events. The spokesperson of the Russian MFA, Maria Zakharova stated on 29 January 2016:

Russia submitted more than 30 volumes of materials from the criminal case to the ICC to prove the crimes committed by Saakashvili's regime against the Ossetian people and Russian peacekeepers; however, the ICC Prosecutor placed the blame with South Ossetians and Russian peacekeepers, took the aggressor's side and started the investigation against the victims of the attack...Russia is disappointed by the decision of the ICC judges to support Bensouda's position.⁷⁷

A few days later, in an interview with *Rossiskaya Gazeta*, the Chairman of the Investigative Committee of the Russian Federation declared that the ICC turned the facts of the case upside down by targeting South Ossetian and Russian forces, not Georgian forces.⁷⁸ He was particularly unhappy about the ICC's statement that Russia controlled South Ossetian forces even prior to the direct intervention of its own forces.⁷⁹ Keeping the promise that they would reconsider their attitude towards the ICC,⁸⁰ in November 2016, in a symbolic move, the Russian Federation withdrew its signature from the Rome Statute, calling the ICC "one sided and inefficient".⁸¹

In contrast to Russian authorities, Georgian authorities claimed to focus on all allegations, those related to the commission of war crimes and crimes against humanity by South Ossetian and Russian forces against ethnic Georgians as well as those related to attacks against Rus-

⁷⁷ The Ministry of Foreign Affairs of the Russian Federation, "Briefing by the Foreign Ministry Spokesperson Maria Zakharova", Moscow, 29 January 2016 (<http://www.legal-tools.org/doc/afeaf2/>).

⁷⁸ Interview with Aleksandr Bastrikin, "About the Investigation Initiated by the International Criminal Court into the 2008 Events of South Ossetia", *Rossiskaya Gazeta*, Federal Issue no. 6889, 2 February 2016 (<http://www.legal-tools.org/doc/922194/>).

⁷⁹ ICC, Request for Authorisation of an Investigation Pursuant to Article 15, 2015, para. 72, see *supra* note 2; ICC, Decision on the Prosecutor's Request for Authorisation of an Investigation, 2016, para. 27, see *supra* note 3.

⁸⁰ The Ministry of Foreign Affairs of the Russian Federation, "Briefing of the Russian Foreign Ministry Spokesperson Maria Zakharova", see *supra* note 77 ("In this regard and in the light of the latest decision, the Russian Federation will be forced to fundamentally review its attitude towards the ICC").

⁸¹ Shaun Walker and Owen Bowcott, "Russia Withdraws Signature from the International Criminal Court Statute", in *The Guardian*, 16 November 2016 (<http://www.legal-tools.org/doc/a01c8f/>).

sian peacekeepers by members of the Georgian armed forces.⁸² This may be taken as an indicator that Georgian authorities took their responsibility to investigate and prosecute seriously. Focus on all allegations, including the ones against the Georgian military, shows that they cared about the credibility of the investigation and wanted to avoid accusations of one-sidedness. However, the Georgian government may also have had a few additional, implicit reasons for insisting on all encompassing national proceedings, all of which have to do with uncertainty about the consequences of the ICC intervention and the choices the ICC would make. First, it may have been sceptical about the prospect that the ICC would prosecute Russian nationals, because that would mean antagonizing Russia. Second, even if the ICC investigation covered Russians nationals, the Georgian Government may have feared that the OTP would target Georgian nationals only to maintain the image of impartiality. Third, the Georgian Government may have been concerned that the ICC intervention would create a narrative of the conflict, one which they would not entirely agree with. Due to these reasons, the Georgian authorities may have been motivated to insist on investigations and prosecutions at the domestic level.

Prior to the change of government in late 2012, the Georgian authorities claimed that the evidence accumulated was sufficient to identify suspects.⁸³ The new government of Georgia (in power since late 2012) renewed the commitment to carrying out genuine investigations and prosecutions. In May 2013, the Georgian Prosecutor's Office set up an eight-member group to handle the investigation.⁸⁴ In 2013 and 2014, the new Prime Minister and Minister of Justice emphasized that Georgian authorities would investigate the alleged crimes at the national level to fulfil Georgia's international obligations. Minister of Justice, Thea Tsulukiani said: "We should not make this case subject of hearing at international tribunal. We should tackle our problems and investigate it by ourselves in frames of those international commitments that we have undertaken."⁸⁵

⁸² OTP, *Report on Preliminary Examination Activities 2014*, 2014, para. 146, see *supra* note 73.

⁸³ ICC, Request for Authorisation of an Investigation Pursuant to Article 15, 2015, para. 295, see *supra* note 2.

⁸⁴ "The Prosecutor's Office Sets up Group to Probe into August War", in *Civil Georgia*, 14 May 2013 (<http://www.legal-tools.org/doc/0aef13/>).

⁸⁵ "Ivanishvili on August War Probe", in *Civil Georgia*, 10 April 2013 (<http://www.legal-tools.org/doc/02b820/>).

In a letter to the OTP dated 17 March 2015,⁸⁶ the Georgian Government claimed that investigative authorities could file charges against a number of individuals allegedly responsible for war crimes and crimes against humanity, but chose not to. The letter explains this was due to “a fragile security situation” in the occupied territories and adjacent areas and fear of “aggressive and unlawful reactions” if prosecutions were to be initiated, as “the persons implicated in the commission of the crimes subject to Georgia’s domestic proceedings might be directly involved or affiliated with the ongoing violence”. The letter also raised concern about “security and safety of witnesses of alleged crimes” living in close proximity to the occupied territories”. They argued that these threats tipped the balance in favour of non-prosecution, at least until these concerns disappeared. The Georgian investigation (including into the attacks against ethnic Georgians) was “indefinitely suspended”.⁸⁷

This letter raises a few concerns and questions. In the statements made in 2013 and 2014, Georgian authorities did not invoke security concerns to justify non-prosecution, notwithstanding the fact that the security situation was equally alarming. In 2014, the Georgian government presented a charging decree against one of those bearing the greatest responsibility to the ICC.⁸⁸ It also committed to submitting an additional report showing that it had completed some investigations and providing updates on prosecutions related to the “ethnic cleansing” of Georgians and investigations into the attack on peacekeeping forces.⁸⁹ While security concerns may be serious, the sudden emergence of this argument, in the absence of any significant prior discussion (including about how this problem could be solved), leaves the impression that this was only a convenient reason used to shift the burden to the ICC. Importantly, it appears that the Georgian Government is not against prosecution *per se*. The ICC may be seen as a more effective forum or a more appropriate one, in terms of neutrality and impartiality, when compared to national authorities. It may also be

⁸⁶ ICC, Situation in Georgia, Annex G to Request for Authorisation of an Investigation Pursuant to Article 15, 13 October 2015, ICC-01/15-4-AnxG (<http://www.legal-tools.org/doc/a007a3/>).

⁸⁷ ICC, Request for Authorisation of an Investigation Pursuant to Article 15, 2015, para. 15, see *supra* note 2.

⁸⁸ ICC, Separate Opinion of Judge Péter Kovács, 2016, para. 48, see *supra* note 3.

⁸⁹ *Ibid.*, paras. 49–50.

seen as an institution that gives greater voice and exposure to the concerns of victims compared to national investigations.

It seems that while shifting the burden of investigation to the ICC, the Georgian Government continues to express its views about which crimes should be investigated and who should be prosecuted by the OTP. As an example, on 16 October 2015, the current Minister of Justice, Ms. Thea Tsulukiani stated that the Ministry had raised the issue with the Prosecutor about having the alleged torture and killing of Georgian POWs covered by the investigation.⁹⁰

16.3.2. Social Control

Georgian civil society has been actively engaged with the OTP, since the latter opened the preliminary examination into the situation of Georgia. Georgian NGOs provided the OTP with information about the crimes allegedly committed.⁹¹ They also presented their views about the quality of national investigations. They started calling for the initiation of an investigation by the ICC early on, both in direct communications with the OTP⁹² and indirectly, in various speeches (including those at the ASP sessions⁹³) and reports.⁹⁴

⁹⁰ “Investigation into Torture of Giorgi Antsukhelidze, Kakha Khubuluri, Ushangi Sopromadze and 23 other Georgian PoWs should be primary focus of the ICC’s investigation”, in IPN, 16 October 2015 (<http://www.legal-tools.org/doc/ec2eca/>).

⁹¹ See, for example, Tinatin Khidasheli (ed.), *August Ruins: Report of the Georgian Non-Governmental Organizations on Violation of Fundamental Human Rights & International Humanitarian Law: August War, 2008*, Open Society Georgia Foundation, Tbilisi, 2009 (<http://www.legal-tools.org/doc/1743a5/>).

⁹² OTP, *Report on Preliminary Examination Activities 2012*, 2012, para. 139, see *supra* note 75 (Referring to an open letter of 24 April 2012 of a network of Georgian and International NGOs that emphasized the failure of the Russian and Georgian investigative authorities and recommended opening an investigation).

⁹³ Already in 2009, at the eighth session of the ASP, a representative of Georgian Coalition for War Crimes Documentation declared that “more than a year after the end of the conflict, very little has been done to bring those responsible before justice” and emphasized that the initiation of an investigation by the ICC would have a profound effect on the ground. “Statement on Behalf of the Georgian Coalition for War Crimes Documentation: 8th Assembly of States Parties to the Rome Statute of the International Criminal Court” (<http://www.legal-tools.org/doc/c19ef4/>). See also the speeches of the representative of the Georgian Young Lawyers’ Association, Natia Katsitadze at the tenth and eleventh sessions of the ASP in December 2011 (<http://www.legal-tools.org/doc/751830/>) and November 2012 (<http://www.legal-tools.org/doc/55121a/>).

In anticipation of the accusation that civil society discounted the prospect of effective national investigations too quickly, NGO representatives note that their initial communications with those authorities provided sufficient grounds for suspicions about their willingness and ability to investigate.⁹⁵ National investigative authorities reportedly made no information available to the victims or the general public about their activities or progress made, if any.⁹⁶ There were considerable delays in granting victim status to individuals who suffered as a result of the August 2008 conflict.⁹⁷

In principle, the strategy of calling for the OTP examination might have been justified in the sense that it could induce national authorities to pursue investigation more proactively. This would make no difference if the states in question wanted to shift the burden to the OTP, but could be effective if the national authorities sought to avoid the initiation of formal investigation by the ICC.

Aside from providing feedback to the Prosecutor throughout the preliminary examination (mostly indirectly and informally), victims used formal channels of communicating their concerns once the preliminary examination was completed and the Pre-Trial Chamber requested authorization to open an investigation. Under Article 15(3) of the Rome Statute, “Victims may make representations to the Pre-Trial Chamber”. This allows affected communities to act as counterweights to the Prosecutor. In

⁹⁴ Norwegian Helsinki Committee, “Unable or Unwilling? Georgia’s Faulty Investigation of Crimes Committed During and After the Russian-Georgian war of August 2008”, 2011 (<http://www.legal-tools.org/doc/a3f185/>). Norwegian Helsinki Committee, “Waiting for Russian Justice: The Ineffective Investigation of Crimes Committed During the August 2008 Armed Conflict between Russia and Georgia”, 2012 (<http://www.legal-tools.org/doc/5be38d/>).

⁹⁵ Interview with Tamar Abazadze, lawyer at the Georgian Young Lawyers’ Association, 5 July 2017, Tbilisi, Georgia (“you may ask: do not you think that it was too early for the Georgian civil society to claim ineffectiveness of national investigations and demand initiation of investigation by the ICC in 2009 or 2011? In my view, our insistence on the ICC investigation may be explained by the lack of trust in the national authorities that is based on our early experience of communicating with them on these issues. Our initial communication between 2009 and 2011 with the Georgian Prosecutor’s Office did not give us reasons to conclude that national investigation was effective. The same can be said about the Russian investigation”). The interview was conducted in Georgian and subsequently translated.

⁹⁶ See the speeches of Natia Katsitadze, *supra* note 93.

⁹⁷ Interview with Tamar Abazadze, lawyer at the Georgian Young Lawyers’ Association, 2017, see *supra* note 95.

the Georgian situation, the victims generally agreed with the parameters set out by the Prosecutor in her request. However, they had a few concerns. Specifically, some claimed to have suffered from crimes which fell outside the time-frame proposed by the Prosecutor. Victims also emphasized that there were crimes not mentioned in the Prosecutor's request.⁹⁸ Additional concerns regarding the scope of investigation were voiced at the fourteenth session of the ASP. The GYLA chairperson called for judges to expand the scope of the investigation to cover the unlawful deprivation of liberty of ethnic Georgian civilians and the ill-treatment of Georgian prisoners of war.⁹⁹ The civil society also believed that the territorial scope of the future ICC investigation was to include the region of Abkhazia and also that the ICC was to look into the role of Russian armed forces together with Ossetian forces.¹⁰⁰

16.3.3. Reflections on Political and Social Control and their Interplay

What forms do political and social control take in practice? How are the two types of control related? Ability to control may be understood as the ability to influence. It can be exercised through interaction. It appears that political control is, for the most part, exercised through persuasion. However, if a government fails to convince, it may criticize specific decisions of an institution or question its authority more broadly. The communication of the Russian Federation with the OTP exemplifies this pattern. The Georgian government similarly sought to influence the OTP's understanding of the situation. It has not contested the OTP's authority at any point, and it has pronounced its commitment to fulfil its obligations as a state party to the Rome Statute. Nevertheless, this commitment did not materialize in effective investigations and prosecutions.

Georgian NGOs sought to control the OTP by advancing their own assessments (on the quality of national investigations) and by trying to convince the OTP to initiate an investigation. While the OTP is free to not follow, such calls can arguably force it to at least explain its reluctance to initiate an investigation. It appears that for several years the affected

⁹⁸ ICC, Situation in Georgia, Pre-Trial Chamber I, Report on the Victims' Representations Received Pursuant to Article 15(3) of the Rome Statute, 4 December 2015, ICC-01/15-11, paras. 24–26 (<http://www.legal-tools.org/doc/eb0a8b/>).

⁹⁹ Speech of the GYLA Chairwoman, Ana Natsvlishvili, 14th ASP Session, 2015 (<http://www.legal-tools.org/doc/12202b/>).

¹⁰⁰ *Ibid.*

communities were uncertain of the prospects of an ICC investigation. Their scepticism about the prospects of an effective national investigation turned out to be justified in the end.

It is arguably preferable that the mechanisms of political and social control are equally strong, that they balance each other and reveal each other's weaknesses. This would help improve the quality of control and ultimately, also the quality of prosecutorial activities.

16.3.4. Prosecutor's Response to Competing Social and Political Pressures

The Georgian situation shows that the Prosecutor may be criticized by different actors for different reasons. The Prosecutor has been criticized for targeting certain groups and not others,¹⁰¹ for focusing on certain crimes and not others,¹⁰² and for the timing of making a determination as to whether an investigation is warranted.¹⁰³ The ICC's definition of the parameters of the situation subject to investigation (including temporal parameters) has also been questioned.¹⁰⁴ In a politically charged situation, the Prosecutor faces the challenge of not only acting independently and impartially, but also of appearing independent and impartial. This requires providing a credible explanation of the choices he/she makes. It also calls for reliance on the materials provided by more or less credible third parties.¹⁰⁵

The Georgian situation also exemplifies how the OTP may face pressure from the civil society claiming that the situation is ripe for ICC

¹⁰¹ See, for example, The Ministry of Foreign Affairs of the Russian Federation, "Briefing of the Russian Foreign Ministry Spokesperson Maria Zakharova", see *supra* note 77.

¹⁰² ICC, Report on the Victims' Representations Received Pursuant to Article 15(3) of the Rome Statute, 2015, para. 26 (referring to additional crimes not included in the Prosecutor's Request), see *supra* note 98.

¹⁰³ NGOs believe that the investigation should have been opened earlier.

¹⁰⁴ ICC, Report on the Victims' Representations Received Pursuant to Article 15(3) of the Rome Statute, 2015, para. 24, see *supra* note 98.

¹⁰⁵ ICC, Corrected Version of Annex J to Request for Authorisation of an Investigation Pursuant to Article 15, 2015, paras. 15–35, see *supra* note 72 (pointing out that the OTP examined the information from three international and regional organisations that conducted fact finding assessments, the International Independent Fact-Finding Mission on the Conflict in Georgia (IIFMCG), the UN and the OSCE and also thoroughly reviewed the information provided by the European Court of Human Rights).

investigation while governments insist that it is not.¹⁰⁶ While national and international observers were sceptical about national authorities' willingness and ability to investigate and prosecute, for the OTP, national authorities showed sufficient progress to prevent the initiation of an investigation by the ICC, at least until 2015, according to the OTP annual reports. While acknowledging in its 2012 report that neither investigation has yielded any results four years after the events,¹⁰⁷ the OTP took note of the obstacles encountered in the course of the investigation (the lack of access to the crime scene and the lack of cooperation, invoked by Georgian authorities,¹⁰⁸ and the lack of cooperation and immunities of senior Georgian officials, invoked by the Russian Federation¹⁰⁹) and inquired about the steps taken to overcome those obstacles. It was also understanding of delays caused by the change of the Georgian government and several changes in the leadership of the Georgian Prosecutor's office.¹¹⁰

The OTP reports leave the impression that the main purpose of the interactions between the Georgian authorities and OTP was to ascertain the existence of genuine national proceedings, so that if there were none, the ICC intervened. There is not much evidence of encouragement by the OTP of national investigative authorities or of its efforts to improve their capacity.¹¹¹ However, the OTP's monitoring of national investigations in the course of preliminary examination might have had a catalysing effect, so long as the national authorities were interested in making progress.

¹⁰⁶ Fabricio Guariglia and Emeric Rogier, "Prosecutorial Policy and Practice: The Selection of Situations and Cases by the OTP of the ICC", in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, p. 354 (highlighting the possibility of pressures from multiple sides).

¹⁰⁷ OTP, *Report on Preliminary Examination Activities 2012*, 2012, para. 135, see *supra* note 75.

¹⁰⁸ *Ibid.*, para. 136; OTP, *Report on Preliminary Examination Activities 2014*, 2014, para. 147, see *supra* note 73.

¹⁰⁹ ICC, Request for Authorisation of an Investigation Pursuant to Article 15, 2015, para. 317, see *supra* note 2; OTP, *Report on Preliminary Examination Activities 2012*, 2012, paras. 133–36, see *supra* note 75.

¹¹⁰ OTP, *Report on Preliminary Examination Activities 2014*, 2014, para. 147, see *supra* note 73.

¹¹¹ An exception may be found in the OTP, *Report on Preliminary Examination Activities 2013*, November 2013, para. 175 (indicating that on 6–7 June 2013, the OTP accepted the invitation of the Georgian Chief Prosecutor to give a presentation to national investigators and prosecutors on crimes falling under the ICC jurisdiction) (<http://www.legal-tools.org/doc/dbf75e/>).

Assuming that the two governments wanted to avoid ICC intervention, the need to show progress arguably pushed the investigations forward. According to the OTP, it issued ten formal requests for information to the two governments, six to the Government of Georgia, four to the Government of the Russian Federation.¹¹² The OTP received twelve submissions from the Government of Georgia between 6 October 2008 and 24 March 2015, including eight submissions on the status of relevant national proceedings.¹¹³ The OTP received five submissions from the Russian Federation regarding its investigation between 2008 and 2012.¹¹⁴ The OTP issued several warnings that it would seek authorization for investigation if no progress was shown and explained to the national authorities the level of specificity and substantiation of evidence that is required to demonstrate that genuine national investigations and prosecutions are ongoing.¹¹⁵ The OTP appears to have addressed delays in the Georgia investigation and in fulfilling the reporting obligations between the end of 2012 and early 2014.¹¹⁶ It informed the Chief Prosecutor's Office of Georgia that, due to their failure to submit the updated information about the national proceedings, the OTP would seek authorization for initiation of investigation.¹¹⁷ Consequently, the Georgian Prosecutor's Office submitted an updated report in November 2014 and supporting materials in the month thereafter.

It is difficult to argue that national proceedings are genuine and credible when no charges are brought for several years. Despite delays, it was not until 2014 that the OTP used a more explicit language in its annual report on preliminary examinations. It pointed out that “both sets of investigations have suffered from significant delays” and “six years after the end of the armed conflict, no alleged perpetrator has been prosecuted,

¹¹² ICC, Request for Authorisation of an Investigation Pursuant to Article 15, 2015, para. 39, see *supra* note 2.

¹¹³ ICC, Corrected Version of Annex J to Request for Authorisation of an Investigation Pursuant to Article 15, 2015, paras. 2, 5, see *supra* note 72.

¹¹⁴ *Ibid.*

¹¹⁵ OTP, *Report on Preliminary Examination Activities (2015)*, 12 November 2015, para. 262 (<http://www.legal-tools.org/doc/ac0ed2/>); OTP, *Report on Preliminary Examination Activities 2014*, 2014, para. 152, see *supra* note 73.

¹¹⁶ ICC, Request for Authorisation of an Investigation Pursuant to Article 15, 2015, paras. 296–99, see *supra* note 2.

¹¹⁷ *Ibid.*, para. 301.

nor has there been any decision not to prosecute”.¹¹⁸ Consequently, the OTP warned that it would reach a decision on whether to seek authorization to open an investigation in the near future.¹¹⁹ Any further delay in this regard would undermine the ICC’s legitimacy. Indefinite suspension of proceedings by Georgian authorities simplified the task by making at least some of the potential cases (most importantly, attacks against ethnic Georgians and their forced displacement) automatically admissible on account of inactivity (while admissibility of others – namely, alleged attacks against Russian peacekeepers – remained contested by Russia).

The OTP’s move is an indicator that the ICC is willing to engage with situations even at the risk of antagonizing powerful non-States Parties, such as Russia. The Georgian situation is clearly not an easy one to investigate. While the cases the OTP currently focuses on are strong evidentially and the Georgian Government appears willing to co-operate, the investigation is likely to be complicated due to the lack of co-operation of Russia/South Ossetia and the lack of access to the crime scenes. Interestingly, the ICC investigation at this point does not appear to cover the crimes allegedly committed by Georgian military servicemen. It also does not appear to be planning to prosecute Russian political or military leadership for attacks against ethnic Georgians and their forced displacement. Its reports indicate that there is conflicting information about the participation of Russian soldiers in the commission of attacks against ethnic Georgians and it does not indicate the existence of a State or organizational policy.¹²⁰ This means that the OTP’s main focus is on the third group, the South Ossetian forces.

16.3.5. Judicial Control

Due to its policy of inviting voluntary referrals of territorial states to trigger the ICC jurisdiction, the OTP did not have to use its *proprio motu* powers.¹²¹ Consequently, it managed to avoid formal judicial review re-

¹¹⁸ OTP, *Report on Preliminary Examination Activities 2014*, 2014, para. 154, see *supra* note 73.

¹¹⁹ *Ibid.*

¹²⁰ OTP, *Report on Preliminary Examination Report (2015)*, 2015, paras. 245–47, see *supra* note 115.

¹²¹ Jan Wouters, Sten Verhoeven and Bruno Demeyere, “The international criminal court’s office of the Prosecutor: navigating between independence and accountability?”, KU Leuven, Institute of International Law, July 2006, Working Paper No. 97, p. 16 (<http://www.legal-tools.org/doc/58bd4a/>) (pointing out as regards the Prosecutor’s *proprio motu* powers

quired only in the absence of such referrals. The procedure for the authorization of an investigation under Article 15(3) was under-utilized for some years. In the absence of any referrals by Georgia, the Prosecutor had to file a request for authorization to initiate the investigation. This created an opportunity to clarify the scope of judicial review for this procedure.

16.3.5.1. Major Disagreements in the Pre-Trial Chamber’s Decision

The Decision of the Pre-Trial Chamber of 27 January 2016 (authorizing investigation into the situation in Georgia) reveals disagreements over the role of the Pre-Trial Chamber under the Article 15 procedure and over the appropriate scope of judicial review. The majority view is that judicial examination “must be strictly limited” in the sense that it “serves no other purpose than to prevent the abuse of power on the part of the Prosecutor”.¹²² The majority referred back to previous jurisprudence, claiming that the material presented by the Prosecutor did not need to be “conclusive” and the Pre-Trial Chamber was not supposed to disregard available information, unless it was “manifestly false”.¹²³

Judge Kovács disagreed: “I fail to understand how the Chamber can prevent the abuse of power on the part of the Prosecutor if the exercise of its supervisory role is strictly limited”. He saw this as a “self-imposed restriction”, not mandated by Article 15(4) of the Rome Statute. He believed that, in accordance with the mentioned provision, the Chamber had a duty to reach its own conclusion on whether there was a reasonable basis to proceed with an investigation. He emphasized that “judicial control entails more than automatically agreeing with what the Prosecutor presents” and that it calls for “an independent judicial inquiry”, “a full and proper examination” of the supporting material relied upon by the Prosecutor as well as the victims’ representations.¹²⁴ Judge Kovács argued that “being at the early stages of the proceedings does not justify a marginal assessment” and that despite a “low evidentiary standard”, the assessment

that “it is in the use of proprio motu powers that his real force resides” but “before actually resorting to using those powers”, the Prosecutor has to increase the legitimacy of his office).

¹²² ICC, Decision on the Prosecutor’s Request for Authorisation of an Investigation, 2016, para. 3, see *supra* note 3.

¹²³ *Ibid.*, paras. 25–27.

¹²⁴ ICC, Separate Opinion of Judge Péter Kovács, 2016, paras. 4–6, see *supra* note 3.

should be carried out thoroughly,¹²⁵ and result in a clear and well-reasoned decision, securing the transparency of the judicial process and guaranteeing a considerable degree of persuasiveness.¹²⁶

The majority asserted that it was “unnecessary and inappropriate for the Chamber to go beyond the submissions in the request in an attempt to correct any possible error on the part of the prosecutor”.¹²⁷ Judge Kovács argued that “it is not only necessary, but also appropriate to go beyond the submissions of the Prosecutor, lest the Chamber automatically agrees with the Prosecutor”.¹²⁸ He noted that the “Article 15 procedure imposes a duty on the Chamber to reach its own conclusions on whether an investigation is warranted or not and not merely examine the Prosecutor’s conclusions.”¹²⁹ Judge Kovács criticized the “truncated presentation of law and facts” and the obvious inconsistency in the Prosecutor’s assessment of the relevant factors.¹³⁰ He pointed out that according to the Prosecutor, information about indiscriminate/disproportionate attacks against civilian targets by Georgian and Russian forces was limited and contradictory.¹³¹ However, “when faced with similar difficulties in the context of the attack against peacekeeping forces, the Prosecutor did not refrain from drawing conclusions on the commission of war crimes”.¹³²

The Pre-Trial Chamber largely concurred with the Prosecutor’s assessment of complementarity. As regards admissibility, Judge Kovács argued that the majority excised a lot of relevant facts, which he believed were necessary for an accurate admissibility assessment, judicial reasoning, and more importantly, transparency to the public and to interested states. He pointed out that the majority followed a “short-cut approach” and did not explain the “flaws” of Georgian and Russian national investigations which was decisive for accurate Article 17 admissibility determinations.¹³³

¹²⁵ *Ibid.*, para. 11.

¹²⁶ *Ibid.*, para. 12.

¹²⁷ *Ibid.*, para. 35.

¹²⁸ *Ibid.*, para. 20.

¹²⁹ *Ibid.*, para. 20.

¹³⁰ *Ibid.*, para. 19.

¹³¹ ICC, Decision on the Prosecutor’s Request for Authorisation of an Investigation, 2016, para. 34, see *supra* note 3.

¹³² ICC, Separate Opinion of Judge Péter Kovács, 2016, para. 22, see *supra* note 3.

¹³³ *Ibid.*, paras. 41–60.

Another disagreement is connected to the status of the proceedings conducted by the *de facto* regime in South Ossetia. The Pre-Trial Chamber agreed with the Prosecutor's submission that any proceedings undertaken by the *de facto* authorities of South Ossetia are not capable of meeting the requirements of Article 17 of the Statute, due to South Ossetia not being a recognized state.¹³⁴ Judge Kovács, on the other hand, believed that the majority oversimplified the issue and focused only on the fact that South Ossetia was not a recognized state.¹³⁵ He took the view that depriving non-recognized entities of the possibility of lodging admissibility challenges, so far as they are able and willing to genuinely investigate and prosecute, would result in widening the impunity gap.¹³⁶ He supported a case-by-case assessment without any automatic effect on the legal status of the non-recognized entity.¹³⁷

The final point is that the majority appears uninterested in the broader context (pre-history) of the situation. While Judge Kovács appears to be calling for a better understanding of the local context.¹³⁸

16.3.5.2. Reflections on the Quality of Judicial Control

The 26 January 2016 decision discloses a disagreement on the type of review to be exercised by the Pre-Trial Chamber. The two alternatives may provisionally be labelled as 'substantive' and 'procedural'. In case of substantive review, the Pre-Trial Chamber as a controlling body reaches its own conclusions. As a consequence, it may agree with the Prosecutor in some respects, but disagree in other respects. In case of procedural review, the OTP is deferential in the sense that it does not engage in a thorough examination and instead is willing to accept the Prosecutor's conclusions/determinations, unless it observes some manifest abuse of power on his/her part. This means that the strictness of a review will vary, depending on the quality of prosecutorial submissions. The determination is bound to be made on a case by case basis. Such a deferential stance is based on the understanding that the entity making decisions (in this case, the Prosecutor) is better placed to decide on the issues at stake or is more

¹³⁴ ICC, Decision on the Prosecutor's Request for Authorisation of an Investigation, 2016, para. 40, see *supra* note 3.

¹³⁵ ICC, Separate Opinion of Judge Péter Kovács, 2016, para. 65, see *supra* note 3.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*, para. 66.

¹³⁸ *Ibid.*, para. 16.

competent than the entity that exercises control (in this case the Pre-Trial Chamber).¹³⁹

Depending on whether one supports substantive or procedural review, the quality of judicial control will either be associated with a detailed and thorough examination of the Prosecutor's determinations in all instances or with a lenient, deferential approach, unless the Prosecutor obviously abuses power. The Prosecutor previously argued that the Pre-Trial Chamber need not engage in an in-depth analysis of the information presented for the purpose of what he called a "procedural decision" under Article 15(4) of the Statute.¹⁴⁰ According to drafting history, however, states must have called for substantive review as a condition of accepting the Prosecutor's power to initiate an investigation *proprio motu*. Judge Hans Peter Kaul, in his dissent to the decision authorizing an investigation in Kenya pointed out: "Thus, the Pre-Trial Chamber's decision pursuant to article 15(4) of the Statute is not of a mere administrative or procedural nature, but requires a substantial and genuine examination by the judges of the Prosecutor's Request. Any other interpretation would turn the Pre-Trial Chamber into a mere rubber-stamping instance".¹⁴¹

It appears that the reference to "abuse of power" in the majority's reasoning is meant to show that the Court will only engage in intensive review if prosecutorial behaviour is manifestly inadequate. This seems to be what this chapter labelled as 'procedural review'. If the review were sufficiently thorough, the Pre-Trial Chamber could have raised a range of questions, including those about non-inclusion of certain crimes and about the territorial and temporal scope of the crimes alleged. It would also have been more explicit in its assessment of the quality of national proceedings. According to the alternative view of Judge Kovács, examination by the Pre-Trial Chamber of prosecutorial submissions should be intensive (even if they do not immediately appear manifestly inadequate) to avoid abuse of power. This resembles what was earlier designated as 'substantive review'.

¹³⁹ I am borrowing this distinction between substantive and procedural review from the discussions on the standards of review in the context of international human rights courts.

¹⁴⁰ ICC, Situation in the Republic of Kenya, Pre-Trial Chamber II, Request for Authorisation of an Investigation Pursuant to Article 15, 26 November 2009, ICC-01/09-3, para. 110 (<http://www.legal-tools.org/doc/c63dcc/>).

¹⁴¹ ICC, Dissenting Opinion of Judge Hans-Peter Kaul, 2010, para. 19, see *supra* note 48.

If one compares the decisions of Pre-Trial Chamber authorizing the initiation of an investigation in Kenya and Georgia, one will notice a clear difference. In its decision authorizing the initiation of an investigation into the Kenyan situation, the judges examined supporting information to reach their own conclusions. This shows that the judges, once they review the available information may concur with the Prosecutor.¹⁴² However, it is possible that the judges will not find the prosecutorial submissions entirely clear or convincing¹⁴³ and make necessary clarifications.¹⁴⁴

16.3.6. Transparency and Control in the Georgian Preliminary Examination

The OTP made the initiation of a preliminary examination into the Georgian situation public on 14 August 2008.¹⁴⁵ Subsequently, it publicized visits to Georgia and Russia.¹⁴⁶ However, public statements made following such visits were mostly limited to taking note of the two governments' co-operative attitude in providing updates on ongoing investigations.¹⁴⁷ The OTP made its preliminary assessments on jurisdiction and admissibility as well as information about its activities available in its annual reports on preliminary examinations. These reports described modalities and intensity of the OTP's engagement with the relevant stakeholders. They referred to the steps the Prosecutor intended to take,¹⁴⁸ thereby increasing predictability. However, several questions and concerns need to be raised.

¹⁴² ICC, Situation in the Republic of Kenya, Pre-Trial Chamber II, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, ICC-01/09-19, paras. 185, 195 (<http://www.legal-tools.org/doc/338a6f/>).

¹⁴³ *Ibid.*, para. 201 (“the chamber observes that in the Prosecutor’s Request the temporal scope of the investigation is not clearly defined”).

¹⁴⁴ *Ibid.*, para. 203 (“it is the responsibility of the Chamber to define the temporal scope of the authorization for investigation with respect to the situation under consideration”).

¹⁴⁵ OTP, The Prosecutor’s Statement on Georgia, 2008, see *supra* note 1.

¹⁴⁶ See, for example, “No impunity for crimes committed in Georgia: OTP concludes second visit to Georgia in context of preliminary examination”, in *ICC Weekly Update*, no. 39, 28 June 2010 (<http://www.legal-tools.org/doc/a446f9/>).

¹⁴⁷ For criticism on the formulation of press releases, see Human Rights Watch, “ICC Course Correction: Recommendations to the Prosecutor for a More Effective Approach to “Situations under Analysis””, 2011, p. 16 (<http://www.legal-tools.org/doc/43aefb/>).

¹⁴⁸ OTP, *Report on Preliminary Examination Activities 2012*, 2012, para. 140, see *supra* note 75; OTP, *Report on Preliminary Examination Activities 2013*, 2013, paras. 177–78, see *supra* note 111.

The OTP would arguably need to be careful when formulating these reports and statements not to antagonize the states and also to avoid constraining itself in its further assessments. Consequently, one may question whether these reports are reflective of how the OTP actually operates. One may also question whether the information provided therein actually reached the affected communities and even if it did, whether these reports responded to the questions they might have had. The affected communities appear to have suffered throughout the preliminary examination due to uncertainty as to where it was heading and as to why the initiation of investigation by the OTP was delayed. While the two governments may have also been affected by uncertainty, their interest in knowing about the OTP's intentions was mostly connected to their interest in avoiding the ICC intervention altogether. It is logical to think that they had better access to the information than the general public.

On the positive side, reports on the preliminary examinations contained at least some information about ongoing investigations which was not disclosed to the affected individuals and civil society by national investigative authorities directly. As noted above, national investigative authorities provided very limited information to the victims and general public about ongoing investigation. As mentioned in the speeches of NGO representatives at the ASP in 2011 and 2012, Georgian civil society expected that the OTP would "reach out to victims and communities affected by the August war" and provide information about the status of its preliminary examination, including its findings concerning investigations carried out by Georgian and Russian authorities.¹⁴⁹ Calls for taking measures to raise the awareness of the affected communities about the OTP's activities may be seen as a hint that the efforts already undertaken in this regard by the OTP were thought to be insufficient.

16.4. Concluding Remarks

This contribution raises two issues regarding preliminary examinations: that of control of *quality* and that of quality of *control*. The case study reveals some general challenges common to all situations as well as some case-specific difficulties. It is clear that at the stage of preliminary examination, mechanisms of controlling the quality of prosecutorial activity are under-developed. The ICC judges step in to exercise judicial control only

¹⁴⁹ See the speeches of Natia Katsitadze, *supra* note 93.

after the Prosecutor makes a determination as to whether initiation of an investigation is warranted, upon completion of preliminary examination (which in the absence of time limits, may last for years). Until then, control is political and/or social (that is, non-mandatory, largely dependent on the willingness and ability of relevant actors to exercise control) and predominantly informal.

The preliminary examination appears to be an interactive, bi-directional process. This means that while the OTP engages with domestic stakeholders to ascertain if the initiation of an investigation is warranted, those stakeholders have an opportunity to influence prosecutorial decision-making, raise concerns and provide feedback. From this standpoint, the prolongation of preliminary examination is not as detrimental as some might believe it to be. The Prosecutor gains a better understanding of the local context. Moreover, if the Prosecutor engages with the stakeholders and creates the perception of a fair, inclusive process, the likelihood that these stakeholders will accept the outcome of the process (even an unfavourable one) will increase. However, the ‘reasonable time’ requirement remains relevant. Since the Prosecutor waited for seven years before it decided to initiate an investigation into the situation in Georgia, the questions arise: Was the Prosecutor too slow? Was she too lenient in assessing national authorities’ efforts? While I believe that imposition of rigid time limits would deprive the Prosecutor of necessarily flexibility, it is essential for the Prosecutor to provide some reasonable explanation for the delay, especially in response to criticisms.

One may also argue that due to the pressure of some stakeholders (especially the ones upon which the ICC is dependent for co-operation or resources), the Prosecutor may be guided by political considerations, even if he or she makes efforts to maintain the appearance of legality. The fact that the OTP sometimes acts contrary to the preferences of powerful actors may serve as an indicator that it does not happen. Whatever the case, the informal and opaque nature of communications, coupled with the lack of proper explanations by the Prosecutor of the choices he or she makes (for example, his or her focus on some crimes and not on others, on some groups of alleged perpetrators and not on others, his or her definition of temporal framework and other parameters) increases suspicions about motivations behind these choices. The Pre-Trial Chamber’s choice of a procedural, deferential model of judicial review further aggravates these concerns.

The Venture of the Comoros Referral at the Preliminary Examination Stage

Ali Emrah Bozbayındır*

17.1. Introduction

As of September 2017, the situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the United Kingdom of Cambodia (hereinafter the ‘Gaza flotilla situation’) was still on the list of ongoing preliminary examinations of the Office of the Prosecutor (hereinafter the ‘OTP’). The Gaza flotilla situation goes back to a referral by the Union of the Comoros, which was submitted to the International Criminal Court (‘ICC’) on 14 May 2013 “with respect to the 31 May 2010 Israeli raid on a humanitarian aid flotilla bound for the Gaza Strip”.¹ The referral proved both legally and politically significant. The Comoros referral is the first referral of a State concerning the alleged crimes committed by another State that is also a non-State Party of the Rome Statute of the ICC.² Moreover, the referral by Comoros has a symbolic significance – especial-

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¹ Union of the Comoros, “Referral of the Union of Comoros with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza Strip”, 14 May 2013, ICC-01/13-1-Anx1 (<http://www.legal-tools.org/doc/d5e455/>).

² See Antonio Marchesi and Eleni Chaitidou, “Article 14: Referral of a situation by a State Party”, in Otto Triffterer and Kai Ambos (eds.), *Rome Statute of the International Criminal Court: A Commentary*, 3rd edition, C.H. Beck, Hart, Nomos, Munich, 2016, margin no. 17; Rod Rastan, “Jurisdiction”, in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*, Oxford University Press, Oxford, 2015, pp. 141, 165.

ly if one considers the Court's activities in its first decade – namely, it is a situation where an African State is referring a situation involving a non-African State to the ICC, and for this reason and others, such as due to the fact the situation in question involves a powerful Western State *vis-à-vis* a small African State, a commentator has dubbed the Comoros Referral as the “Nicaragua Moment for the ICC”.³

Following her receipt of the referral, the Prosecutor of the ICC has commenced a preliminary examination⁴ into the Gaza flotilla situation; and in her analysis dated 6 November 2014, she concluded that there was “a reasonable basis to believe that the killing of passengers of the *Mavi Marmara* amounted to the war crime of wilful killing pursuant to Article 8 (2) (a) (i) of the Statute”. Nonetheless, she decided not to initiate an investigation into the situation by invoking the Court's gravity requirement. Up until the situation in question, the Prosecutor has not declined to proceed when a State Party has referred a situation. Comoros successfully exercised its right under Article 53 by filing a request for review of the Prosecutor's decision not to investigate and raised two complaints, that is, the contextualization of the gravity analysis and analytical errors in the Prosecutor's assessment of gravity. After reviewing the Prosecutor's decision, Pre-Trial Chamber (‘PTC’) I requested her to reconsider. The Prosecutor's vigorous opposition to PTC I's decision is one of the remarkable procedural aspects with respect to the Gaza flotilla situation. Unsurprisingly, the Appeals Chamber dismissed a request for appeal against the Pre-Trial Chamber I's decision by the Prosecutor *in limine*, as the normative framework of the Rome Statute does not contain such an appeal mechanism. As stated in the 2016 report on preliminary examination activities by the OTP, the Prosecutor has reconsidered her decision, which has not been made public so far, however.

The Comoros referral has probably been the most significant step in the pursuit of justice of the victims of the Gaza flotilla situation, which is

³ Dapo Akande, “Court Between A Rock and Hard Place: Comoros Refers Israel's Raid on Gaza Flotilla to the ICC”, in *EJIL: Talk!*, 15 May 2013.

⁴ For an overview of drafting history and current structure of the preliminary examinations of the Office of the Prosecutor see Guiliano Turone, “Powers and Duties of the Prosecutor”, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, pp. 1137, 1146 ff.; Kai Ambos, *Treatise on International Criminal Law: Volume III: International Criminal Procedure*, Oxford University Press, Oxford, 2016, pp. 335 ff.

at times called the ‘*Mavi Marmara* incident’. Prior to the initiation of proceedings by the ICC, the *Mavi Marmara* incident attracted considerable international attention, and a United Nations Fact Finding Mission was dispatched under the aegis of the Human Rights Council, which has produced the most reliable and objective report (‘HRC Report’) with regard to the incident so far.⁵ Apart from the HRC Report, Turkey⁶ and Israel⁷ have published their own inquiry reports concerning the incident, both of which contain factual and legal analyses pertaining to the events that took place aboard *Mavi Marmara*; and finally, the Palmer Report was published in September 2011, at the behest of the UN Secretary-General.⁸ The mandate of the panel was to review the reports of the Israeli and Turkish inquiries and try to reconcile the parties involved.

In this chapter, I shall try to focus my attention towards the most contentious substantive and procedural issues that have arisen from the situation in question, which, in turn, also has a significant bearing on the issues in respect of the quality of preliminary examinations conducted by the OTP and the quality of review by PTC I in the preceding four years. To be sure, these issues will incontestably have lasting repercussions on the proceedings of the Court, especially with respect to the scope and nature of review of the Prosecutor’s decision not to initiate an investigation upon a Security Council or a State Party referral, and the limits of the Prosecutor’s discretion at the preliminary examination stage.⁹

Yet, before embarking upon my analysis, I would like to first elucidate the factual basis on which I wish to proceed. I will be basing my legal analysis on the facts that have been determined and outlined by the

⁵ Report of the International fact-finding mission to investigate violations of international law, including international humanitarian and human rights law, resulting from the Israeli attacks on the flotilla of ships carrying humanitarian assistance, UN Doc. A/HRC/15/21, 27 September 2010 (hereinafter the ‘HRC Report’) (<http://www.legal-tools.org/doc/32f94d/>).

⁶ The Turkish National Commission of Inquiry, *Report on the Israeli Attack on the Humanitarian Aid Convoy to Gaza on 31 May 2010*, 11 February 2011 (<http://www.legal-tools.org/doc/022ff6/>) (hereinafter the ‘Turkish Report’).

⁷ The Public Commission to Examine the Maritime Incident of 31 May 2010, *The Turkel Commission Report*, 21: Part One, 23 January 2011 (hereinafter the ‘Israeli Commission Report’) (<http://www.legal-tools.org/doc/f2aae4/>).

⁸ *Report of the Secretary-General’s Panel of Inquiry on the 31 May 2010 Flotilla Incident*, 2 September 2011 (<http://www.legal-tools.org/doc/f2de32/>) (hereinafter ‘Palmer Report’).

⁹ Cf. Chantal Meloni, “The ICC preliminary examination of the Flotilla situation: An opportunity to contextualise gravity”, in *Questions of International Law*, 2016, vol. 33, p. 3.

HRC Report. It has been indeed a remarkable deficit with regard to the quality of the preliminary examination of the Gaza flotilla situation that when the accounts in the four reports differed, the Prosecutor preferred the version of contested event that was contained in the Israeli Commission Report (for instance, regarding the use of live ammunition from helicopters). Likewise, Judge Kovacs heavily relied on the Israeli Commission Report's factual and legal analysis in his dissenting opinion. Without a doubt, this choice is by no means limited to the appreciation of the facts but also pertains to the legal analysis of the most pertinent issues like that of the legality of blockade imposed by Israel on Gaza at that time or the nature of the armed conflict in the present situation. The four reports, therefore, exhibit the greatest divergence with respect to the interpretation and application of international humanitarian law, especially with respect to two out of the six requirements for the legality of blockade, namely that: the blockade must be in response to an international armed conflict and in all cases it must be proportionate.¹⁰

Moreover, in the scholarly treatments of the *Mavi Marmara* incident, one can easily discover whether the respective author has chosen to proceed upon the HRC Report or the Israeli Commission Report version of the events. This state of affairs reveals itself in the utmost difference between the conclusions arrived at.¹¹

For these reasons, I shall commence my analysis with a factual overview of the incident based on the accounts provided in the HRC Report (Section 17.3.), following a brief procedural history of the proceedings before the Court (Section 17.2.). Then, in order to pave the way for further discussion, I will first provide an analysis of the most significant preliminary legal issues concerning the situation in question (Section

¹⁰ For a comparative analysis of these reports' legal analysis respecting these issues see Russell Buchan, "The *Mavi Marmara* Incident and the Application of International Humanitarian Law by Quasi-Judicial Bodies", in Darek Jinks, Jackson N. Maogoto and Solon Solomon (eds.), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies: International and Domestic Aspects*, T.M.C. Asser Press, The Hague, 2014, p. 479; Victor Kattan, "The ICC and the Saga of the *Mavi Marmara*", in Ardi Imseis (ed.), *The Palestine Yearbook of International Law*, vol. 18, no. 1, 2016, pp. 53, 57 ff.

¹¹ Compare only Russell Buchan, "The *Mavi Marmara* Incident and the International Criminal Court", in *Criminal Law Forum*, 2014, vol. 25, nos. 3–4, p. 466; Geert-Jan Alexander Knoops and Tom Zwart, "The *Flotilla* Case before the ICC: The Need to Do Justice While Keeping Heaven Intact", in *International Criminal Law Review*, 2015, vol. 15, no. 6, p. 1069.

17.4.). In this vein, I will address the legal characterization of the Israeli-Palestinian conflict (Section 17.4.1.), as well as the legality of Israeli blockade on Gaza and that of the Israeli attack on the Gaza flotilla (Section 17.4.2.) respectively. Subsequently, I shall conclude my preliminary analysis with the characterization of the crimes that have allegedly been committed by the Israeli Defence Forces during and in the aftermath of their raid on the Gaza flotilla (Section 17.5.). This analysis will hopefully elucidate the pitfalls and merits of the preliminary examination stage of the Gaza flotilla situation. In doing so, I have made an effort to combine the chronological and thematic orders in treating the issues to be analysed.¹²

In my analysis, I have singled out the following main issues: (1) the Prosecutor's relationship with other fact-finders (Section 17.6.1.), the interpretation of the notion of gravity by the OTP, Comoros and PTC I (Section 17.6.2.), and the issues of limits of prosecutorial discretion and the nature of judicial review contained in Article 53(1)(a) of the Statute. More concretely, I will be dealing with the issue of the tension between the Prosecutor's discretion and judicial review (Section 17.6.3.).

In that respect, I will first deal with the question of gravity. I shall analyse, in turn, the assessment of gravity advanced by the OTP in its 6 November 2014 decision not to initiate an investigation, and PTC I's findings in its decision of 16 July 2015, which found material errors in the Prosecutor's determination of the gravity of the potential cases. The stark contrast between the OTP and PTC I with respect to the assessment of scale, manner of commission, impact and nature of crimes merits further analysis. I will finally question the function of gravity as a leeway for prosecutorial discretion since the Prosecutor has too often resorted to it, especially when she is confronted with a politically sensitive situation. Thus, at times even when a situation would be of sufficient gravity to justify the initiation of an investigation, such an investigation may not be initiated based on a determination of lack of sufficient gravity as a proxy for political considerations.

Secondly, I will address the questions of the nature of review exercised by the PTC and internal institutional accountability of discretionary powers of the Prosecutor and its proper limits. These questions inevitably

¹² For a thorough chronological analysis of the proceedings before the ICC, see Kattan, 2016, pp. 60 ff., see *supra* note 10.

require an analysis of the general issues of prosecutorial discretion and role of the PTC, which, in turn, was created as an institutional response to the establishment of an independent prosecutor. Indeed, the proper nature of judicial review and its advantages in preserving the legitimacy, integrity, consistency and transparency of the Court must be readdressed.

Finally, I will assess the possible actions that may be taken by the Prosecutor concerning the present situation, that is, inaction, initiation of an investigation or not initiating an investigation on the ground of either gravity or the interests of justice. Accordingly, the possible impact of the Turkish-Israeli Agreement of 28 June 2016 on the preliminary examination of the situation in question shall be addressed (Section 17.7.). After the conclusion (Section 17.8.), a postscript written after the submission of the manuscript is included (Section 17.9.)

17.2. Procedural History

On 14 May 2013, the authorities of the Union of the Comoros referred to the Prosecutor the situation “with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for the Gaza Strip”. Comoros, by letters to the Prosecutor dated 29 May and 21 June 2013, specified that the situation relates to the incidents allegedly committed from 31 May 2010 through 5 June 2010 on registered vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia bound for the Gaza Strip.

In November 2013, the OTP published its Report on Preliminary Examination Activities 2013. In this report, the OTP notes that the situation has been examined by four separate commissions, and states that:

The Office has analysed the supporting documentation accompanying the referral along with the reports published by each commission, and has identified a number of significant discrepancies in the factual and legal characterization of the incidents by these commissions. Accordingly, the Office is seeking additional information from relevant reliable sources in order to resolve these discrepancies.¹³

¹³ Office of the Prosecutor (‘OTP’), Annex A: Notice of filing the report prepared by the Office of the Prosecutor pursuant to article 53(1) of the Rome Statute, 4 February 2015, ICC-01/13-6-AnxA, para. 101 (hereinafter the ‘OTP Report’ or ‘Decision Not to Investigate’) (<http://www.legal-tools.org/doc/6b833a/>).

On 6 November 2014, the OTP concluded this preliminary examination with regard to the situation and issued a report entitled “Situation on Registered Vessels of Comoros, Greece and Cambodia: Article 53(1) Report”, in which she announced her determination that there was no reasonable basis to proceed with an investigation into the situation. The Prosecutor concluded that there “is a reasonable basis to believe that war crimes under the Court’s jurisdiction have been committed in the context of interception and takeover of the *Mavi Marmara* by IDF [Israel Defense Forces] soldiers on 31 May 2010”. The Prosecutor determined that there was reasonable basis to believe that the war crimes of wilful killing under Article 8(2)(a)(i), wilfully causing serious injury to body and health under Article 8(2)(a)(iii), committing outrages upon personal dignity under Article 8(2)(b)(xxi), and, if the blockade of Gaza by Israel is to be deemed unlawful, also intentionally directing an attack against civilian objects under Article 8(2)(b)(ii) of the Rome Statute were committed. However, according to the Prosecutor, “the potential case(s) that would likely arise from an investigation into the situation would not be of sufficient gravity to justify further action by the Court and would therefore be inadmissible pursuant to Articles 17(1)(d) and 53(1)(b) of the Statute”. The Prosecutor, based on this determination, decided that: “there is no reasonable basis to proceed with an investigation and [...] decided to close this preliminary examination”.

On 29 January 2015, Comoros submitted an “Application for Review pursuant to Article 53(3)(a) of the Prosecutor’s Decision of 6 November 2014 not to initiate an investigation in the Situation” to PTC I.¹⁴ The request for review made three arguments:

1. The Prosecutor failed to take into account facts which did not occur on the three vessels over which the Court has territorial jurisdiction;¹⁵
2. The Prosecutor committed errors in addressing the factors relevant to the determination of gravity under Article 17(1)(d) of the Rome Statute;¹⁶ and

¹⁴ International Criminal Court (‘ICC’), Public Redacted Version of Application for Review pursuant to Article 53(3)(a) of the Prosecutor’s Decision of 6 November 2014 not to initiate an investigation in the Situation, 29 January 2015, ICC-01/13-3-Red (<http://www.legal-tools.org/doc/b60981/>).

¹⁵ *Ibid.*, paras. 62–81.

¹⁶ *Ibid.*, paras. 82–135.

3. The Prosecutor should reconsider her decision in light of the attainment by the Court of broader jurisdiction over Gaza.¹⁷

On 30 March 2015, with the authorization of the Chamber, the Prosecutor responded to the Request for Review.¹⁸

On 24 April 2015, PTC I issued its Decision on Victims' Participation and appointed the Principal Counsel of the Office of Public Counsel for Victims as legal representative of unrepresented victims.¹⁹

On 23 June 2015, the Principal Counsel for Victims submitted their "Observations on behalf of victims in the proceedings for the review of the Prosecutor's decision not to initiate an investigation".²⁰

On 16 July 2015, upon review, PTC I decided by majority (Judge Kovacs dissenting) in favour of Comoros by granting the request on the grounds that her gravity analysis was mistaken and insufficiently took into account facts concerning the situation, and the decision to investigate occupies the lowest evidentiary threshold of a "reasonable basis to proceed". Accordingly, the Chamber requested the Prosecutor to "reconsider her decision not to initiate an investigation".²¹

On 27 July 2015, the Prosecutor appealed against PTC I's decision claiming that the decision of the Chamber constituted a decision with re-

¹⁷ *Ibid.*, paras. 136–38.

¹⁸ OTP, 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 (<http://www.legal-tools.org/doc/0e4e4c/>).

¹⁹ ICC, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Pre-Trial Chamber I, Decision on the Victims' Participation, 24 April 2015, ICC-01/13-18 (<http://www.legal-tools.org/doc/118fc5/>).

²⁰ Office of Public Counsel for Victims, ICC, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Observations on behalf of victims in the proceedings for the review of the Prosecutor's decision not to initiate an investigation, 23 June 2015, ICC-01/13-27-Red (<http://www.legal-tools.org/doc/3b60b4/>).

²¹ ICC, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Pre-Trial Chamber 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-01/13-34, para. 50 (<http://www.legal-tools.org/doc/2f876c/>).

spect to admissibility, which may be directly appealed under Article 82(1)(a) of the Statute.²²

On 6 November 2015, the Appeals Chamber decided by majority to dismiss, *in limine*, and without discussing its merits, the Prosecutor's appeal against PTC I's request on the ground that it was not a decision "with respect to [...] admissibility" within the meaning of Article 82(1)(a) of the Rome Statute.²³ The Appeals Chamber reasoned that allowing the Prosecutor's appeal to be heard would rupture the scheme for judicial review of the Prosecutor's decisions as explicitly set out in Article 53 of the Statute and would amount to introducing an additional layer of review that lacks any statutory basis. Besides, the Appeals Chamber opined that the nature of PTC I's decision was not "a determination of admissibility that would have the effect of obliging the Prosecutor to initiate an investigation". In this regard, as provided in Article 53, the final decision remained with the Prosecutor.

On 14 November 2016, the Prosecutor announced her Report on Preliminary Examination Activities 2016,²⁴ in which she makes the following remarks with regard to the Comoros referral:

Over the reporting period, the Office conducted a *de novo* review of all the information available to it prior to 6 November 2014, upon which the 6 November 2014 report was based. This included analysis of information from multiple sources, including, inter alia, the reports of the four commissions that previously examined the flotilla incident and the supporting materials and documentation accompanying the referral by the Comoros as well as additional materials provided by it later in the course of the preliminary examination.

This review was conducted in light of the reasoning of Pre-Trial Chamber I in its request to the Prosecutor to review

²² OTP, Notice of Appeal of "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation" (ICC-01/13-34), 27 July 2015, ICC-01/13-35 (<http://www.legal-tools.org/doc/50ca53/>).

²³ ICC, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic 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/>).

²⁴ OTP, *Report on the Preliminary Examination Activities 2016*, 14 November 2016 (<http://www.legal-tools.org/doc/f30a53/>).

her prior decision, as well as the arguments presented by the Comoros and the participating victims.

In addition, the Prosecutor exercised her independent discretion under Article 53 (4) to consider the significance, if any, of information newly made available to the Office since 6 November 2014. The volume of this new information was significant, encompassing further information from the legal representatives of the Comoros and the participating victims, and such submissions as they chose to make.

The Office is nearing completion of its review of all information gathered prior to and since its initial report of 6 November 2014 and is preparing to issue the Prosecutor's final decision under rule 108 (3) in the near future.²⁵

As of September 2017, the Comoros situation was on the list of on-going preliminary examinations.²⁶

17.3. Factual Basis

17.3.1. The Importance of the Human Rights Council Report

Determination of facts is a vital aspect of any legal process. In the context of the flotilla incident, the report of the Fact Finding Mission established by the Human Rights Council has been the most reliable and accurate source of establishing facts of the incident so far. Indeed, bearing in mind the fact that there are four reports addressing the incident, each of which includes significant irreconcilable discrepancies, one should employ the following criteria in order to make a determination with respect to the reliability of the information at hand:

- The nature of the commission and, more specifically, whether it was a fact-finding commission (like the United Nations Fact Finding Mission), which has investigated the facts of the situation (witness hearing, visiting the vessels and taking note of other evidence etc.), or a politically mandated commission established to resolve conflicts between the States (the Palmer-Ulribe Report, for instance);
- The impartiality of the commissions, for instance, a commission established by the defence forces of a State to which the potential per-

²⁵ *Ibid.*, paras. 328–31.

²⁶ OTP, "Preliminary Examinations", available on the ICC web site.

petrators of the alleged crimes belong would not be deemed, by many, as impartial and independent; and

- The recognition given to the reports under consideration.

Comparing and contrasting the existing four reports in light of the above criteria will soon reveal the fact that the HRC Report is the sole report that has such qualities, by virtue of being a product of an independent international fact-finding mission. It is also noteworthy that the HRC Report has been approved by the Human Rights Council of the General Assembly of the United Nations, and is thereby recognized by the international community.²⁷ I will, therefore, in this study rely on the facts that have been determined and outlined by the HRC Report, but I will also compare the conflicting accounts among the reports when they pertain to a significant issue.

17.3.2. Interception of the Gaza Flotilla by the Israeli Navy and Its Aftermath: Factual Overview and a Summary of the Cases

On 3 January 2009, Israel gave notice of a naval blockade from the coastline of the Gaza Strip up to a distance of 20 nautical miles from the coast. As noted in the OTP Report: “The naval blockade was part of a broader effort to impose restrictions on travel and the flow of goods in and out of the Gaza strip [...]”.²⁸ It was the purpose of the Gaza flotilla, which was organized by the Free Gaza Movement, a human rights organization registered as charity in Cyprus, to break this blockade and to deliver humanitarian assistance and supplies to Gaza.²⁹

The Gaza flotilla was composed of eight vessels and a total of 748 persons:

1. *M.V. Mavi Marmara* (registered in Comoros), a passenger ship carrying 577 passengers;
2. *M.V. Defne Y* (registered in Kiribati), a cargo ship with 20 passengers;

²⁷ Follow-up to the report of the independent international fact-finding mission on the incident of the humanitarian flotilla, UN Doc. A/HRC/RES/15/1, 29 September 2010 (<http://www.legal-tools.org/doc/aa1c5f/>).

²⁸ OTP, *Report on Preliminary Examination Activities 2013*, 25 November 2013, para. 90 (<http://www.legal-tools.org/doc/dbf75e/>).

²⁹ The HRC Report, paras. 75–79, see *supra* note 5.

3. *M.V. Gazze 1* (registered in Turkey), a cargo both carrying 18 passengers;
4. *M.V. Eleftheri Mesogios* (Greece), a cargo boat carrying 30 passengers;
5. *M.V. Sfendoni* (Togo), a passenger boat carrying 43 passengers;
6. *Challenger 1* (USA), a passenger boat carrying 20 passengers;
7. *Challenger 2* (USA), a passenger boat carrying 20 passengers, which withdrew from after developing engine problems; and
8. *Rachel Corrie* (Cambodia), a cargo ship carrying 20 passengers, which was delayed and thus unable to join the flotilla. The Israeli Navy seized the ship in international waters on 6 June.³⁰

The present factual overview and jurisdictional analysis shall confine itself to events which took place on three vessels: *Mavi Marmara*, on which the most serious alleged crimes have been committed, *Eleftheri Mesogios* and *Rachel Corrie*. This is also in line with the Prosecutor's determination with regard to the jurisdiction *ratione loci*. In this regard, the OTP Report states that:

The Union of the Comoros ratified the Rome Statute on 18 August 2006. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Comoros or by its nationals from 1 November 2006 onwards. Cambodia ratified the Rome Statute 11 April 2002. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Cambodia or by its nationals from 1st July onwards. Greece ratified the Rome Statute on 15 May 2002. The ICC therefore has jurisdiction over Rome Statute crimes committed on the territory of Greece by its nationals from 1st July 2002 onwards.³¹

17.3.2.1. Events aboard the *Mavi Marmara*

On 31 May 2010 at approximately 04:30, the Israeli Defence Force made an initial attempt to board the *Mavi Marmara* from zodiac boats. The Israeli forces fired non-lethal weaponry onto the ship, including smoke and stun grenades, tear-gas and paintballs. Due to the strong sea breeze and later due to the downdraft from the helicopters, the smoke and tear gas

³⁰ *Ibid.*, paras. 81–82.

³¹ OTP, *Report on Preliminary Examination Activities 2013*, para. 89, see *supra* note 28.

were not effective.³² These initial attempts of the Israeli forces to board *Mavi Marmara* proved unsuccessful.

Just minutes after soldiers from the zodiac boats had made an initial attempt to board, the first helicopter appeared and the Israeli forces used smoke and stun grenades in an attempt to clear an area for the landing of soldiers. The Israeli forces boarded the *Mavi Marmara* lowering a rope, which was let down from the helicopter and from which the first group of soldiers descended.³³

There are different accounts about the use of live ammunition from the helicopters. The Israeli Commission Report claims that no firing from helicopters took place. The Turkish Commission Report states that from 04:32 onwards, live ammunition was fired from the zodiacs and the helicopter. Even though the OTP's initial report states that the HRC Report "found that live ammunition had been used from at least one of the helicopters and also admitted it was very difficult to establish the exact chain of events due to the conflicting accounts and available evidence".³⁴ By contrast, the HRC Report is in fact quite clear about the use and time of live fire from the helicopter:

The Mission does not find it plausible that soldiers were holding their weapons and firing as they descended on the rope. However, it has concluded *that live ammunition was used from the helicopter on the top deck prior to the descent of the soldiers*.³⁵

Indeed, this finding is supported by the witness testimony. As an example, a witness who was on board the *Mavi Marmara* while the Israeli attack took place, stated that:

[...] without landing on the ship they [the Israeli soldiers] started to shoot with guns using real bullets. Several friends were shot and fell down [wounded]. While gunfire was continuing, they released ropes and began to land to the ship.³⁶

Although the HRC Report states that: "it is difficult the exact course of events on the top deck between the time first soldier descending and

³² The HRC Report, para. 112, see *supra* note 5.

³³ *Ibid.*, para. 114.

³⁴ The OTP Report, para. 95, see *supra* note 13.

³⁵ The HRC Report, para. 114, see *supra* note 5 (emphasis added).

³⁶ The Comoros Referral, para. 13, see *supra* note 1.

the Israeli forces securing control of the deck”,³⁷ the report is clear and unambiguous about the use of live ammunition from the helicopters prior to the descending of the Israeli forces.³⁸ This fact is fairly important in terms of the both parties’ claims and in particular is relevant to the recourse to self-defence.

On the use of live ammunition, the Israeli Commission Report claims that the Israeli soldiers came under live fire themselves. However, the HRC Report has found that:

The Mission has found no evidence to suggest that any of the passengers used firearms or that any firearms [was] taken on board the ship. Despite requests, the Mission has not received any medical records or other substantiated information from the Israeli authorities regarding any firearm injuries sustained by soldiers participating in the raid. Doctors examined the three soldiers taken below decks and no firearm injuries were noted. Further, the Mission finds that the Israeli accounts so inconsistent and contradictory with regard to evidence of alleged firearms injuries to Israeli soldiers that it has to reject it.³⁹

After the descending of the Israeli soldiers, a fight ensued between passengers and the first soldiers. Several passengers on the top deck fought with soldiers using their fists, sticks, metal rods and kitchen knives in order to defend themselves or others. During this initial fighting on the top deck three Israeli soldiers were taken under control and brought inside the ship. The soldiers received their rudimentary medical treatment from doctors, who were passengers of the *Mavi Marmara*.⁴⁰ On this point, the HRC Report’s findings read as follows:

Two of the soldiers received had received wounds to the abdomen. One of the soldiers had a superficial wound to the abdomen, caused by a sharp object, which penetrated to the subcutaneous tissue. None of the three soldiers had received gunshot injuries, according to doctors examined them. All three soldiers were in a state of shock and were suffering from cuts, bruises and blunt force trauma⁴¹ [...] It was de-

³⁷ The HRC Report, para. 115, see *supra* note 5.

³⁸ *Ibid.*, para. 114.

³⁹ *Ibid.*, para. 116.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*, para. 125.

cided that [by the passengers] the soldiers should be released and they were taken to the bow of the lower deck. Once the bow deck two of the soldiers jumped into the sea and were picked up by Israeli boats. The third soldier did not jump and was rapidly joined by Israeli soldiers who came down from the top deck.⁴²

During the operation the Israeli soldiers landed from three helicopters over a 15-minute period. The soldiers used paintballs, plastic bullets and live ammunition, fired by soldiers from the helicopters above and the soldiers who had landed on the top deck. It was not easy to escape from the fire, for the escape points to the bridge deck from the top deck were narrow and restricted, as a result of which it was very difficult for passengers in this area to avoid being hit by live rounds. The Israeli soldiers killed a passenger, for instance, who was using a video camera and not involved in any of the fighting.⁴³

It also needs to be highlighted that the majority of wounds suffered by passengers were to their upper torsos in the head, thorax, abdomen and back. Furthermore, the Israeli soldiers continued shooting at passengers who had already been wounded with live ammunition, soft baton charges, and plastic bullets. Several wounded passengers were subjected to further violence, including “being hit with the butt of a weapon, being kicked in the head, chest and back and being verbally abused”.⁴⁴

After securing the control of the top deck, the Israeli soldiers moved down to the bridge deck below in order to take control of the ship. During this part of the operation, the Israeli soldiers fired live ammunition both from the top deck at passengers on the bridge deck below and after they had moved down to the bridge deck. As a result of live fire during this period of time, at least four passengers died, and at least nine were injured. Furthermore, none of these passengers posed any threat to the Israeli forces as those passengers were defenceless and more importantly the Israeli soldiers were firing from the top deck above.⁴⁵ The HRC Report states that:

There was considerable live fire from Israeli soldiers on the top deck and a number of passengers were injured or killed

⁴² *Ibid.*, para. 126.

⁴³ *Ibid.*, para. 117.

⁴⁴ *Ibid.*, para. 118.

⁴⁵ *Ibid.*, paras. 119–20.

whilst trying to take refuge inside the door or assisting other to do so.⁴⁶

One witness described such a case in which one passenger was killed in the following manner:

There were two guys hidden underneath a walkway of the ship to the right hand side and I was screaming at them not to move. The two passengers were below the soldiers. They could not see the soldiers and the soldiers could not see them while they were hidden under the walkway. Then the guys moved out, making themselves visible as they tried to run towards the metal door. One man made it to open the door and got inside. The other man must have been shot. I think he was shot in the head from the way he looked, he wasn't moving at all.⁴⁷

During the shootings on the bridge deck, Bulent Yildirim, the President of IHH [a Turkish NGO] and one of principal organizers of the flotilla, removed his white shirt in order to use it as a white flag to indicate surrender. Yet, the live firing continued.⁴⁸

As the operation of the Israeli forces concluded at 05:17, during the 45–50-minute period, nine passengers were killed, more than 24 passengers received serious injuries caused by live ammunition and a large number of other passengers had received injuries by other means (plastic rounds, soft baton chargers, beatings etc.).⁴⁹

17.3.2.1.1. Death of Nine Passengers

During the operation nine passengers were killed by the Israeli soldiers: Furkan Doğan, İbrahim Bilgen, Fahri Yıldız, Ali Heyder Bengi, Cevdet Kılıçlar, Cengiz Akyüz, Cengiz Songür, Çetin Topçuğlu, and Necdet Yıldırım. These deaths occurred on the top deck (roof) and on the bridge deck, portside.

Deaths occurring on the top deck (roof)

Furkan Dogan, a 19-year-old with dual Turkish and United States citizenship, was on the central area central are of the

⁴⁶ *Ibid.*, para. 120.

⁴⁷ *Ibid.*, para. 121.

⁴⁸ *Ibid.*, para. 123.

⁴⁹ *Ibid.*, para. 128.

top deck filming with a small video camera when he was first hit with live fire [...] *In total Furkan received five bullet wounds, to the face, head, back thorax, left leg and foot. All the entry wounds were on the back of his body, except for the face wound which entered to the right of his nose. According to forensic analysis, tattooing around the wound in his face indicates that the shot was delivered at point blank range. Furthermore, the trajectory of the wound, from bottom to top, together with a vital abrasion to the shoulder that could be consistent with the bullet exit point, is compatible with shot being received while he was lying on the ground on his back [...]* The wounds to the leg and foot were most likely received in a standing position.

Ibrahim Bilgen, a 60-year-old Turkish citizen, from Sirt in Turkey, was on the top deck and was one of the first passengers to be shot. He received a bullet wound to the chest, the trajectory of which was from above and not at close range [...] *The wounds are consistent with the deceased being shot from soldiers on board the helicopter above and receiving a further wound to the head while lying on the ground, already wounded.*

Fahri Yildiz, a 42-year-old Turkish citizen from Adiyaman, received five bullet wounds, one to the chest, one to the left leg and three to the right leg. The chest wound was caused by a bullet that *entered near the left nipple and hit the heart* and lungs before exiting from the shoulder.

Ali Haydar Bengi, a 38-year-old Turkish citizen from Diyarbakir, received six bullet wounds (one in the chest, one in the abdomen, one in the right arm, one in the right thigh and two in the left hand) [...] *There are several witness accounts which suggest that Israeli soldiers shot the deceased in the back and chest at close range while he was lying on the deck as a consequence of initial bullet wounds.*

Deaths occurring on the bridge deck, portside

Cevat Kiliclar, a 38-year-old Turkish citizen from Istanbul, was on the *Mavi Marmara*, in his capacity as a photographer employed by IHH. At the moment he was shot he was standing on the bridge deck on the port side of the ship near to the door leading to the main stairwell and was attempting to photograph Israeli soldiers on the top deck. *Ac-*

According to the pathology reports, he received a single bullet to his forehead between the eyes. The bullet followed a horizontal trajectory which crossed the middle of the brain from front to back. He would have died instantly.

Cengiz Akyüz and Cengiz Songür, were injured on the bridge deck in close succession by live fire from above. They had been sheltering and were shot as they attempted to move inside the door leading to the stairwell. Cengiz Akyüz received a shot to the head and it is probable that he died instantly [...] Cengiz Songür received a single bullet to the upper central thorax below the neck, shot from a high angle, which lodged in the right thoracic cavity injuring the heart and aorta. Cetin Topcuoglu, a 54-year-old Turkish citizen from Adana had been involved in helping to bring injured passengers inside the ship to be treated. He was also shot close to the on the bridge deck [...] He was shot by three bullets. One bullet entered from the top soft tissues of the right side of the back of the head, exited from the neck and then re-entered into the thorax. Another bullet entered the left buttock and lodged in the right pelvis. The third entered the right groin and exited from the lower back. There are indications that the victim may have been in a crouching or bending position when this would be sustained.

Necdet Yildirim, the location and circumstances of the shooting and death of him remain unclear. He was shot twice in the thorax, once from the front and once from the back. The trajectory of both bullets was from top to bottom. He also received bruises consistent with plastic bullet impact.⁵⁰

This information shows that five of the victims were shot either in the back of the head or in the back. As pointed out by Guilfoyle, the HRC Report raises several disturbing categories of deaths:

Civilians on the top deck attempting to obstruct the boarding who were either shot once in the chest or lower limbs and then shot again in the head or who were shot from above and not at close range (the inference being that at least one live round was fired from the boarding helicopter); Civilians on lower decks who were shot and killed from above with live

⁵⁰ Emphasis added. See for a full account of deaths occurred on the *Mavi Marmara*, *ibid.*, Table deaths of flotilla participants at pp. 29–30.

fire (i.e. from the top deck where the boarding party landed).⁵¹

17.3.2.1.2. Injuries and Subsequent Treatment of Injured and Other Passengers

Forensic reports confirm that at least 54 passengers suffered injuries. During the operation to secure control of the top deck, the Israeli forces wounded at least 19 passengers, 14 with gunshot wounds.⁵²

Likewise, forensic reports confirm some disturbing categories of injuries. For instance, the serious nature of wounds to a passenger (Uğur Süleyman Söylemez), which include at least one bullet wound to the head, have left the victim in a coma in an Ankara hospital. He passed away after four years in coma on 24 May 2014.⁵³

Subsequent treatment of injured and other passengers on the *Mavi Marmara* by the Israeli forces included the following:

- The wounded were required to leave the cabins themselves, or taken outside in a rough manner, without apparent concern for the nature of their injuries and the discomfort that this would cause.⁵⁴
- The wounded passengers were taken to the front of the top deck where they joined other passengers injured during the operation on the top deck and where the bodies of persons killed during the operation had been left.⁵⁵
- Wounded passengers, including persons seriously injured with live fire wounds, were handcuffed with plastic cord handcuffs, which were often tied very tightly causing some of the injured to lose sensitivity in their hands. The plastic handcuffs could not be loosened without being cut off, but could be tightened.⁵⁶ A number of passengers were still experiencing medical problems related to handcuffing three months later and forensic reports confirm that least 54

⁵¹ Douglas Guilfoyle, “The *Mavi Marmara* Incident and Blockade in Armed Conflict”, in James Crawford and Vaughan Lowe (eds.), *The British Yearbook of International Law 2010*, vol. 81, no. 1, Oxford University Press, Oxford, 2011, pp. 171–223, at p. 212.

⁵² The HRC Report, para. 117, see *supra* note 5.

⁵³ *Ibid.*, see table: deaths of flotilla participants at p. 30.

⁵⁴ *Ibid.*, para. 130.

⁵⁵ *Ibid.*, para. 131.

⁵⁶ *Ibid.*

passengers had received injuries, transversal abrasions and bruises, as a result of handcuffing on board the *Mavi Marmara*.⁵⁷

- Many passengers were also stripped naked and then had to wait some time, possibly as long as two to three hours, before receiving medical treatment.⁵⁸
- Some of the wounded remained on board of the *Mavi Marmara*, at least one of whom had injuries caused by live ammunition and did not receive appropriate medical treatment until after the ship's arrival at the port of Ashdod in Israel many hours later.⁵⁹
- In the process of being detained, or while kneeling on the outer decks for several hours, there was physical abuse of passengers by the Israeli forces, including kicking and punching and being hit with the butts of rifles.⁶⁰
- One foreign correspondent, on board in his professional capacity, was thrown on the ground and kicked and beaten before being handcuffed.⁶¹
- The passengers were not allowed to speak or to move and there were frequent instances of verbal abuse, including derogatory sexual remarks about the female passengers.⁶²
- The Israeli forces also used dogs and some passengers received dog-bite wounds.⁶³

17.3.2.1.3. Confiscation of Property

The HRC Report also provides facts with respect to confiscation of property on the *Mavi Marmara* by Israeli authorities and includes, among others, the following:

- The Israeli authorities confiscated cash and a wide variety of personal belongings, including passports, identification cards, driving licenses, mobile telephones, laptop computers, audio equipment in-

⁵⁷ *Ibid.*, para. 135.

⁵⁸ *Ibid.*, para. 131.

⁵⁹ *Ibid.*, para. 132.

⁶⁰ *Ibid.*, para. 134.

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ *Ibid.*

cluding MP3 players, photographic and video recording equipment, credit cards, documents, books and clothing. These items were taken at a number of stages, primarily while on board of vessels including *Mavi Marmara*.⁶⁴

- The passengers were carrying tens of thousands of dollars cash donations, and some of cash confiscated by the Israeli authorities.⁶⁵

The Fact Finding Mission of the UN reported cases of misuse of items confiscated by the Israeli authorities, including laptop computers, credit cards, and mobile telephones. Furthermore, there were allegations regard the use of credit card that belong to the passengers, and stealing and selling laptops belonging to passengers that were on board the flotilla.⁶⁶

The confiscation of property that belonged to the passengers, according to the HRC Report, shows that the soldiers and authorities intended to and did suppress and destroy relevant evidence:

Amongst the items confiscated and not returned by the Israeli authorities is a large amount of video and photographic footage that was recorded on electronic and other media by passengers, including many professional journalists, on board the vessels of the flotilla. This includes a large number of photographic and video materials of the Israeli assault and interception on the *Mavi Marmara* and other vessels. The Israeli authorities have subsequently released a very limited amount of this for public access, in an edited form, but the vast majority has remained in the private control of the Israeli authorities.⁶⁷

This mission is satisfied this represents a deliberate attempt by the Israeli authorities to suppress or destroy evidence and other information related to the events of 31 May on the *Mavi Marmara* and other vessels of the flotilla.⁶⁸

⁶⁴ *Ibid.*, para. 235.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*, para. 239.

⁶⁷ *Ibid.*, para. 240.

⁶⁸ *Ibid.*, para. 241.

17.3.2.2. Events aboard the *Eleftheri Mesogios* and the *Rachel Corrie*

Israeli forces boarded the *Eleftheri Mesogios* after 04:30, concurrently with the assault on the *Mavi Marmara* and the *Sfendoni*. On the *Eleftheri* too, Israeli soldiers used physical force, electroshock weapons, plastic bullets and paint balls to clear the area. A number of passengers were injured as a result, including one passenger whose leg was fractured.⁶⁹

Like the assault on the *Mavi Marmara*, all passengers and crew were handcuffed. Two further passengers were also subjected to physical assault. Furthermore, the passengers were almost continuously filmed on video cameras by the Israeli forces. The UN Fact Finding Mission reported that: “One passenger said that he felt this was being done deliberately to humiliate the passengers and that this contributed directly to an elderly passenger experiencing an anxiety attack”.⁷⁰

Events aboard the M.V. *Rachel Corrie* took place on 5 June 2010. The ship was captured through same method and the boarding proceeded peacefully. Yet, the lead passenger, who had control of the ship just prior to the boarding, was handcuffed and made to kneel at the back of the ship for approximately 45 minutes after that was placed with the crew. One aspect with regard to capture of the M.V. *Rachel Corrie* needs to be emphasized. The Israeli Chief of Staff cited *Rachel Corrie* as an example of a humanitarian ship which had accepted to be diverted to Ashdod. Yet, this contradicts the passengers’ assertions.⁷¹ The passengers as indicated in the HRC Report stated that: “the ship was boarded after protest and was taken to Ashdod against their will”.⁷²

17.4. Preliminary Legal Issues

The legal analysis in this section will initially focus on the preliminary legal issues such as the law of naval blockade in armed conflict and the legal characterization of the Israeli-Palestinian conflict. In this regard, the following questions need to be addressed:

1. Was the deployment of a naval blockade on Gaza lawful?
2. If the blockade was actually lawful, was the enforcement thereof, on the Gaza flotilla, both legal and proportionate?

⁶⁹ *Ibid.*, para. 148.

⁷⁰ *Ibid.*, paras. 149–51.

⁷¹ *Ibid.*, paras. 154–60.

⁷² *Ibid.*, para. 161.

3. Could the Israeli violation on the vessels be justified on the basis that Israel was enforcing a blockade under international humanitarian law?
4. If not, did Israeli forces commit international crimes within the jurisdiction of the ICC?

In this regard, I will address first the issue of legal characterization of the Israeli-Palestinian conflict and then the issue of legality of the Israeli blockade.

17.4.1. Legal Characterization of the Israeli-Palestinian Conflict

Legal characterization of the Israel-Palestinian conflict, namely determining whether it is an international or non-international armed conflict, is of twofold importance. First, it will be the basis for determining the applicability of the norms of international humanitarian law (for example, the Fourth Geneva Convention) and of the Rome Statute. Second, it shall determine the applicability of the law of blockade to the present situation (for under customary international humanitarian law, blockades are only permitted in international armed conflicts).⁷³ Classifying the Israeli-Palestinian conflict is complex. Clearly, Gaza is not a State and the status of Palestine was on 31 May 2010 still unclear. Therefore, this situation begs the question whether the conflict between Israel and Palestine could be classified as an international or non-international armed conflict.

Israel, Palestine and the international community generally characterize the Israel-Palestinian conflict as an international armed conflict, albeit for different reasons. However, the Israeli approach on this matter is ambiguous.⁷⁴ Before Israel's implementation of the Revised Disengage-

⁷³ See Russell Buchan, "The International Law of Naval Blockade and Israel's Interception of the *Mavi Marmara*", in *Netherlands International Law Review*, 2011, vol. 58, no. 2, pp. 209–41, p. 215; Wolff Heintschel von Heinegg, "Blockade", in Rüdiger Wolfrum (ed.), *Max Planck Encyclopaedia of Public International Law*, Oxford University Press, Oxford, 2008, para. 25; for further references see Iain Scobbie, "Gaza", in Elizabeth Wilms-hurst (ed.), *International Law and the Classification of Conflicts*, Oxford University Press, Oxford, 2012, pp. 280–315, p. 301 endnote 115; Wolff Heintschel von Heinegg, "The Law of Armed Conflict at Sea", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, Oxford, 2013, pp. 463–547, pp. 464–65; see however the Israeli Commission Report, para. 39, which cites solely two episodes of supporting state practice, see *supra* note 7.

⁷⁴ Dieter Fleck, "The Law of Non-International Armed Conflict", in Dieter Fleck (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, Oxford, 2013, pp. 581–609, pp. 584–85.

ment Plan in August 2005, the jurisprudence of Israel's High Court, as well as the arrangements made for Israel's disengagement, made it plain that Israel considered Gaza as an occupied territory.⁷⁵ Nonetheless, especially after putting the Disengagement Plan into force in 2005, Israel has been claiming that they relinquished control over Gaza and its population, thus Gaza is no longer an occupied territory of Israel.⁷⁶ In the *al Bassiouni* case, in which the petitioners challenged Israel's restrictions on the supply of electricity, Israel's High Court held that, according to the disengagement in 2005, Israel does not have 'effective control' over Gaza, and thus no longer occupied the territory. The relevant part of the judgment reads as follows:

[...] since September 2005 Israel no longer has effective control over what happens in the Gaza Strip. Military rule that applied in the past in this territory came to an end by a decision of the government, and Israeli soldiers are no longer stationed in the territory on a permanent basis, nor are they in charge of what happens there. In these circumstances, the State of Israel does not have a general duty to ensure the welfare of the residents of the Gaza Strip or to maintain public order in the Gaza Strip according to the laws of belligerent occupation in international law. Neither does Israel have any effective capability, in its present position, of enforcing order and managing civilian life in the Gaza Strip. In the prevailing circumstances, the main obligations of the State of Israel relating to the residents of the Gaza Strip derive from the state of armed conflict that exists between it and the Hamas organization that controls the Gaza Strip; these obligations also derive from the degree of control exercised by the State of Israel over the border crossings between it and the Gaza Strip, as well as from the relationship that was created between Israel and the territory of the Gaza Strip after years of Israeli military rule in the territory, as a result of which the Gaza Strip is currently almost completely dependent upon the supply of electricity from Israel.⁷⁷

⁷⁵ See, *Matar and others v. The Commander of the Israeli Defence Force in Gaza*, 1 August 2005, ILDC 73 (IL 2005), para. 7; see further Scobbie, 2012, pp. 284 ff., see *supra* note 73.

⁷⁶ See, for such a view, the Supreme Court of Israel sitting as the High Court of Justice, *Al-Bassiouni v. Prime Minister*, 30 January 2008, HCJ 9132/07.

⁷⁷ *Ibid.*, para. 12.

The Israeli Commission Report has also aligned itself to this view.⁷⁸ Nonetheless, the very same report (after stating that “there is a consensus that the conflict between the State of Israel and the Hamas is an international armed conflict, although the reasons that have led various parties to this conclusion vary”⁷⁹) arrived at the conclusion that Israel and Hamas were in an international armed conflict:

[...] The Commission has examined the conditions for imposing and enforcing the naval blockade on the Gaza Strip on the basis of the assumption that the conflict between Israel and Hamas is international in character.⁸⁰

Yet, the Commission’s grounds for such a classification are rather unconvincing. While not recognizing Palestine as a State nor as an occupied territory, the Commission considers that the present conflict is ‘international’ based on a geographical criterion, which has been adopted by the Israeli Supreme Court in the *Targeted Killings* case.⁸¹ The Court held that according to customary international law, where an armed conflict crosses the borders of the State, it is regarded then as international armed conflict from the humanitarian law perspective.⁸² However, the Court’s reasoning has been sharply criticized. First, there is no State practice which supports the claim that customary international law recognized an armed conflict to be international in character only based on geographical criteria, that is, “a conflict that crosses the border of a state”.⁸³ As Guilfoyle rightly puts:

[...] The fact that a conflict [is] ‘external’ is not enough to make it ‘international’ as a matter of law [...] the question is not one of the geography of a conflict but the identity of the parties to it [...] The fundamental definition of an IAC [international armed conflict] under the four 1949 Geneva Conventions is that it is a conflict involving ‘High Contracting Parties’: states. The *Tadić* case expands this definition to include as an IAC a conflict involving state-sponsored forces. This, however, remains a test of identity, not geography [...]

⁷⁸ The Israeli Commission Report, para. 47, see *supra* note 7.

⁷⁹ *Ibid.*, para. 41.

⁸⁰ *Ibid.*, para. 44.

⁸¹ See the Supreme Court of Israel sitting as the High Court of Justice, *The Public Committee against Torture in Israel et al. v. The Government of Israel et al.*, Judgment, 11 December 2006, HCJ 769/02.

⁸² *Ibid.*, para. 18.

⁸³ Buchan, 2011, p. 224, see *supra* note 73.

it is difficult to accept, therefore, the Israeli Supreme Court's position that cross-border violence between Israel and organized armed groups must be governed by the law of IAC.⁸⁴

Whether the State of Israel was an occupying power in Gaza on 31 May 2010 shall be determined by the effective control test which is prescribed by Article 42 of the Hague Regulations, regarded as customary international law,⁸⁵ which reads: "Territory is considered occupied when it is actually placed under the authority of the hostile army". Accordingly, a State shall be regarded as an occupying power or an occupation continues to the extent that the occupying power retains effective control – in other words, whether there is exercise of authority by the occupying State in the occupied territory during the period under investigation. To assume that Israel's withdrawal of ground troops from Gaza *per se* is sufficient in determining the termination of the occupation would be incorrect. This is because an effective test based on factual control should not ignore Israel's continued control of Gaza's airspace and other means of control employed by Israel such as satellites.⁸⁶ Thus, an analysis of the existence of an occupation should apply the test of effective control that contains the capacity to assert control that is a view supported in the *List* case of the US Military Tribunal at Nuremberg⁸⁷ as well as by the ICTY in *Prosecutor v. Naletilić and Martinović*.⁸⁸ Indeed, Israeli land forces have re-entered Gaza on numerous occasions since the disengagement and satisfied the test of "capacity to send troops within a reasonable time" or, in the terms of the *List* case, showed that it "could anytime they desired assume physical control of any part of the country".⁸⁹

⁸⁴ Guilfoyle, 2011, pp. 185 ff., see *supra* note 51; see further, *ibid*.

⁸⁵ The International Court of Justice, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, 19 December 2005, para. 172 (<http://www.legal-tools.org/doc/8f7fa3/>).

⁸⁶ On Israel's continuing control on Gaza see Scobbie, 2012, pp. 298 ff., see *supra* note 73.

⁸⁷ The United States Military Tribunal, Nuremberg, "Trial of Wilhelm List and others (the Hostages trial)", in United Nations War Crimes Commission (ed.), *Law Reports of Trial of War Criminals*, vol. VIII, His Majesty's Stationery Office, London, 1949, pp. 34–92.

⁸⁸ International Criminal Tribunal for the former Yugoslavia ('ICTY'), *Prosecutor v. Naletilić and Martinović*, Trial Chamber, Judgment, 31 March 2003, IT-98-34-T (<http://www.legal-tools.org/doc/f2cfef/>).

⁸⁹ See Scobbie, 2012, p. 298, see *supra* note 73.

These arguments, as explained by Scobbie, have been neglected or ostensibly manipulated by Israeli authorities in order to achieve pragmatic objectives in particular cases:

The attempt to classify this conflict was complicated both by the unique nature of Gaza and by Israel's manipulation, and probably conscious manipulation, of legal categories. 'Disengagement' arguably did not terminate occupation as it retained existing structures of control, but was portrayed as such simply because of the absence of boots on the ground. Given the high-tech means of surveillance and attack employed by Israel, this was an attempt to deny responsibility for the territory while reaping the benefits of effective, albeit remote, control.⁹⁰

Indeed, the overwhelming majority of UN Member States, as reflected in the several UN General Assembly⁹¹ and Security Council resolutions,⁹² still considered Gaza occupied. This represents the view of the majority of States, and is shared by the International Court of Justice in the *Wall Advisory Opinion*.⁹³ Likewise, the Goldstone Report⁹⁴ affirms that Gaza is a territory occupied by Israel, and as occupier of Gaza, Israel is bound by the provisions of the Fourth Geneva Convention. As the Goldstone Report has found, Israel maintains effective control over Gaza:

276. Israel has without doubt at all times relevant to the mandate of the Mission exercised effective control over the Gaza Strip. The Mission is of the view that the circumstances of this control establish that the Gaza Strip remains occupied by Israel. The provisions of the Fourth Geneva Convention

⁹⁰ *Ibid.*, p. 314.

⁹¹ Resolution adopted by the General Assembly on 10 December 2009, UN Doc. A/RES/64/92, 10 December 2009 (<http://www.legal-tools.org/doc/4b9ca5/>); Resolution adopted by the General Assembly on 10 December 2009, UN Doc. A/RES/64/94, 10 December 2009 (<http://www.legal-tools.org/doc/ad9d98/>); see further Guilfoyle, 2011, p. 181, see *supra* note 51.

⁹² Resolution 1860 (2009), UN Doc. S/RES/1860(2009), 8 January 2009 (<http://www.legal-tools.org/doc/01f14b/>).

⁹³ ICJ, Legal Consequences of the construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, para. 101 (<http://www.legal-tools.org/doc/e5231b/>).

⁹⁴ Human Rights in Palestine and other Occupied Arab Territories: Report of the United Nations Fact-Finding Mission on the Gaza Conflict, UN Doc. A/HRC/12/48, 25 September 2009, paras. 276–78 (hereinafter 'Goldstone Report') (<http://www.legal-tools.org/doc/ca9992/>).

therefore apply at all relevant times with regard to the obligations of Israel towards the population of the Gaza Strip.

277. Despite Israel's declared intention to relinquish its position as an occupying Power by evacuating troops and settlers from the Gaza Strip during its 2005 "disengagement", the international community continues to regard it as the occupying Power.

278. Given the specific geopolitical configuration of the Gaza Strip, the powers that Israel exercises from the borders enable it to determine the conditions of life within the Gaza Strip. Israel controls the border crossings (including to a significant degree the Rafah crossing to Egypt, under the terms of the Agreement on Movement and Access) and decides what and who gets in or out of the Gaza Strip. It also controls the territorial sea adjacent to the Gaza Strip and has declared a virtual blockade and limits to the fishing zone, thereby regulating economic activity in that zone. It also keeps complete control of the airspace of the Gaza Strip, *inter alia*, through continuous surveillance by aircraft and unmanned aviation vehicles (UAVs) or drones. It makes military incursions and from time to time hit targets within the Gaza Strip. No-go areas are declared within the Gaza Strip near the border where Israeli settlements used to be and enforced by the Israeli armed forces. Furthermore, Israel regulates the local monetary market based on the Israeli currency (the new sheqel) and controls taxes and custom duties.

Moreover, the HRC Report also concludes that the conflict between Israel and Hamas was of an international character. According to the HRC Report, the occupation exception applies here, which means that the conflict is an international armed conflict to which the law of international armed conflict applies, because Gaza was occupied by Israel on 31 May 2010.⁹⁵

Indeed, the Fact Finding Mission was also satisfied that these circumstances continued to prevail on 31 May 2010.⁹⁶ Furthermore, the Comoros referral states that the law of international armed conflicts must be applied to the incident at stake based upon the argument of occupa-

⁹⁵ See the HRC Report, paras. 62–64, see *supra* note 5.

⁹⁶ *Ibid.*, paras. 64.

tion.⁹⁷ As an occupying power, the State of Israel had certain obligations imposed on it by international law, such as combatant status, prisoner of war status, right to war booty, and release of those deprived of their liberty.⁹⁸ The Palmer Report also classifies the conflict as an international one by noting the inconsistencies of the Israeli approach:

The Panel now turns to consider whether the other components of a lawful blockade under international law are met. Traditionally, naval blockades have most commonly been imposed in situations where there is an international armed conflict. While it is uncontested that there has been protracted violence taking the form of an armed conflict between Israel and armed groups in Hamas-controlled Gaza, the characterization of this conflict as international is disputed. The conclusion of the Panel in this regard rests upon the facts as they exist on the ground. The specific circumstances of Gaza are unique and are not replicated anywhere in the world. Nor are they likely to be. Gaza and Israel are both distinct territorial and political areas. Hamas is the de facto political and administrative authority in Gaza and to a large extent has control over events on the ground there. It is Hamas that is firing the projectiles into Israel or is permitting others to do so. The Panel considers the conflict should be treated as an international one for the purposes of the law of blockade. This takes foremost into account Israel's right to self-defence against armed attacks from outside its territory. In this context, the debate on Gaza's status, in particular its relationship to Israel, should not obscure the realities. The law does not operate in a political vacuum, and it is implausible to deny that the nature of the armed violence between Israel and Hamas goes beyond purely domestic matters. In fact, it has all the trappings of an international armed conflict. This conclusion goes no further than is necessary for the Panel to carry out its mandate. *What other implications may or may not flow from it are not before us, even though the Panel is mindful that under the law of armed conflict a State can hardly rely on some of its provisions but not pay heed to others.*⁹⁹

⁹⁷ The Comoros Referral, paras. 51–52, see *supra* note 1.

⁹⁸ See Fleck, 2013, p. 604, see *supra* note 74.

⁹⁹ The Palmer Report, para. 73, see *supra* note 8 (emphasis added).

Yet, there are views in the legal literature that classify the present conflict as a non-international conflict, and as a consequence of this assumption the legality of the Israeli blockade is denied. As emphasized above, a blockade according to customary international law is only available in an international armed conflict, which is a majority view solely contested by the Israeli Commission Report and then based only on two episodes of supporting State practice.¹⁰⁰ Accordingly, as a consequence of views according to which the Israeli-Hamas conflict was on 31 May 2010 of non-international character, the blockade on Gaza was, from the very beginning, unlawful. As put by Guilfoyle:

There is [...] no consistent state practice and *opinio juris* suggesting blockade is available outside an IAC. It follows from this that Israel had no right to impose a blockade on the Gaza Strip and its enforcement of that unlawful blockade against the flotilla including the *Mavi Marmara* was an act incurring state responsibility.¹⁰¹

However, given the effective control Israel has exercised over Gaza's borders, airspace and territorial waters, it appears that Israel continues to occupy the territory. The 'internationalization' of the conflict based on the arguments of occupation means the present conflict should be characterized as an international armed conflict. The argument that Israel no longer maintains a permanent military presence in Gaza and thus, it is no longer the belligerent occupant of Gaza is disputed, and it has not been accepted by UN bodies and most States.

Accordingly, the following analysis of the remaining legal issues, such as the legality of the blockade on Gaza and the alleged war crimes, shall be based on the assumption that the Israel and Hamas were engaged in an international armed conflict on 31 May 2010.

17.4.2. The International Law of Naval Blockade and the Question of the Legality of the Israeli Blockade on Gaza and the Legality of Israeli Attack on the Gaza Flotilla

The modern law of the high seas is based on the principle of freedom of the high seas, that is, free use by all.¹⁰² Accordingly, a vessel on the high

¹⁰⁰ The Israeli Commission Report, para. 39, see *supra* note 7.

¹⁰¹ Guilfoyle, 2011, p. 217, see *supra* note 51; Buchan, 2011, pp. 240 ff., see *supra* note 73.

¹⁰² See, Malcolm Evans, "The Law of the Sea", in Malcolm Evans (ed.), *International Law*, third edition, Oxford University Press, Oxford, 2010, pp. 651–86, at p. 665.

seas is subject to the exclusive jurisdiction of its flag State in time of war or armed conflict as well as in time of peace.¹⁰³ The UN Convention on the Law of the Sea, which can for most purposes be taken to reflect customary international law on the subject, renders the principle of freedom of the high seas in its Article 87 as follows:

1. The high seas are open to all States, whether coastal or land locked. Freedom of the high seas is exercised under the condition laid down by this Convention and by other rules of international law. It comprises, inter alia, for both coastal and land-locked States:
 - (a) freedom of navigation;
 - (b) freedom of over flight;
 - (c) freedom to lay submarine cables and pipelines, subject to Part VI;
 - (d) freedom to construct artificial islands and other installations permitted under international law, subject to Part VI;
 - (e) freedom of fishing, subject to the conditions laid down in section 2;
 - (f) freedom of scientific research, subject to Parts VI and XIII.
2. These freedoms be exercised by all States with due regard to the interests of other States in their exercise of the freedom of the high seas, and also with due regard for the rights under this Convention with respect to activities [on the sea bed and ocean floor and subsoil thereof.]

Naturally, the result flows from the basic principle of the freedom of the high seas that one State cannot interfere with vessels sailing under the flag of another without consent.¹⁰⁴ Furthermore, the flag State has jurisdiction over the ship. The flag State will enforce rules and regulations not only of its own national law but of international law as well.¹⁰⁵ Ac-

¹⁰³ James Crawford, *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press, Oxford, 2012, pp. 296–98.

¹⁰⁴ *Ibid.*, p. 301.

¹⁰⁵ Malcolm N. Shaw, *International Law*, 8th ed., Cambridge University Press, Cambridge, 2017, p. 455.

cordingly, only military vessels or other specially authorized ships of the flag State may exercise authority over civilian ships of this flag on the high seas.

The international law of the sea, however, provides exceptions to the principle of freedom of the high seas, which are usually limited to suspicion of certain activities such as piracy, slave trade, unauthorized high seas broadcasting, stateless vessels, and acts of self-defence under Article 51 of the United Nations Charter. Where such an exception applies, a warship of a State may stop, search and even seize foreign vessels as an exercise of its jurisdiction.¹⁰⁶

The law of naval warfare, which is potentially applicable on the high seas, also contains exceptions to the freedom of the high seas such as the practice of blockade. A blockade, as a form of economic warfare, is “a belligerent operation to prevent vessels and/or aircraft of all nations, enemy as well as neutral, from entering and exiting specified ports, airfields, or coastal areas belonging to, occupied by, or under the control of enemy nation”.¹⁰⁷ Although there were attempts to codify the international law of blockade, this area of law is regulated by customary international law. Yet, there are declarations and manuals (national and international) on which the interpreters rely as expressions of customary international law. Hence, it would suggest that blockades were initially regulated under the 1856 Paris Declaration Respecting Maritime Law¹⁰⁸ and the 1909 London Declaration.¹⁰⁹ The most recent attempt to codify the law of armed conflict at sea is the 1994 San Remo Manual on International Law Applicable to Armed Conflicts at Sea which is prepared by international and naval experts as a consequence of series of meetings under the auspices of the

¹⁰⁶ United Nations Convention on the Law of the Sea, article 10 December 1982, Article 110 (<http://www.legal-tools.org/doc/c7b2bf/>); The HRC Report, para. 49, see *supra* note 5; Shaw, 2008, pp. 614–28, see *supra* note 105; Douglas Guilfoyle, *Shipping Interdiction and the Law of Sea*, Cambridge University Press, Cambridge, 2009, pp. 21 ff.; Crawford, 2012, p. 301, see *supra* note 103.

¹⁰⁷ Article 7.71 of the U.S. Naval Handbook, US Naval War College Annotated Supplement to the Commander’s Handbook on the Law of Naval Operations, Newport, 2007.

¹⁰⁸ Paris Declaration Respecting Maritime Law, 16 April 1856, Martens, Nouveau Recueil General 1re ser, vol. XV, UK, HC, c. in *Sessional Papers*, vol. 66 (1856) (<http://www.legal-tools.org/doc/a06141/>).

¹⁰⁹ London Declaration Concerning the Laws of Naval War, 26 February 1909, 208 Consol TS 338 (1909) (<http://www.legal-tools.org/doc/3181d5/>); see further Heintschel von Heinegg, pp. 463–547, p. 533, see *supra* note 73.

International Institute of Humanitarian Law in San Remo, Italy. The San Remo Manual contains provisions on blockades that regulates, among other things, the conditions of lawfulness of a blockade. The Manual is not a binding document. Yet, its codification effort has had a significant impact on the formulation of military manuals including the UK manual, the Canadian manual and to a certain extent the German manual.¹¹⁰ As stated in the introduction of the Manual, it is an attempt to “provide a contemporary restatement of international applicable to armed conflicts at sea”¹¹¹ and can therefore be regarded as part of customary international law.

Israel has expressly relied upon the San Remo Manual in justifying its boarding and capture of the Gaza flotilla.¹¹² The Israeli authorities, basically, claimed that the attack on the flotilla was a part or a deployment of a lawful blockade imposed on Gaza.¹¹³ For instance, one day after the interception of the *Mavi Marmara*, the spokesman for the Israeli Prime Minister stated that:

We were acting totally within our legal rights. The international law is very clear on this issue [...] if you have a declared blockade, publicly declared, legally declared, publicized as international law requires, and someone is trying to break that blockade and though you have warned them [...] you are entitled to intercept even on the high seas.¹¹⁴

Further, the Israeli Commission Report concludes that: “The naval blockade was imposed on the Gaza Strip lawfully, with Israel complying with the conditions for imposing it”.¹¹⁵

The question of legality of the Israeli blockade must be addressed at the outset. Further, the introduction to war crimes in the Elements of Crimes of the Rome Statute provides that: “The elements for war crimes under article 8, paragraph 2, of the Statute shall be interpreted within the

¹¹⁰ See, Guilfoyle, 2011, p. 195, see *supra* note 51.

¹¹¹ San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994, Introduction (<http://www.legal-tools.org/doc/118957/>).

¹¹² See the Israeli Commission Report, paras. 29 ff., *supra* note 7; the HRC Report, para. 50, see *supra* note 5; Guilfoyle, 2011, p. 195., see *supra* note 51.

¹¹³ See *ibid.*

¹¹⁴ Mark Regev, spokesman for Israeli Prime Minister Binyamin Netanyahu, quoted in the *Washington Post*, 1 June 2010.

¹¹⁵ The Israeli Commission Report, para. 112, see *supra* note 7.

established framework of the international law of armed conflict including, as appropriate, the international law of armed conflict applicable to armed conflict at sea”.

According to the rules set out in Part IV, Section II of the San Remo Manual and in a number of military manuals of civilized nations, a blockade must satisfy the following requirements to be lawful:

1. Notification (publication): the details relating to the naval blockade need to be publicly announced;
2. Effective enforcement: the line on which the blockade is established needs to be enforced and effective;
3. Impartial enforcement: the blockade must be applied to the vessels of all States;
4. The blockade must not prevent access to ports and coasts of neutral states;
5. The blockade must be in response to an international armed conflict; and
6. The blockade must be in accordance with the principle of humanity or proportionality.

The first requirement means that a State which intends to impose a blockade must publicly declare it and notify both belligerents and all neutral States.¹¹⁶ The notification must specify the commencement and duration, location, and extent of the blockade and the period within which vessels of neutral States may leave the blockaded coastline.¹¹⁷ Generally, a Notice to Mariners (as known as ‘NOTMAR’) is regarded as a sufficient means of notification.¹¹⁸

In the present case, Israel declared its blockade by issuing a Notice to Mariners on 3 January 2009: “the Gaza maritime area is closed to all maritime traffic and is under blockade imposed by [the] Israeli Navy until further notice”.¹¹⁹ In addition, the establishment and existence of this

¹¹⁶ The San Remo Manual, Rule 93, see *supra* note 111.

¹¹⁷ *Ibid.*, para. 94.

¹¹⁸ The Palmer Report, Appendix 1: The Applicable International Principles, para. 28, p. 86, see *supra* note 8.

¹¹⁹ Israel Ministry of Transport, “NO. 1/2009 Blockade of the Gaza strip”.

blockade was transmitted by other means of communication (the Internet, for instance).¹²⁰

The contested issue concerning this requirement is whether the term “until further notice” in the Israeli Notice to Marines satisfied the specification of the notification duration of the blockade. There are, at least, two views with regard to the duration requirement.

The Israeli Commission Report argues that the San Remo Manual in this regard does not reflect customary international law and it states that:

Even if we regard the ‘duration’ as an emerging rule of customary international law, great weight is not attached to establishing a specific term during which the blockade is required to run. Therefore, it appears that the notice that the naval blockade would continue “until further notice” satisfies the legal requirements.¹²¹

The Palmer Report echoes the other argument in the Israeli Commission Report, namely “restricting the blockade to a specific duration was regarded as impossible, in view of the open ended nature of the conflict with Hamas”¹²² and arrives at the conclusion that the Israeli notification has met the requirement of duration.¹²³

The Turkish Report, on the other hand, rejects the open-endedness of the conflict argument and concludes that the blockade on Gaza did not meet the notification requirement:

It is the duty on the blockading state to establish a clear time period and to extend it if necessary. This customary rule of international law as restated in Rule 94 of the San Remo Manual employs the conjunctive and not disjunctive where all elements are required for a lawful blockade and not simply those chosen as convenient. The vague formulation of until further notice is not acceptable. The purpose for requiring an express time limit is to allow for periodic reviews to assess the impact of the blockade. For example, whether the military advantage is being achieved or not, or assess the impact on the civilian population. An open-ended time frame

¹²⁰ See further, the Israeli Commission Report, para. 58, see *supra* note 7.

¹²¹ *Ibid.*, para. 59.

¹²² *Ibid.*

¹²³ The Palmer Report, para. 75, see *supra* note 8.

left to the discretion of the blockading authorities risks arbitrariness which is not consistent with international law.¹²⁴

It is, indeed, evident that the term “until further notice” is not a kind of expression that would clearly specify duration under any set of circumstances, let alone a practice like blockade, which would have detrimental effect on the civilian population. Although it has been presumed that this formal defect cannot *per se* invalidate a blockade, the idea of indefinite blockade has its own difficulties, especially with regard to the principle of proportionality.¹²⁵

From the vantage point of legal methodology, a teleological interpretation is possible only when the wording of the given legal norm is obscure. The San Remo Manual in Rule 94 clearly states that: “The declaration shall specify the commencement, duration, location, and extent of the blockade”. These conditions regarding the declaration are required to be met cumulatively. Otherwise, a declaration may not be qualified as a declaration of the blockade within the meaning of the San Remo Manual. Furthermore, the Manual does not make a distinction between formal and substantive requirements of the naval blockade. To overcome this obstacle, the Palmer Report states that: “The notice does specify a duration. Given the uncertainties of a continuing conflict, nothing more was required.”¹²⁶ Although this would not be seen as a convincing argument, it is not possible to conclude solely based on such a formal defect that the Israeli blockade on Gaza had not met the requirement of notification as of 31 May 2010.

The second requirement is that a blockade must be effective, which means effective enforcement of the blockade.¹²⁷ On the determination of the effectiveness, the San Remo Manual states that: “A blockade must be effective. The question whether a blockade is effective is a question of fact”.¹²⁸ This rule seeks to rule out the historic practice of fictitious or

¹²⁴ The Turkish Report, pp. 63–64, see *supra* note 6. The Turkish Report, furthermore, asserted that the “extent” requirement did not meet as well. See *ibid.*, p. 65.

¹²⁵ Guilfoyle, 2011, p. 197 footnote 145, see *supra* note 51; The Israeli Commission Report, paras. 60, 95, see *supra* note 7.

¹²⁶ The Palmer Report, para. 75, see *supra* note 8.

¹²⁷ The San Remo Manual, Rule 95, see *supra* note 111; The Paris Declaration Respecting Maritime Law, para. 4, see *supra* note 108; The London Declaration Concerning the Laws of Naval War, Article 2, see *supra* note 109; UK Manual, para. 13.67; US Manual, para. 7.7.2.3.

¹²⁸ The San Remo Manual, Rule 95, see *supra* note 111.

paper blockades.¹²⁹ Whether a blockade is effective, therefore, must be decided on a case-by-case basis, and a determination concerning the effectiveness of a blockade depends on facts and geographical circumstances. Since 3 February 2009 until 31 May 2010 including the flotilla raid, Israeli forces have stopped any vessel attempting to enter the blockaded area.¹³⁰ Based on this practice, it could be concluded that the second requirement is satisfied.

The third requirement means that the blockade must be applied impartially to vessels of all States.¹³¹ The blockading power may only authorize all neutral and belligerent shipping only in exceptional cases. There is nothing to indicate that the Israeli blockade was being enforced in a discriminatory manner.¹³²

The fourth requirement bars the blockading party from extending its blockade to neutral ports and coasts.¹³³ In this regard, the Israeli blockade was imposed on the coast of Gaza and there is no suggestion that Israel had deployed the blockade to the coasts and ports of other countries neutral to the conflict.

In relation to the fifth requirement, we have already provided an analysis on the legal characterization of the Israeli-Palestinian armed conflict. We have concluded that it was an international armed conflict based on occupation. Thus, the Israeli blockade had met the fifth requirement. The OTP has also classified the present conflict as an international one.

The most contentious and crucial issue with regard to the Israeli blockade was the assessment and analysis of the sixth requirement, namely the principle of proportionality or humanity. This principle provides that a blockade will be unlawful where:

1. it has the sole purpose of starving the civilian population or denying it other objects essential for its survival; or

¹²⁹ Guilfoyle, 2011, p. 197, fn. 146, see *supra* note 51; Heintschel von Heinegg, 2008, para. 33, see *supra* note 73.

¹³⁰ The Israeli Commission Report, paras. 26–27, see *supra* note 7; The Palmer Report, para. 76, see *supra* note 8.

¹³¹ London Declaration Concerning the Laws of Naval War, Article 4, see *supra* note 109; The San Remo Manual, Rule 100, see *supra* note 111.

¹³² The Palmer Report, para. 76, see *supra* note 8; The Israeli Commission Report, para. 27, see *supra* note 7; The Turkish Report, p. 75, see *supra* note 6.

¹³³ The London Declaration Concerning the Laws of Naval War, Article 18, see *supra* note 109; The San Remo Manual, Rule 99, see *supra* note 111.

2. the damage to the civilian population is, or may be expected to be, excessive in relation to the concrete and direct military advantage anticipated from the blockade.¹³⁴

There are two disjunctively formulated criteria here: (1) starvation or hunger as a weapon of war and (2) excessive civilian damage. Starvation is only a form of excessive damage; hence starvation is not the only basis for judging proportionality of a blockade. The specific norm on starvation derives from the wider prohibition on excessive damage, which is one of the core principles of law of armed conflict.¹³⁵

A judgment on the principle of proportionality must initially establish whether it is the naval blockade alone that needs to be subjected to this test of proportionality or whether Israel's closure policy needs to be assessed generally, including the naval blockade and the land crossings.¹³⁶ The Palmer Report, for instance, adopts the former approach and presumably this led the Panel to conclude that the Israeli blockade was proportionate and legal, since it subjected the naval blockade to the test of proportionality separate from the land crossings. The Palmer Report separates these two practices based, in essence, on the argument that the naval blockade and land crossings are in pursuit of different objectives by emphasizing that they were deployed at different times, that they differed in intensity, and lastly, that the naval blockade was deployed in order to provide Israel with a sound legal basis to prevent war materials from reaching Gaza by sea.¹³⁷ The objective of naval blockade was, according to the Palmer Report, the security of Israel ("to prevent weapons, ammunition, military supplies and people from entering Gaza"¹³⁸), but the Report fails to identify what objectives the land crossings pursued.¹³⁹

This distinction based on the presumed different objectives of these measures, and ultimately treating them separately, is rather unconvincing

¹³⁴ *Ibid.*, para. 102.

¹³⁵ Guilfoyle, 2011, p. 198, see *supra* note 51.

¹³⁶ Cf. Douglas Guilfoyle, "The Palmer Report on the *Mavi Marmara* Incident and the Legality of Israel's Blockade of the Gaza Strip", in *EJIL: Talk!*, 6 September 2011.

¹³⁷ The Palmer Report, para. 70, see *supra* note 8.

¹³⁸ *Ibid.*, para. 77.

¹³⁹ Cf. Russell Buchan, "II. The Palmer Report and the Legality of Israel's Naval Blockade of Gaza", in *International and Comparative Law Quarterly*, 2012, vol. 61, no. 1, pp. 264, 270 ff.

and this approach of the Panel has been criticised.¹⁴⁰ The two regimes serve a single objective, that is, preventing war materials and dual-use goods from entering or leaving Gaza. Israel has stated on numerous occasions that the land crossings served a security objective, that is, the prevention of weapons reaching Gaza.¹⁴¹ The Israeli Commission Report, on this matter, states that: “Both the naval blockade and the land crossings policy were imposed and implemented because of the prolonged international armed conflict between Israel and the Hamas [...] The Naval blockade is also connected to the land crossings policy on a tactical level”.¹⁴² Indeed, when cast in this light, it is difficult to follow such salami-slicing approach in this context; in other words, it is difficult to argue that the naval blockade and the land crossings can be separated.¹⁴³ As Buchan convincingly put it:

The effective working of one [the naval blockade] is dependent upon the effective working of the other [the land crossings]. Indeed, this is evidenced by the fact that the naval blockade was deployed after the establishment of the land crossings, insurgent had sought to bypass the land crossings by ferrying goods to Gaza (and to Hamas fighters) via the sea. Consequently, the naval blockade was needed in order to buttress the land crossings and ensure that they effectively served their purpose: preventing war material from entering or leaving Gaza. Thus, on a tactical level the naval blockade and the land crossings are intimately linked. To this end, I would disagree with the Palmer Report and argue that the naval blockade and the land crossings should be regarded as on single unified closure policy. Consequently, it is this general closure policy that must be subjected to the test of humanity, not just the naval blockade.¹⁴⁴

All three previous reports on Israel’s interception of the Gaza flotilla – the HRC Report, the Israeli Commission Report and the Turkish Commission Report – conclude that the naval blockade and land crossings

¹⁴⁰ Cf. *ibid.*, pp. 271–73; Guilfoyle, “The Palmer Report on the *Mavi Marmara* Incident and the Legality of Israel’s Blockade of the Gaza Strip”, see *supra* note 136.

¹⁴¹ The Israeli Commission Report, para. 63, see *supra* note 7.

¹⁴² *Ibid.*

¹⁴³ See Buchan, 2012, p. 272, see *supra* note 139.

¹⁴⁴ *Ibid.*

should be considered as one single policy. The HRC Report, for instance, states that:

The Mission finds that the policy of blockade or closure regime, including the naval blockade imposed by Israel on Gaza was inflicting disproportionate civilian damage. The Mission considers that the naval blockade was implemented in support of the overall closure regime. As such it was part of a single disproportionate measure of armed conflict and as such cannot itself be found proportionate.¹⁴⁵

In the following analysis, therefore, the impact of the entire blockade on the Gaza population, that is, cumulative effects of the naval blockade and the land crossings, shall be subjected to the test of proportionality. As the land and sea blockades mutually reinforce each other and they are components of a general closure policy imposed on the Gaza policy, their legality must be judged as a whole. As Guilfoyle points out: “Proportionality must be a contextual assessment; where an objectively related package of measures with a single military aim creates disproportionate damage in toto, it should not be judged through the device of considering its components piecemeal”.¹⁴⁶

According to the first test of proportionality (humanity) set out in Rule 102(a) of the Manual, the imposition of a naval blockade would be illegal if its imposition is intended to starve or to deny it other objects essential for its survival. The term ‘starvation’ is under the law of armed conflict is simply to cause hunger.¹⁴⁷ The second alternative objective requirement is depriving the population in the blockaded area of objects essential to their survival. There is no exhaustive list of essential objects, but it includes not just food, water and medical supplies but also housing, clothing, electricity and means of shelter.¹⁴⁸ Yet, the San Remo Manual provision contains the adjective ‘sole’ that requires that the starvation be the sole purpose of the blockade.¹⁴⁹

By May 2010, it was evident that Israel’s blockade of Gaza was having devastating impact upon the population in Gaza, which is a well-

¹⁴⁵ The HRC Report, para. 59, see *supra* note 5.

¹⁴⁶ Guilfoyle, 2011, p. 217, see *supra* note 51.

¹⁴⁷ See *ibid.*, p. 200; the HRC Report, para. 52, see *supra* note 5.

¹⁴⁸ See Protocol I Additional to the Geneva Conventions, 8 June 1977, Articles 54(2), 69 (<http://www.legal-tools.org/doc/d9328a/>); Buchan, 2011, p. 233, see *supra* note 73.

¹⁴⁹ See Guilfoyle, 2011, p. 200, see *supra* note 51.

documented fact by reliable sources, such as the UN Office for Coordination of Humanitarian Affairs ('UNOCHA'), UN Relief and Works Agency ('UNRWA'), and the International Committee of Red Cross ('ICRC'). In April 2010, the UNOCHA reported that:

The deterioration of living conditions in the Gaza Strip, mainly as a result of the Israeli blockade continued to be of concern. A new poverty survey conducted by UNRWA showed that the number of Palestine refugees completely unable to secure access to food and lacking the means to purchase even the most basic items, such as soap, school stationary and safe drinking water ('abject poverty') has tripled since the imposition of the blockade in 2007 [...] The UN's ability to meet the current level of need in Gaza continues to be significantly impeded by the blockade, which has either prevented the implementation of planned humanitarian projects or resulted in significant delays.¹⁵⁰

Further, on 25 May 2010, only several days before Israel's interception of the Gaza flotilla, the UNOCHA informed that 61% of the population suffered from food insecurity,¹⁵¹ and the UNOCHA opined that:

Restrictions imposed on the civilian population by the continuing blockade of the Gaza Strip amount to collective punishment, a violation of international humanitarian law. The blockade of Gaza also prevents or greatly hampers the exercise by the children, women and men living there of many human rights, including the right to food, the right to an adequate standard of living, the right to work, and the right the highest attainable standard of health.¹⁵²

Indeed, Article 33 of the Fourth Geneva Convention of 1949 prohibits collective punishment of civilians under occupation, which provides:

No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

¹⁵⁰ The UN Office for the Coordination of Humanitarian Affairs, "The Humanitarian Monitor: April 2010", p. 2.

¹⁵¹ The Food and Agriculture Organization of the UN, UN Office for the Coordination of Humanitarian Affairs, "Farming Without Land, Fishing Without Water: Gaza Agriculture Sector Struggles to Survive", Factsheet.

¹⁵² *Ibid.*

Strikingly, reports of the UN as well as the ICRC have reached the conclusion that the closure regime of Israel constitutes a collective punishment.¹⁵³ The Goldstone Report, produced on behalf of the UN Human Rights Council, states that:

[...] From the facts ascertained by it, the Mission believes that Israel has violated its obligation to allow free passage of all consignments of medical and hospital objects, food and clothing (Article 23 of the Fourth Geneva Convention). The Mission also finds that Israel violated specific obligations it has as Occupying Power spelled out in the Fourth Geneva Convention, such as the duty to maintain medical and hospital establishments and services and to agree to relief schemes if the occupied territory is not well supplied.¹⁵⁴

[...] The Mission finds that Israel violated its duty to respect the right of the Gaza population to an adequate standard of living, including access to adequate food, water and housing.¹⁵⁵

The Conditions of life in Gaza, resulting from deliberate actions of the Israeli forces and the declared policies of the Government of Israel – as they were presented by its authorized and legitimate representatives – with regard to the Gaza Strip before, during and after the military operation, cumulatively *indicate the intention to inflict collective punishment on the people of the Gaza Strip* in violation of international humanitarian law.¹⁵⁶

Likewise, the HRC Report places special emphasis on the intention to inflict collective punishment in making its assessment with regard to the proportionality in accordance with Rule 102 of the San Remo Manual. The mission considered that: “one of the principle motives behind the imposition of blockade was a desire to punish the people of the Gaza Strip for having elected the Hamas. The combination of this motive and the

¹⁵³ The grave violations of human rights in the Occupied Palestinian Territory, particularly due to the recent Israeli military attacks against the occupied Gaza Strip: report of the United Nations High Commissioner for Human Rights on the implementation of Human Rights Council resolution S-9/1, A/HRC/12/37, 10 August 2009, para. 3030 (<http://www.legal-tools.org/doc/edc0db/>); “Gaza closure: not another year!”, International Committee of the Red Cross, 14 June 2010, News Release no. 10/103.

¹⁵⁴ The Goldstone Report, para. 72, see *supra* note 94.

¹⁵⁵ *Ibid.*, para. 73.

¹⁵⁶ *Ibid.*, para. 74 (emphasis added).

effect of the restrictions on the Gaza Strip leave no doubt Israel's actions and policies amount to collective punishment as defined by international".¹⁵⁷ Relying on these reports, it could be suggested that by 31 May 2010, Israel's blockade of Gaza was preventing essential objects from reaching the civilian population, and indeed, the claim that intention of Israel was to inflict collective punishment on the people of the Gaza supported by the evidence and legal assessment provided by the reports cited above.

This said, it would be difficult to prove that the 'sole purpose' of the Israeli blockade is to deny civilian population objects essential for its survival. It would, therefore, be more plausible to claim that the damage to the civilian population constitutes a disproportionate effect as indicated in Rule 102(b).¹⁵⁸ This provision subjects naval blockades to a proportionality test, which means that if the damage to the civilian population is excessive in relation to the anticipated military advantage, then the blockade is or will become unlawful. The military objective of Israel is to protect its people from mortar and rocket attacks. On the other hand, there is strong evidence that civilian damage involved is excessive in Gaza. As Buchan rightly writes: "[...] even though the military advantage anticipated from the closure regime is considerable (protection of civilian population of Israel), the fact that the closure regime is causing a devastating humanitarian crisis in Gaza would indicate that the damage to the civilian population is excessive".¹⁵⁹ As the naval blockade was implemented as part of comprehensive denial of commerce and supplies essential for living, these measures inflict disproportionate civilian damage within the meaning of Rule 102(b).¹⁶⁰ Accordingly, the intentional infliction of starvation is not the only test of a blockade's lawfulness. As explained above, it is "also possible that where the civilian population is inadequately supplied with food so as to cause hunger ('starvation' in an ordinary sense) this may constitute a disproportionate effect rendering a blockade illegal irrespective of whether this effect was intentional ('starvation' as a prohibited

¹⁵⁷ The HRC Report, para. 54, see *supra* note 5.

¹⁵⁸ Cf. Guilfoyle, 2011, p. 200, see *supra* note 51; See Buchan, 2012, pp. 272 ff., see *supra* note 139.

¹⁵⁹ See *ibid.*, p. 273.

¹⁶⁰ See Guilfoyle, 2011, pp. 203 ff., 217, see *supra* note 51; Buchan, 2011, pp. 235 ff., see *supra* note 73.

measure of war)”.¹⁶¹ Consequently, the naval blockade imposed on Gaza on 31 May 2010 by the Israel was unlawful, which was the conclusion of the HRC Report as well, which strongly expresses that:

The Mission has come to the firm conclusion that a humanitarian crisis existed on the 31 May 2010 in Gaza. The preponderance of evidence from impeccable sources is too overwhelming to come to a contrary opinion. Any denial of this cannot be supported on any rational grounds. One of the consequences flowing from this is that for this alone the blockade is unlawful and cannot sustained in law. This is so regardless of the grounds on which one seeks to justify the legality of the blockade.¹⁶²

The most significant legal consequence that flows from this conclusion is the action of the Israel Defence Force in intercepting the *Mavi Marmara* and other vessels of the flotilla were unlawful. It was, therefore, an unlawful exercise of jurisdiction over neutral vessels on the high seas and a wrongful act for which the State of Israel bears responsibility and compensation would have to be paid.¹⁶³ Further, the defensive measures by the crew of the *Mavi Marmara* were within their right of self-defence against the unlawful attack committed by the Israeli Defence Forces.¹⁶⁴

Despite the conclusion that there was no legal basis for the blockade, for the sake of argument, we shall now provide a brief analysis of enforcement action against the *Mavi Marmara* within the legal framework of law of naval blockade and international humanitarian law. Where there is a lawfully deployed blockade, under the San Remo Manual: “merchant vessels believed on reasonable grounds to be breaching a blockade may be captured. Merchant vessels which, after prior warning, clearly resist capture may be attacked”.¹⁶⁵ Rule 146(f) of the San Remo Manual further provides that: “neutral merchant vessels are subject to outside waters if they [...] are breaching or attempting to breach a blockade”. As the *Mavi Marmara* had expressed its intention to breach the naval blockade, Israel

¹⁶¹ Guilfoyle, 2011, p. 220, see *supra* note 51.

¹⁶² The HRC Report, para. 261, see *supra* note 5.

¹⁶³ *Ibid.*, para. 61; Guilfoyle, 2011, p. 207, see *supra* note 51.

¹⁶⁴ See further Andrew Sanger, “The Contemporary Law of Blockade and the Gaza Freedom Flotilla”, in *Yearbook of International Humanitarian Law*, 2010, vol. 13, pp. 397, 441; Buchan, 2011, pp. 241 ff., see *supra* note 73.

¹⁶⁵ The San Remo Manual, rule 98, see *supra* note 111.

sought to capture it and such capture is permitted in international law if the underlying blockade was lawful. Any armed attack that involves civilians is subject to certain restrictions.¹⁶⁶ The use of force, for instance, is limited by a strict principle of necessity and only such force is permissible which is indispensable to enforce the right and the principle of distinction. Besides, civilians should not be the direct targets of the attack, the use of force against civilians is only permitted in self-defence and this use of force must be exercised in a proportionate manner.¹⁶⁷ Israel's use of force on the *Mavi Marmara* went beyond what was necessary in the circumstance to capture it. On this matter, the Palmer Report, for instance, states that:

Israel's decision to board the vessels with such substantial force at a great distance from the blockade zone and with no final warning immediately prior to the boarding was excessive and unreasonable:

1. Non-violent options should have been used in the first instance. In particular, clear prior warning that the vessels were to be boarded and demonstration of dissuading force should have been given to avoid the type of confrontation that occurred;
2. The operation should have reassessed its options when the resistance to the initial boarding attempt became apparent so as to minimize casualties.¹⁶⁸

It is highly regrettable that the operation continued under the evident circumstances and the Israeli forces employed excessive force in capturing the *Mavi Marmara*.

The HRC Report describes the conduct of the Israeli soldiers during the course of operation as follows:

[...] throughout the operation to seize control of the *Mavi Marmara*, including before the live fire restriction was eased, lethal force was employed by the Israeli soldiers in a widespread and arbitrary manner which caused an unnecessarily large number of persons to be killed or seriously injured. Less extreme means could have been employed in nearly all instances of the Israeli operation, since there was no immi-

¹⁶⁶ *Ibid.*, paras. 38–46; Sanger, 2010, pp. 440 ff., see *supra* note 164.

¹⁶⁷ Cf. Buchan, 2011, pp. 238 ff., see *supra* note 73.

¹⁶⁸ The Palmer Report, para. 117, see *supra* note 8.

ment threat to soldiers; for example in relation to the operation to move down to the bridge deck and seize control of the ship and the firing of live ammunition at passengers on the bow deck of the ship [...] In such circumstances the use of less extreme means, such as available less-lethal weaponry, would have been sufficient to achieve the required objective [...] A well-trained force such as the Israeli Defence Force should have been able to successfully contain a relatively small group of passengers armed with sticks and knives and secure control of the ship without the loss of life or serious injury to either passengers or soldiers.¹⁶⁹

The conduct of the Israeli military and other personnel towards flotilla passengers was not only disproportionate to the occasion but demonstrated levels of totally unnecessary and incredible violence. It betrayed an unacceptable level of brutality. Such conduct cannot be justified or condoned on security or any other grounds [...]¹⁷⁰

The HRC Report in its overall assessment on the Israeli action on board of the *Mavi Marmara* makes the following assessment: “The Mission is satisfied that much of the use force used by the Israeli soldiers on board the *Mavi Marmara* and from the helicopters was unnecessary, disproportionate, excessive and inappropriate and resulted in the wholly avoidable killing and maiming of a large number of civilian passengers. On the basis of the forensic and firearm evidence, at least six of the killings can be characterized as extra-legal, arbitrary and summary execution”.¹⁷¹ Likewise, the Palmer Report expresses criticism with regard to the excessive and arbitrary violence of the Israeli soldiers during the capture of the *Mavi Marmara*: “Nine passengers were killed and many others seriously wounded by Israeli forces. No satisfactory explanation has been provided to the Panel by Israel for any of the nine deaths. Forensic evidence showing that most of the deceased were shot multiple times, including in the back, or at close range has not been adequately accounted for in the material presented by Israel”.¹⁷² As these facts clearly show, even if the Israeli blockade on Gaza was lawful, its enforcement went far beyond the limits of the law.

¹⁶⁹ The HRC Report, paras. 167–68, see *supra* note 5.

¹⁷⁰ *Ibid.*, para. 264.

¹⁷¹ *Ibid.*, para. 172 (emphasis added).

¹⁷² The Palmer Report, para. 134, see *supra* note 8.

Within the context of the Rome Statute, this attack would, among others, satisfy the elements of Article 8(2)(b)(iv), which provides that:

Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

Evidently, the Israeli attack was in violation of basic principles of international humanitarian law, that is, principles of distinction, military necessity and proportionality. Indeed, the following remarks in the Palmer Report provide support for this assertion:

The Panel concludes that the operation should have been better planned and differently executed. It was foreseeable that boarding in the manner that was done could have provoked physical resistance from those on board the vessels. In such a case there was a real risk of casualties resulting, as turned to be the case. Such a scenario should have been specifically addressed in the planning of the operation. The Panel also concurs with the comment in the Israeli report that the operation should have withdrawn and reassessed its options when the resistance to the initial boarding from the speedboats occurred. Having an alternative plan when clear resistance was first shown might have avoided the events that subsequently unfolded. Given the outcome, it is highly regrettable that the operation continued despite the evident circumstances.

Israel's decision to board the vessels with substantial force at a great distance from the blockade zone and with no final warning immediately prior to the boarding was excessive and unreasonable:

Non-violent options should have been used in the first instance. In particular, clear prior warning that the vessels were to be boarded and a demonstration of dissuading force should have been given to avoid the type of confrontation that occurred;

The operation should have reassessed its options when the resistance to the initial boarding attempt became apparent so as to minimize casualties.¹⁷³

¹⁷³ *Ibid.*, paras. 116–17.

We will now, relying on the factual and legal findings so far, proceed to discuss the question of whether crimes within the jurisdiction of the Court have been committed in the Gaza flotilla situation.

17.5. Crimes within the Jurisdiction of the Court

The reasonable basis that a crime within the jurisdiction of the Court exists is the first condition under Article 53(1) for initiating an investigation. The “reasonable basis” means that the Prosecutor must believe that a crime naturally exists, and as put by Bergsmo, Kruger and Bekou: “it is not required at this stage that the information conclusively proves all the elements of the crime”.¹⁷⁴ The decision of the Prosecutor thus depends on an objective assessment of the *notitia criminis*.¹⁷⁵ In making an assessment with regard to the initiation of an investigation, the OTP shall make an objective assessment of whether the event constitutes criminal activity under Article 5 of the Rome Statute. At this stage it is not necessary to identify suspects, but there must be a reasonable basis that the event occurred and that it amounts to criminal activity under Article 5. What is required here is rather an initial suspicion regarding the possible commission of the Rome Statute crimes.¹⁷⁶

The second condition under Article 53(1) is that the Court has to have jurisdiction over the situation. The jurisdiction assessment is three-fold: (1) subject-matter jurisdiction, (2) territorial jurisdiction and (3) temporal jurisdiction. In an early decision, PTC I defined these parameters as follows:

To fall within the Court’s jurisdiction, a crime must meet the following conditions; it must be one of the crimes mentioned in Article 5 of the Statute, that is to say, the crime of genocide, crimes against humanity and war crimes; the crime must have been committed within the time period laid down in Article 11 of the Statute; and the crime must meet one of

¹⁷⁴ Morten Bergsmo, Peter Kruger and Olympia Bekou, “Article 53: Initiation of an investigation”, in Triffterer and Ambos (eds.), 2016, margin no. 15, see *supra* note 2; Ignaz Stegmiller, *The Pre-Investigation Stage of the ICC: Criteria for Situation Selection*, Duncker & Humblot, Berlin, 2011, p. 270.

¹⁷⁵ *Ibid.*

¹⁷⁶ For the difference between the preliminary examinations and the actual formal investigations, see Ambos, 2016, p. 336, see *supra* note 4.

the two alternative conditions described in Article 12 of the Statute.¹⁷⁷

Article 5 lists four crimes over which the Court has subject-matter jurisdiction: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression. The crime of aggression was inserted in Article 8*bis* at the Kampala Conference in accordance with Articles 5(2), 121 and 123 of the Rome Statute.¹⁷⁸ However, the Court shall have jurisdiction on the crime of aggression no earlier than 1 January 2017 in accordance with Articles 15*bis* and 15*ter*.¹⁷⁹

The Comoros referral alleged that the conduct of the Israeli Defence Forces on 31 May 2010 aboard *Mavi Marmara*, and in the aftermath of the capture of the flotilla subsequent conduct of soldiers against the crew members of *Mavi Marmara* when they were being ferried to Israel amount to war crimes and crimes against humanity.¹⁸⁰ Thus, this section will analyse and consider whether there is a reasonable basis to believe that either war crimes or crimes against humanity or both have been committed.

17.5.1. War Crimes

Unlike crimes against humanity, war crimes do not require, by definition, the same quantitative scale. Even a single isolated act can constitute a war crime.¹⁸¹ Article 8 of the Rome Statute contains a non-exclusive threshold instead, which reads: “The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of crimes”. The plan or policy or large-scale element is, rather, part of the admissibility determination. In other words,

¹⁷⁷ ICC, Situation in the Democratic Republic of the Congo, PTC I, Decision on the applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, 17 January 2006, ICC-01/04-101-tEN-Corr, para. 85 (<http://www.legal-tools.org/doc/2fe2fc/>); see further Stegmiller, 2011, p. 273, see *supra* note 174.

¹⁷⁸ Assembly of States Parties, ICC, Resolution RC/Res.6 The Crime of Aggression, 11 June 2010., RC/Res.6 (<http://www.legal-tools.org/doc/0d027b/>).

¹⁷⁹ See further Kai Ambos, *Internationales Strafrecht: Strafanwendungsrecht, Völkerstrafrecht, Europäisches Strafrecht, Rechtshilfe*, 3rd ed., Verlag C.H. Beck, Munich, 2011, Section 7, margin no. 268.

¹⁸⁰ The Comoros Referral, paras. 59 ff., see *supra* note 1.

¹⁸¹ Robert Cryer, Hakan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, second edition, Cambridge University Press, Cambridge, 2010, p. 288.

isolated war crimes may fall within the Court's jurisdiction, but they may not satisfy the conditions of gravity or the interests of justice. That being said, the Court may choose to act with regard to an isolated incident which involves war crimes, where the war crimes are of sufficient gravity to warrant action.¹⁸² Consequently, it could be said that war crimes that does not take place in a systematic or widespread manner, fall outside the subject-matter jurisdiction of the Court.¹⁸³ Furthermore, PTC II stated that: "the term 'in particular' makes it clear that the existence of a plan, policy or large-scale commission is not a prerequisite for the Court to exercise jurisdiction over war crimes but rather serves as a practical guideline for the Court".¹⁸⁴ This threshold, however, has been employed, for it is part of the admissibility determination, which shall be discussed below.¹⁸⁵

We may now proceed to the question of whether the acts committed by the Israeli soldiers on the vessels would satisfy the definitions contained in Article 8 of the Rome Statute. The preliminary issue to be determined in charges under Article 8 is the existence of an armed conflict. The existence of an armed conflict between Israel and Palestine on 31 May 2010 is generally accepted, albeit on different reasoning; whether it be on the argument of occupation or the imposition of the naval blockade on Gaza, which is a method regulated under law of armed conflict.¹⁸⁶ And the armed conflict between Israel and Palestine is, as discussed above, generally characterized as an international armed conflict to which Articles 8(2)(a) and 8(2)(b) of the Rome Statute apply.¹⁸⁷ The Comoros referral makes this point when it states that: "The rules of international law governing occupation are to be found in the Fourth Geneva Convention

¹⁸² *Ibid.*, p. 289.

¹⁸³ Stegmiller, 2011, p. 215, see *supra* note 174.

¹⁸⁴ ICC, Situation in the Central African Republic, *The Prosecutor v. Jean-Pierre Bemba Gombo*, PTC II, Decision pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 15 June 2009, ICC-01/05-01/08-424, para. 211 (<http://www.legal-tools.org/doc/07965c/>); see further William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd ed., Oxford University Press, Oxford, 2016, p. 226.

¹⁸⁵ We shall, therefore, deal with the interpretation of Article 8(1) by the Office of the Prosecutor below. *Ibid.*, p. 229; Stegmiller, 2011, p. 275, see *supra* note 174.

¹⁸⁶ See generally Cryer, Friman, Robinson and Wilmschurst, 2010, p. 280, see *supra* note 181; Gerhard Werle, *Völkerstrafrecht*, 3rd edition, Mohr Siebeck, Tübingen, 2012, margin nos. 1070 ff.

¹⁸⁷ Buchan, 2014, pp. 475 ff., see *supra* note 11.

1949 (GC IV). The fact that Gaza is an occupied territory which falls within the ambit of the GC IV means that it is covered by rules governing international armed conflicts”.¹⁸⁸ Nevertheless, if one argues, as Buchan does, that on 31 May 2010 Israel was no longer an occupying power, then the analysis should be focused on whether the elements of non-international offences have been satisfied.¹⁸⁹ Yet, as discussed above, I am of the view that based on the effective control argument, Israel was still an occupying power on 31 May 2010. I will therefore analyse whether the elements of the crimes that have been alleged in the Comoros referral have been committed. It should be at this point highlighted that the Prosecutor in her decision not to initiate concluded that:

[...] there is a reasonable basis upon which to conclude that Israel continues to be an occupying power in Gaza despite the 2005 disengagement. The Office has therefore proceeded on the basis that the situation in Gaza can be considered within the framework of an international armed conflict in view of the continuing military occupation by Israel.¹⁹⁰

That said, the existence of the armed conflict *per se* is insufficient; in addition to an armed conflict, there must be a nexus between conduct and conflict.¹⁹¹ ICTY jurisprudence has held that:

It is necessary to conclude that the act, which could well be committed in the absence of a conflict, was perpetrated against the victim(s) concerned because of the conflict at issue.¹⁹²

Further, the Elements of Crimes of the Rome Statute also contain a similar condition, which states: “The conduct took place in the context of and was associated with an (international) armed conflict”.¹⁹³ It is sufficient that the perpetrator acted in furtherance or under the guise of an armed conflict. Furthermore, the status of the perpetrator or whether the

¹⁸⁸ The Comoros Referral, para. 52, see *supra* note 1.

¹⁸⁹ For such an analysis, see Buchan, 2014, pp. 479 ff., *supra* note 11.

¹⁹⁰ The OTP Report, para. 29, see *supra* note 13.

¹⁹¹ Cryer, Friman, Robinson and Wilmschurst, 2010, p. 285, see *supra* note 181.

¹⁹² ICTY, *Prosecutor v. Aleksovski*, Trial Chamber, Judgment, 25 June 1999, IT-95-14/1-T, para. 45 (<http://www.legal-tools.org/doc/52d982/>).

¹⁹³ See ICC, Elements of Crimes, Article 8(2)(a)(i) (“War crime of wilful killing”), pp. 13–14 (<http://www.legal-tools.org/doc/3c0e2d/>).

act serves a goal of a military campaign may be taken into account as well.¹⁹⁴

With respect to the armed conflict in Gaza, there exists a nexus between the Israeli forces' conduct and the armed conflict, because the attack against the Gaza flotilla by the Israeli soldiers was in furtherance or part of the blockade policy imposed by Israel on Gaza.

The perpetrator of a war crime also must have been aware of the factual circumstances that made the conduct a war crime. The Elements of Crimes provide guidance with respect to this knowledge element, and provide that:

With respect to the last two elements listed for each crime:

1. There is no requirement for a legal evaluation by the perpetrator as to the existence of an armed conflict or its character as international or non-international;
2. In that context there is no requirement for awareness by the perpetrator of the facts that established the character of the conflict as international or non-international;
3. There is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict that is implicit in the terms "took place in the context of and was associated with."¹⁹⁵

Accordingly, the Elements appear to require that sufficient factual awareness of the perpetrator satisfy the knowledge element of war crimes. In the present situation, it was evident that both the Israeli soldiers and their superiors were aware of the fact that their raid on the flotilla was part of blockade imposed on Gaza in the context of an armed conflict between Israel and Palestine. Indeed, this view is supported by the remarks of highly-ranked Israeli soldiers to national and international media and afterwards by the testimonies before the Israeli Commission.

Further, war crimes under the Rome Statute must be committed persons protected under the Geneva Conventions.¹⁹⁶ The HRC Report sug-

¹⁹⁴ Cryer, Friman, Robinson and Wilmschurst, 2010, p. 286, see *supra* note 181.

¹⁹⁵ Elements of Crimes, Article 8 ("War crimes"), Introduction, para. 3., p. 13, see *supra* note 193.

¹⁹⁶ See further Knut Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, Cambridge, 2003, p. 29.

gested that flotilla passengers were civilians and in the context of the interception of the vessels must be considered as protected persons in accordance with Article 4 of the Fourth Geneva Convention, which provides that protected persons: “are those who, at a given moment and in any manner whatsoever, find themselves [...] in the hands of a Party to the conflict or Occupying Power of which they are not nationals”. Indeed, according to the teleological interpretation of Article 4 adopted by the ICTY in the *Tadić* judgment, the flotilla passengers could be subsumed under Article 4 of the Fourth Geneva Convention:

Article 4 of the Geneva Convention IV, if interpreted in the light of its object and purpose, is directed to the protection of civilians to the maximum extent possible [...] Its primary purpose is to ensure the safeguards afforded by the Convention to those civilians who do not enjoy the diplomatic protection, and correlatively are not subject to the allegiance and control, of the State in whose hands they may find themselves.¹⁹⁷

Furthermore, it could be argued that the flotilla passengers were protected persons under common Article 3 of the Geneva Conventions that are equally applicable in international armed conflicts.¹⁹⁸ In an armed conflict according to the principles of distinction, the principle of humanity, and the immunity of civilian population military force can only use against civilians only when they participate actively and directly in hostilities.¹⁹⁹

Strikingly, the Israeli Commission Report claims that the passengers that were targeted by the Israeli soldiers on the *Mavi Marmara* were directly participating in hostilities (thus transforming them into combatants) and thereby sought to justify the killing of the nine passengers as targeted killings.²⁰⁰ This classification implies significant consequences with regard to the classification of the acts of Israeli soldiers under international humanitarian law, for the direct participation in hostilities is the only ex-

¹⁹⁷ ICTY, *Prosecutor v. Tadić*, Appeals Chamber, Judgment, 15 July 1999, IT-94-1-A, para. 166 (<http://www.legal-tools.org/doc/8efc3a/>).

¹⁹⁸ ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 27 June 1986, para. 218.218 (<http://www.legal-tools.org/doc/046698/>).

¹⁹⁹ See further Michael Bothe, “Friedenssicherung und Kriegsrecht”, in Wolfgang Vitzthum (ed.), *Völkerrecht*, 5th ed., De Gruyter, Berlin, 2010, pp. 639, 697 ff.

²⁰⁰ See the Israeli Commission Report, paras. 198, 201 and 255, see *supra* note 7.

ception to the civilian protection according to which civilians may not be object of deliberate attack.

Thus, whether passengers on the *Mavi Marmara* or a group in the crew (the International Humanitarian Relief activists, for instance, as identified by the Israelis) were directly participating in hostilities must be analysed. The interpretative guidance of the ICRC provides a legal reading of the notion of ‘direct participation in hostilities’. As put by the guidance, there are three constitutive elements of direct participation in hostilities. In order to qualify as a direct participant in hostilities, a specific act must meet the following cumulative criteria:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm);
2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation); and
3. The act must be specifically designed to directly cause the required threshold in support of a party to the conflict and to the detriment of another (belligerent nexus).²⁰¹

The Israeli Commission Report claims that there were two points at which the passengers targeted by the Israeli soldiers were directly participating in hostilities: first, by being physically present on the *Mavi Marmara* and refused to stop when instructed; second, the crew of the *Mavi Marmara* did use violence against the Israeli soldiers. Such acts may satisfy the first two criteria, but it is highly unlikely that this act would satisfy the third, since not every act that directly adversely affects the military operations of a party to armed conflict necessarily amounts to direct participation in hostilities. This is because the concept of direct participation in hostilities is limited to specific acts “that are so closely related to the hostilities conducted between parties to an armed conflict that they constitute an integral part of those hostilities”.²⁰² In other words, the specific

²⁰¹ Nils Melzer, *Interpretive Guidance on the notion of Direct Participation in Hostilities under International Humanitarian Law*, International Committee of the Red Cross, Geneva, 2009, p. 46.

²⁰² *Ibid.*, p. 58.

acts of the civilians must be “specifically designed to do so in support of a party to an armed conflict”.²⁰³ Indeed, there are many acts during armed conflict that lack a belligerent nexus even though they cause a considerable level of harm. In cases of individual self-defence or defence of others, for instance, the use of necessary and proportionate force in such situations cannot be regarded as direct participation in hostilities, for its purpose clearly is not to support a party to the conflict against another.²⁰⁴ Indeed, the use of violence by the crew may have been in individual self-defence or their act of protest would be classified as political demonstration, which falls within the ambit of notion civil unrest that cannot establish a belligerent nexus. Indeed, as Buchan rightly puts: “it [...] seems difficult to sustain the claim that their [the crew members’] use of force was designed to support Hamas in its armed conflict with Israel. On the contrary, the intention of the Mavi was to protect the cargo (humanitarian aid) and deliver it to the population in Gaza [...] the crew that were targeted by the Israeli military should be regarded as civilians engaging in violent unrest rather than as civilians directly participating in hostilities”.²⁰⁵ Further, the ICRC Guidance provides important information with regard to the task of determining the belligerent nexus of an act in concrete situations:

These determinations must be based on the information reasonably available to the person called on to make the determination, but they must always be deduced from objectively verifiable factors. In practice, the decisive question should be whether the conduct of a civilian, in conjunction with the circumstances prevailing at the relevant time and place, could reasonably be perceived as an act designed to support one party to the conflict by directly causing the required threshold of harm to another party. As the determination of belligerent nexus may lead to a civilian’s loss of protection against direct attack, all feasible precautions must be taken to prevent erroneous or arbitrary targeting and, in situations of doubt, the persons concerned must be presumed to be protected against direct attack.²⁰⁶

²⁰³ *Ibid.*

²⁰⁴ *Ibid.*, p. 61.

²⁰⁵ See Guilfoyle, 2011, p. 210, see *supra* note 51; Buchan, 2011, p. 239, see *supra* note 73.

²⁰⁶ Melzer, 2009, pp. 63 ff., see *supra* note 201; see further Buchan, 2014, pp. 484 ff., see *supra* note 11.

Consequently, the crew members of the *Mavi Marmara* cannot be civilians directly participating in hostilities; hence, all passengers on the *Mavi Marmara* and passengers of other vessels of the Gaza flotilla were civilians within the meaning of Article 8 of the Rome Statute and thus protected persons under the law of armed conflict.²⁰⁷

Further, the OTP Report, on this issue, concludes that:

Based on the information available, it does not appear that the passengers' resistance to the IDF interception and boarding of the vessel amounts to taking a direct part in hostilities so as to deprive those particular passengers of their protected civilian status.²⁰⁸

17.5.1.1. Wilful Killing (Article 8(2)(a)(i))

Wilful killing of a protected person is a grave breach under all the Geneva Conventions and is a war crime under the Rome Statute. The material elements of wilful killing are killing or causing death of a person who was under the protection of the Geneva Conventions. As shown above, the passengers on the *Mavi Marmara* were protected persons under the Geneva Conventions. Under Article 30 of the Rome Statute, the mental element of the offence requires that the perpetrator must have meant to kill a person and meant to cause the death or have been aware that the death will occur in the ordinary course of events.²⁰⁹ In other words, the perpetrator must have acted either intentionally or recklessly, which excludes accidental, unforeseeable consequences of the actions of the perpetrator. The explained course of events aboard *Mavi Marmara* and execution type of killings of nine passengers by the Israeli forces provide plain evidence for the *mens rea* of wilful killing within the meaning of Article 8(2)(a)(i).

17.5.1.2. Torture or Inhuman Treatment (Article 8(2)(a)(ii))

The elements of torture as war crime in the Elements of Crimes are specified as follows:

²⁰⁷ For a critic of the Israeli Commission Report's approach in this regard, see Amichai Cohen and Yuval Shany, "The Turkel Commission's Flotilla Report (Part One): Some Critical Remarks", in *EJIL: Talk!*, 28 January 2011.

²⁰⁸ The OTP Report, para. 49, see *supra* note 13.

²⁰⁹ See Knut Dörmann, "Article 8: War crimes", in Triffterer and Ambos (eds.), 2016, margin nos. 82 ff, see *supra* note 2.

1. The perpetrator inflicted severe physical or normal pain or suffering upon one or more persons.
2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.

With regard to the war crime of inhuman treatment, the Elements of Crimes provides that:

The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.

The acts of the Israeli forces after capturing the flotilla may constitute either or, in some cases, both the above war crimes. Indeed, the UN Fact Finding Mission provides strong evidence with respect to material and mental elements of these offences:

It is apparent that a number of the passengers on the top deck were subjected to further mistreatment while lying injured. This included physical and verbal abuse sometime after the operation to secure control of the deck had concluded. Furthermore, these passengers were not provided with medical treatment for two or three hours after the cessation of the operation. Similarly, injured passengers who were inside the ship at the end of the operation of the Israeli forces were denied proper medical treatment for a similar length of time despite frequent efforts by other persons on board, including flotilla organizers, requesting such assistance to be provided.²¹⁰

During the period of detention on board the *Mavi Marmara*, the passengers were subjected to cruel and inhuman treatment which did not respect the inherent dignity of persons who have been deprived of their liberty. Such treatment involved a large number of persons being forced to kneel down on the outer decks in harsh conditions for many hours, physical mistreatment and verbal abuse inflicted on many of those detained, widespread and unnecessarily tight handcuffing, as well as the denial of access to basic human needs such as the use of toilet facilities and provision of foods. In addition, there was a prevailing climate of fear of violence that had a dehumanizing effect on all those detained on board. On other vessels in the flotilla, there were additional instances of persons

²¹⁰ The HRC Report, para. 171, see *supra* note 5.

being subjected to similar severe pain and suffering, including a person being seriously physically abused for refusing to provide his passport without receipt.²¹¹ Accordingly, one may conclude that the offences of torture or inhuman treatment have been committed on the vessels of the flotilla.²¹²

17.5.1.3. Wilfully Causing Great Suffering (Article 8(2)(a)(iii))

The Elements of Crimes defines the material element of this crime as follows:

The perpetrator caused great physical or mental pain or suffering to, or serious injury to body or health of, one or more persons.

Contrary to the war crime of torture, this war crime solely refers to suffering which is caused without a specific purpose.²¹³ The assessment of the seriousness of an act or omission must take all the factual circumstances of a given case into account, including the nature of act or omission, the context in which it take place, its duration and repetition, the physical, mental and moral effects of the act on the victim and the personal circumstances of the victim, including age, sex and health.²¹⁴ Indeed, the HRC Report concludes that in the following instances, among others, the present offence has been committed:

The Mission is particularly concerned with the widespread use of tight handcuffing of passengers on board the *Mavi Marmara* in particular and to an extent of passengers on board the Challenger I, Sfedoni and the *Eleftheri Mesogios*. Numerous passengers described the pain and suffering caused by being shackled by plastic handcuffs (also known as ‘plastic cuffs’) in an overly tight manner, frequently behind their backs, causing further suffering. Many were experiencing neurological damage up to three months after the events of the flotilla [...] The Mission is satisfied that the manner in which the handcuffs were used was clearly unne-

²¹¹ *Ibid.*, para. 178.

²¹² See *ibid.*, paras. 181, 265.

²¹³ Dörmann, 2016, margin no. 106, see *supra* note 209.

²¹⁴ *Ibid.*, margin nos. 107 ff.

essary and deliberately used to cause pain and suffering to passengers.²¹⁵

17.5.1.4. Extensive Destruction and Appropriation of Property, Not Justified by Military Necessity and Carried out Unlawfully and Wantonly (Article 8(2)(a)(iv))

The specific elements of this offence are defined in the Elements of Crimes as follows:

1. The perpetrator destroyed or appropriated certain property.
2. The destruction or appropriation was not justified by military necessity.
3. The destruction or appropriation was extensive and carried out wantonly.

As seen above, Israeli forces confiscated cash, and a wide variety of personal belongings, including: passports, identification cards, driving licenses, mobile phones, laptop computers, audio equipment including MP3 players, photographic and video recording equipment, credit cards, documents, books and clothing.²¹⁶ As to the element whether the appropriations on the vessels were justified by military necessity, the following remarks of the HRC Report are clear:

Clearly no military necessity existed to justify the confiscation and continuing appropriation of the property of the passengers of the flotilla. Furthermore, the Mission has been made aware of communications between the Government of Israel and a law firm in the United Kingdom, in which the Government admits to retaining property of the passengers, but does not claim reasons of military necessity but only that the items are necessary for ongoing investigations within Israel.²¹⁷

17.5.1.5. Acts of Unlawful Deportation or Transfer or Unlawful Confinement (Article 8(2)(a)(vii))

The illegal arrest of the passengers by the Israeli forces may amount to the war crime of unlawful confinement. The Elements of Crimes defines the crime as follows:

²¹⁵ The HRC Report, para. 179, see *supra* note 5.

²¹⁶ *Ibid.*, para. 235.

²¹⁷ *Ibid.*, para. 248.

The perpetrator confined or continued to confine one or more persons to a certain location.

In addition, there is a requirement of “unlawfulness”. In this regard, the HRC Report states:

[...] Since the Israeli interception of the flotilla was unlawful, the detention of the passengers and crew from the seven vessels at Ashdod was also *prima facie* unlawful since there was no legal basis for the Israeli authorities to have detained and transported these people to Israel. The passengers found themselves in Israel on the basis of an unlawful act by the State of Israel [...]²¹⁸

17.5.1.6. Intentionally Directing Attacks against the Civilian Population as Such or against Individual Civilians Not Taking Direct Part in Hostilities (Article 8(2)(b)(i))

This war crime under the Rome Statute has its treaty roots in the First Additional Protocol to the Geneva Conventions. The elements of the crime are listed in the Elements of Crimes as follows:

1. The perpetrator directed an attack.
2. The object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities.
3. The perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.

The term ‘attack’ refers to any combat action, including offensive and defensive acts. It is evident that the Israeli forces directed an attack on the flotilla. As has been shown above, the passengers on the vessels of the flotilla were civilians not taking direct part in hostilities. With regard to the mental element, the crime requires that the perpetrator meant to cause the consequence or was aware that it would occur in the ordinary course of events. The Israeli forces were aware that crew of the flotilla were civilians, and there is evidence regarding the Israeli attack have been conducted intentionally in the knowledge that civilians were being targeted.

17.5.1.7. Intentionally Directing Attacks against Civilian Objects (Article 8(2)(b)(ii))

The specific elements of this crime read as follows:

²¹⁸ *Ibid.*, para. 215.

1. The perpetrator directed an attack.
2. The object of the attack was civilian objects, that is, objects which are not military objectives.
3. The perpetrator intended such civilian objects to be the object of the attack.

The term “civilian object” is defined in Article 52 of Additional Protocol I: in this category fall all objects which are not ‘military objectives’. Where there is doubt, the object must be treated as if it were a civilian object. Further, the attack must have caused damage to civilian property. In the present situation, the vessels of the flotilla were civilian objects, since as explained above they were not military objectives and the Israeli attack damaged vessels, humanitarian aid cargo and the property of the passengers.²¹⁹

17.5.1.8. Intentionally Directing Attacks against Personnel, Installations, Material, Units or Vehicles Involved in a Humanitarian Assistance or Peacekeeping Mission in Accordance with the Charter of the United Nations, as Long as They Are Entitled to the Protection Given to Civilians or Civilian Objects under the International Law of Armed Conflict (Article 8(2)(b)(iii))

The last clause of this crime limits the scope of application of this crime considerably, and indeed, it does not seem to criminalize any conduct which would not be covered by Article 8(2)(b)(i) and (ii). Yet, the inclusion of this offence into the Rome Statute was a result of the facts that delegations felt the need to explicitly condemn and criminalize attacks against humanitarian assistance and peacekeeping missions and as noted by Cottier and Baumgartner, thereby visibly signalling the exceptional seriousness of such most serious crimes of international concern.²²⁰ Further, attacks on UN and humanitarian assistance personnel are considered to be of exceptional gravity and of concern to the international community as a whole because they are committed against persons who risk their lives to represent the international community.²²¹

²¹⁹ See, *Ibid.*, paras. 234–49.

²²⁰ Michael Cottier and Elisabeth Baumgartner, “Article 8: War crimes”, in Triffterer and Ambos (eds.), 2016, margin no. 219, see *supra* note 2.

²²¹ *Ibid.*

As has been discussed, the Israeli forces directed an attack on the Gaza flotilla. It needs to be assessed whether the flotilla can be qualified as personnel, installations, material, units or vehicles involved in humanitarian assistance. Although there is no generally accepted definition of what constitutes a humanitarian assistance mission, ‘humanitarian assistance’ in connection with an armed conflict refers primarily assistance to prevent or alleviate human suffering of victims of armed conflicts and other individuals with immediate basic needs. Cottier and Baumgartner define it as including: “relief actions with the purpose of ensuring the provision of supplies essential to the survival of the civilian population. Such supplies should at the very least include food, medical supplies, clothing and means of shelter”.²²² The humanitarian assistance personnel may include administrative staff, co-ordinators and logistic experts, doctors, nurses and other specialists and relief workers.²²³ Byron suggests that assistance by an independent humanitarian organization would clearly come under the heading of humanitarian assistance as well.²²⁴ In this light, the six organizers of the Gaza Freedom flotilla may be subsumed under the term ‘humanitarian assistance’.

Indeed, the Comoros referral provides information with regard to the organizers and the cargo of the flotilla: the flotilla was a humanitarian aid convoy, organized in partner vessel between six international relief organizations. As established by the HRC Report, the flotilla was carrying nothing more than humanitarian aid, medical supplies, and construction materials, intent on reaching the inhabitants of the Gaza Strip through the Israeli-imposed blockade.²²⁵ These organizations were comprised of:

1. The Free Gaza Movement,
2. IHH,
3. The European Campaign to End the Siege on Gaza (the ‘ECESG’),
4. The Greek Ship to Gaza Campaign,
5. The Swedish Ship to Gaza, and

²²² *Ibid.*, margin no. 226.

²²³ *Ibid.*

²²⁴ Christine Byron, *War Crimes and Crimes against Humanity in the Rome Statute of the International Criminal Court*, Manchester University Press, Manchester, 2009, pp. 78 ff.

²²⁵ The Comoros Referral, para. 30, see *supra* note 1.

6. International Committee to End the Siege on Gaza.²²⁶

The 10,000 tons of humanitarian assistance consisted of food, medicine, home construction supplies, pre-constructed children's playgrounds, wood, cement, power generators, hardware supplies, desalination units, and paper.²²⁷

Accordingly, it could be argued that the attack of the Israeli forces on the humanitarian assistance personnel and the material have constituted the war crime of attack on humanitarian assistance within the meaning of Article 8(2)(b)(iii).

The Prosecutor, however, argued in her gravity assessment that due to the lack of neutrality and impartiality of its action, the flotilla cannot be regarded as a humanitarian assistance convoy. She concluded that: "Based on the available information and taking into account the foregoing, the flotilla does not appear to reasonably fall within the humanitarian assistance paradigm envisioned under Article 8(2)(b)(iii), due to its apparent lack of neutrality and impartiality as evidenced in the flotilla's explicit and primary political objectives (as opposed to a purpose limited to delivery of humanitarian aid), failure to obtain Israeli consent, and refusal to cooperate with the Israeli authorities in their proposals for alternative methods of distributing the relief supplies".²²⁸

The Prosecutor's approach has been criticised on the ground that peacekeeping operations are losing their impartial character.²²⁹ It is, indeed, a matter that requires further discussion, namely, the question whether a humanitarian aid convoy should be devoid of any political conviction and must be authorised by the UN or the ICRC in order to be qualified as a humanitarian assistance.²³⁰

²²⁶ *Ibid.*, para. 31.

²²⁷ *Ibid.*, para. 33.

²²⁸ The Prosecutor's Decision, para. 125.

²²⁹ Marco Longobardo, "Factors relevant for the assessment of sufficient gravity in the ICC. Proceedings and the elements of international crimes", in *Questions of International Law*, 2016, vol. 33, pp. 21, 36.

²³⁰ Cf. Schabas, 2016, p. 262, see *supra* note 184; Dapo Akande and Emanuela-Chiara Gillara, "Promoting Compliance with the Rules Regulating Humanitarian Relief Operations in Armed Conflict: Some Challenges", in *Israel Law Review*, 2017, vol. 50, no. 2, pp. 119, 129 ff.

17.5.1.9. Pillaging a Town or Place, Even When Taken by Assault (Article 8(2)(b)(xvi))

Pillage can be defined as the unauthorized appropriation or obtaining property in order to confer possession of it on oneself or on a third party against the will of the rightful owner. The Elements of Crimes of this war crime reads as follows: (1) The perpetrator must have appropriated certain property for private or personal use, (2) with intent to deprive the owner of his property, and that (3) the appropriation took place without the consent of the owner.²³¹ The definition of the offence encompasses isolated acts of pillaging as well as organized pillage.²³² Thus, confiscation of the property of the flotilla crew and private use of passengers credit cards by the Israeli soldiers constitutes the crime of pillaging.

17.5.1.10. Committing Outrages upon Personal Dignity, in Particular Humiliating and Degrading Treatment (Article 8(2)(b)(xxi))

The elements of this war crime read as follows:

1. The perpetrator humiliated or otherwise violated the dignity of one or more persons.
2. The severity of the humiliation, degradation or other violations was of such degree as to be generally recognized as an outrage upon personal dignity.
3. The conduct took place in the context of and was associated with an international armed conflict.
4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

On the basis of the facts of the situation, it is suggested that an outrage upon personal dignity was committed within the meaning of Article 8(2)(b)(xxi) of the Rome Statute, whereby Israeli forces humiliated, degraded or otherwise violated the dignity of one or more civilians to such a degree as to be generally recognized as an outrage against personal dignity.

²³¹ Andreas Zimmermann and Robin Geiss, "Article 8: War crimes", in Triffterer and Ambos (eds.), 2016, margin no. 553, see *supra* note 2.

²³² Cf. *ibid.*, margin nos. 555 ff.

17.5.1.11. Conclusion

In her decision not to initiate an investigation into the Gaza flotilla situation, the Prosecutor concluded that there is reasonable basis to believe that these offences have been committed, save for three of them, namely: wilful killing pursuant to Article 8(2)(a)(i); wilfully causing serious injury to body and health pursuant to Article 8(2)(a)(iii); and committing outrages upon personal dignity pursuant to Article 8(2)(b)(xxi).²³³ This economic approach with regard to assessment of facts and the elements of the alleged crimes paved the way for the Prosecutor’s gravity analysis. Indeed, as the Principal Counsel writes:

[...] Had the Prosecutor properly examined the available information, she could not have reasonably concluded that there is no reasonable basis to believe that neither the crime of intentionally directing attacks against civilians not taking direct part in hostilities pursuant to Article 8(2)(b)(i) of the Rome Statute, nor the crime of intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians pursuant to Article 8(2)(b)(iv) of the Rome Statute were committed by IDF soldiers.²³⁴

Likewise, as a consequence of her failure to consider the above circumstances, the Prosecutor concluded that there was no basis to open an investigation into alleged crimes under Articles 8(2)(a)(ii), 8(2)(b)(i), and 8(2)(b)(iv) of the Rome Statute.²³⁵

17.5.2. Crimes against Humanity

Article 7 of the Rome Statute identifies conduct that amounts to a crime against humanity. The *chapeau* of Article 7 contains a stringent threshold according to which the single acts defined in Article 7 shall be qualified as crimes against humanity. Said acts will only be crimes against humanity when they are: “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.

²³³ The OTP Report, para. 149, see *supra* note 13.

²³⁴ The Office of Public Counsel for Victims, “Observations on behalf of victims in the proceedings for the review of the Prosecutor’s decision not to initiate an investigation”, para. 53, see *supra* note 20.

²³⁵ The OTP Report, para. 139, see *supra* note 13. For a comprehensive critic see, The Office of Public Counsel for Victims, “Observations on behalf of victims in the proceedings for the review of the Prosecutor’s decision not to initiate an investigation”, paras. 58–68, see *supra* note 20.

The adjective “widespread” connotes “large-scale nature of the attack and the number of targeted persons”. A widespread attack must be “massive, frequent, carried out collectively with considerable seriousness and directed against a multiplicity of victims”.²³⁶ The adjective “systematic”, on the other hand, refers to the organized nature of the acts violence and to the improbability of their random occurrence.²³⁷ Even a single act of intentional killing which is committed in one of these contexts may be qualified as killing as crime against humanity.²³⁸ And the fundamental feature of the crimes against humanity is that the widespread or systematic attack, as a rule, occurs at the behest of a State.²³⁹

In that connection, there is a reasonable basis to believe that the thoroughly organized and planned attack on the flotilla and the acts on the vessels, such as murder and imprisonment, could be considered as crimes against humanity in accordance with Articles 7(1)(a) (murder), 7(1)(d) (serious injury to body or to mental and physical health), 7(1)(f) (torture) and 7(1)(k) (conduct causing “serious injury to body or to mental or physical health”). In other words, the acts committed by the Israeli soldiers on 31 May 2010 on the vessels of the Gaza flotilla may be seen in the context of the actions taken by the Israeli Government’s overall policy of blockade against Gaza, and the style of execution and treatment of the crew in the aftermath of the capture would support such finding.

Regard must be given to the “systematic” nature of the Israeli attack on the flotilla by due consideration of the high level of organization, planning and political objectives, as well as the fact that the acts have been committed at the behest of the State of Israel. These factors alone would, however, not necessarily lead to the conclusion that the *chapeau* of Article 7 is satisfied, for the legal definition of the term “attack” narrows the operational scope of Article 7. Article 7(2)(a) of the Rome Statute defines the term “attack” as follows:

²³⁶ Schabas, 2016, pp. 148 and 164, see *supra* note 184; Stegmiller, 2011, p. 273, see *supra* note 174; Werle, 2012, margin nos. 871, 875, see *supra* note 186.

²³⁷ Schabas, 2016, pp. 149 and 165, see *supra* note 184; Stegmiller, 2011, p. 274, see *supra* note 174; Werle, 2012, margin no. 876, see *supra* note 186.

²³⁸ ICTY, *Prosecutor v. Tadić*, Trial Chamber, Opinion and Judgment, 7 May 1997, IT-94-1-T, para. 649 (<http://www.legal-tools.org/doc/0a90ae/>); Werle, 2012, margin no. 871, see *supra* note 186.

²³⁹ Antonio Cassese and Paola Gaeta, *Cassese’s International Criminal Law*, 3rd ed., Oxford University Press, Oxford, 2013, pp. 92 ff.

‘attack directed against any civilian population’ means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

Accordingly, even a systematic attack has to involve more than a few incidents, even when this requirement of ‘multiple acts’ does not mean that the attack must be “widespread”.²⁴⁰ Dixon and Hall note that ‘multiple acts’: “refers either to more than one generic act, even though this not required, or more than a few isolated incidents that would fit under one or more of the enumerated acts”.²⁴¹ Concerning this issue, Buchan writes that: “The violence used to capture the Mavi would almost certainly constitute ‘multiple commission’ of acts listed in paragraph 1 [...] The abuse of detained crew members that was documented by the UN Report would also satisfy this criterion, given that the reported abuse was committed repeatedly and against numerous crew members”.²⁴²

A further requirement of the crime, that is, it must be committed as a product of policy to commit an attack against a civilian population, needs to be discussed. Whether the crew of the Gaza flotilla can be regarded as a civilian population is determined according to the rules of humanitarian law, and we have already made this determination in our discussion with regard to war crimes. In this connection, as the crew were neither combatants nor civilians with no direct participation in hostilities, they should be regarded as civilians within the meaning of Article 7 of the Rome Statute.²⁴³ With regard to the policy element, absent any written plan or policy by the Israel Defence Forces, the existence of such a policy to commit the attack could be inferred from the way in which the acts occur. As put by the HRC Report, the use of live ammunition from helicopters before descending, execution style of killings, close range shots and the unnecessary brutality reveal a concerted and pre-planned strategy. I suggest, therefore, that there is reasonable basis to believe that the vio-

²⁴⁰ Rodney Dixon and Christopher K. Hall, “Article 7: Crimes against humanity”, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 2nd ed., C.H. Beck, Hart, Nomos, Munich, 2008, margin no. 88.

²⁴¹ *Ibid.*, margin no. 87.

²⁴² Buchan, 2014, p. 487, see *supra* note 11.

²⁴³ *Ibid.*, p. 488.

lence and successive acts by the IDF were thoroughly organized as products of a certain chain of command rather than being random or isolated.²⁴⁴

It is a debated issue, though, whether a single attack, as in the case of the Israeli attack on the flotilla, that consists of multiple acts may satisfy these requirements. Werle, for instance, expresses an affirmative view by taking the September 11 scenarios into consideration, for even such a single attack may constitute a crime of concern to the international community as a whole.²⁴⁵ Indeed, the Israeli attack on civilians who were on the vessels of the Gaza flotilla shocked the world community as a whole, and this attack condemned by most of the States and organizations. It is not the number of the killed persons (quantity) make the present situation of international concern but the circumstances in which alleged crimes have been committed: a co-ordinated and planned attack on the high seas against civilians who were on the vessels which were carrying humanitarian aid. For instance, after taking note of PTC II's decision in the Kenya situation, which held that a widespread attack may be the cumulative effect of series of inhumane acts or the singular effect of an inhuman act of extra magnitude,²⁴⁶ the Principal Counsel, submitted that: “[...] the information available to the Prosecutor a reasonable basis to believe that the against flotilla was, considered on its own, widespread, and considered in its context, widespread and/or systematic in character”.²⁴⁷

Indeed, considered in its context, the attacks against the Gaza flotilla may well meet the alternative requirement of being of systematic nature. As we have argued respecting policy element, the acts of the IDF were of an organized nature and they were not random occurrences. I suggest, therefore, that both the violence used to capture the Gaza flotilla and treatment of detained crew members were products of a policy; and hence, they may be regard as systematic within the meaning of Article 7. All in

²⁴⁴ See also *ibid.*, p. 489.

²⁴⁵ Werle, 2012, margin no. 873, see *supra* note 186.

²⁴⁶ ICC, Situation in the Republic of Kenya, PTC II, Corrigendum of the 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-Corr, para. 95 (<http://www.legal-tools.org/doc/f0caaf/>).

²⁴⁷ Office of Public Counsel for Victims, “Observations on behalf of victims in the proceedings for the review of the Prosecutor’s decision not to initiate an investigation”, para. 114, see *supra* note 20.

all, I argue that there is a reasonable basis to believe that crimes against humanity have been committed against the crew of the Gaza flotilla, which merits further investigation.²⁴⁸

Yet, in her decision not to investigate, the Prosecutor concluded that there was no reasonable basis to believe that crimes against humanity were committed in the situation on the ground that the required contextual elements are not met. After recalling the contextual elements of the crimes against humanity, the Prosecutor stated that: “on this basis of the information available, it does not appear that the conduct of the IDF during the flotilla incident was committed as part of widespread or systematic attack, or constituted in itself a widespread or systematic attack, directed against a civilian population”. Nonetheless, as the Principal Counsel contended, the Prosecutor: “failed to consider critical elements that appear to conform with the contextual elements of crimes against humanity”.²⁴⁹

17.6. Main Issues

17.6.1. Methodology: The Relationship with Other Fact-Finders

One of the main issues of the preliminary examination in the Comoros situation has been the Prosecutor’s failure to consider all relevant information available to her, and her failure to distinguish and properly weigh the existing four reports regarding the situation.

According to Article 54(1) of the Rome Statute, it is indeed the duty of the Prosecutor to investigate incriminating and exonerating circumstances in order to establish the truth.²⁵⁰ As noted in the Policy Paper on Preliminary Examination, the same principle is applied at the preliminary examination stage in relation to information that forms the basis of a decision to proceed with an investigation.²⁵¹

²⁴⁸ See Buchan, 2014, pp. 490 ff., see *supra* note 11.

²⁴⁹ Office of Public Counsel for Victims, “Observations on behalf of victims in the proceedings for the review of the Prosecutor’s decision not to initiate an investigation”, para. 117, see *supra* note 20.

²⁵⁰ Rome Statute of the International Criminal Court, 17 July 1998, Article 54(1)(a) (‘ICC Statute’) (<http://www.legal-tools.org/doc/7b9af9/>); Article 54(1)(a) reads: “In order to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally”.

²⁵¹ OTP, *Policy Paper on Preliminary Examinations*, 1 November 2013, para. 30 (<http://www.legal-tools.org/doc/acb906/>).

During preliminary examination, the Prosecutor may solely exercise some of the powers that are explicitly provided by the Rome Statute and the Rules of Procedure and Evidence. These powers could be summarised as follows:

- Analyse the seriousness of the information received (Article 15(2), Rule 104(1));
- Seek additional information from States, organs of the United Nations, intergovernmental and non-governmental organizations, or any other reliable source (Article 15(2), Rule 104(2)); and
- Receive oral and written testimony at the seat of the Court, in accordance with the procedure in Rule 47 (Article 15(2), Rule 104(2)).²⁵²

The Prosecutor may, within the ambit of these powers, receive information on alleged crimes 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.²⁵³ The Policy Paper indicates further actions which may be taken by the OTP:

[...] the Office can send requests for information to such sources for the purpose of analysing the seriousness of the information received. For this purpose, the Office may also undertake field missions to the territory concerned in order to consult with the competent national authorities, the affected communities and other relevant stakeholders, such as civil society organizations.²⁵⁴

Thus, considering the facts and circumstances of the situation under discussion, the Prosecutor may have undertaken the following activities in the present situation:

- She could have conducted a comprehensive and thorough analysis of the commission reports through the application of a test which takes note of their impartiality, objectivity and reliability, and thus filter out the relevant reliable information and analysis provided by each report;

²⁵² See Bergsmo, Kruger and Bekou, 2016, margin no. 8, see *supra* note 174; Stegmler, 2011, pp. 224 ff., see *supra* note 174.

²⁵³ Schabas, 2016, p. 833, see *supra* note 184.

²⁵⁴ OTP, *Policy Paper on Preliminary Examinations*, 2013, see *supra* note 251.

- She could have clarified the mandate and objectives of these commissions;
- She could have requested assistance of the Chair of the United Nations Fact Finding Mission and other reliable sources which are deemed appropriate by the OTP;
- She could have requested assistance from independent specialized legal experts (who have not been involved with the national commission reports under consideration) concerning the relevant legal issues;
- She could have identified whether the factual differences in the reports would have any material impact upon proof of the criminal nature of the conduct;
- She could have consulted with the victims and participants of the Free Gaza Movement; and
- She could have set up a field mission.

Of these issues relating to methodology of the preliminary examination, I will only address the issue of the relation to one of the other fact-finders, that is, her treatment of the HRC Report. I will argue that the Prosecutor did not give the HRC Report its proper weight. Put in other words, there was a gross asymmetry in the way in which these reports were used. It is indeed a remarkable fact that in the Prosecutor's decision not to investigate, the Israeli Commission Report was referenced 79 times, and the Palmer Report was referenced 64 times, whereas the HRC Report garnered only 50 references. The Turkish Report garnered only 39 references, which shows that she did not give sufficient weight to the Turkish Report that contains valuable factual information especially in its first 50 pages.²⁵⁵ These numbers show that the OTP Report relies to a greater extent on the reports produced by Israel and the Palmer report. As it will be shown below, the prioritization of the Israeli narrative by the Prosecutor is by no means limited to the number of references that she has made to the Israeli Commission Report.

This is indeed an important quality control issue, for two principal reasons. First, she mainly grounded her decision not to initiate investigation based on the four reports at hand; secondly, she failed to discriminate in favour of the HRC Report in case of conflicting views. Indeed, when

²⁵⁵ See further Kattan, 2016, pp. 61, 90, see *supra* note 10.

assessing the facts of the present situation, the Prosecutor should have prioritized the HRC Report, being the only impartial fact-finding report. If we look at these reports more closely, it will be self-evident that the HRC Report is the principal and most reliable one among them, if one considers the fact that the Turkish and the Israeli reports are the products of the two governments directly involved in the events that took place between 31 May and 5 June 2010. The Principal Counsel argues that both governments take strong and unilateral positions while assessing their own responsibilities and the responsibilities of their nationals implicated in the events. This approach has a substantial impact when looking at the reliability of the reports. This is even clearer for the Israeli Commission Report, as crucial accounts contained therein have been found by the UN Human Rights Council to be “so inconsistent and contradictory” that it had no other option than to reject them.²⁵⁶

As regards the Palmer Report, this Report is not a product of a fact-finding mission, it had rather a narrow mandate. Its mandate was to receive and review the reports of the national investigations with a view to recommending ways of avoiding similar incidents in the future, and “potentially affect the relationship between Turkey and Israel, as well as the overall situation in the Middle East”. Reflecting its mandate, the Panel of Enquiry’s composition was political. Furthermore, at no time did the Panel perform an independent investigation, nor had it access to first hand evidence. As a result, it pleased no one. Both the Turkish and the Israeli representatives appended a dissenting statement.

This state of affairs, I think, is enough to demonstrate the profound significance of the HRC Report. Indeed, it is the only document emanating from a third party not involved in the events. Indeed, the Mission’s task was to investigate “the facts and circumstances surrounding the boarding by Israeli military personnel of a flotilla of ships bound for Gaza and to determine whether in the process violations occurred in international law, including international humanitarian and human rights law”.²⁵⁷ In fulfilling this task, the experts of the Mission were also assisted by external specialists in forensic pathology, military issues, firearms, the law

²⁵⁶ Office of Public Counsel for Victims, “Observations on behalf of victims in the proceedings for the review of the Prosecutor’s decision not to initiate an investigation”, para. 39, see *supra* note 20.

²⁵⁷ The HRC Report, para. 4, see *supra* note 5.

of the sea and international humanitarian law.²⁵⁸ Taking due note of its source, the mandate of the experts who investigated the events and its intrinsic neutrality, the Prosecutor should have prioritized the HRC Report. Remarkably, the Prosecutor in other instances heavily relied on the UN sources and reports. In the situation of Mali, for instance, the Prosecutor's report was mainly built on the UN and independent NGO reports.²⁵⁹ Notwithstanding this fact, the Prosecutor failed to take due consideration of the HRC Report in her analyses. As the Principal Counsel pointed out:

Regrettably in this instance, the Prosecutor's Decision does not consider the impartiality of the HRC Report and consequently fails to attach the appropriate weight and reliability to the information contained therein. On the contrary and without providing any explanation, the Prosecutor seems to greatly rely on the national reports, to the point that in several occasions she found the information to be "significantly conflicting" even when the accounts were consistent in the other three reports and only differed in the Turkel [Israeli Commission] Report.

In conclusion, the Principal Counsel contends that the Prosecutor, by relying equally on each of the Reports, failed to discriminate in favour of the HRC Report in case of conflicting views. In light of its composition, mandate, methodology, and the extent of information considered therein, the HRC Report should have been granted the highest evidentiary weight during the preliminary examination.²⁶⁰

Interestingly, one of the contributors in this volume also criticizes the Prosecutor's reliance on open source materials like materials by UN fact-finding missions. According to this author:

[...] the Prosecutor should provide additional information (and actual past examples) of the way in which it corroborates and verifies information, and how much weight is given to different source types. This problem was exemplified in the 2014 Report concerning the Situation on Registered Ves-

²⁵⁸ *Ibid.*, para. 3.

²⁵⁹ See OTP, *Situation in Mali: Article 53 (1) Report*, 16 January 2013 (<http://www.legal-tools.org/doc/abb70f/>).

²⁶⁰ Office of Public Counsel for Victims, "Observations on behalf of victims in the proceedings for the review of the Prosecutor's decision not to initiate an investigation", paras. 45–46, see *supra* note 20.

sels of Comoros, Greece, and Cambodia. The OTP relied on four different reports [...] seemingly giving all four identical weight. Israel has reason to be concerned about legal and factual determinations based on insufficient evidence.²⁶¹

This argument is untenable. When one considers Israel's long-lasting non-co-operation policy, the UN materials appears to be the only reliable sources, including in the present situation. After taking note of the findings the HRC Report, Sunga makes the following point on the evidence value of the UN reports pertaining to cases relating to the acts of the State of Israel:

In short, given both the Government of Israel's long history of non-co-operation with the international community, as well as the inability of the Security Council to agree to investigate Israeli action in the Occupied Territories, international criminal investigations and prosecutions into Israeli Government practices (itself admittedly a highly unlikely eventuality) would have to rely heavily on information coming from the array of UN human rights sources, including commissions of inquiry, that have been activated by the Human Rights Council from time-to-time. In this respect, one should not overlook the work of the General Assembly's Special Committee on Israeli Practices that has been in operation since 1968.²⁶²

The non-co-operation of the Israeli Government was evident also in the present situation. As the HRC Report points out:

The Mission expresses its profound regret that, notwithstanding a most cordial meeting on 18 August 2010, the Permanent Representative of Israel advised in writing at the end of the meeting that the position of his Government was one of non-recognition of, and non-cooperation with, the Mission.²⁶³

²⁶¹ Asaf Lubin, "Politics, Power Dynamics, and the Limits of Existing Self-Regulation and Oversight in ICC Preliminary Examinations", in Morten Bergsmo and Carsten Stahn (eds.), *Quality Control in Preliminary Examination: Volume 2*, Torkel Opsahl Academic EPublisher, Brussels, 2018, chap. 19.

²⁶² Lyal S. Sunga, "Can International Criminal Investigators and Prosecutors Afford to Ignore Information from United Nations Human Rights Sources?", in Morten Bergsmo (ed.), *Quality Control in Fact-Finding*, Torkel Opsahl Academic EPublisher, Florence, 2013, pp. 388 ff.

²⁶³ The HRC Report, para. 16, see *supra* note 5.

Given the fact that the Israel did not co-operate with the OTP either,²⁶⁴ for the quality of the preliminary examination in the present situation, the Prosecutor should have heavily relied on the HRC Report for the reasons provided above, which is indeed not a matter of preference but a direct consequence of the Prosecutor's duty of objectivity and impartiality, and her obligation to provide a fully reasoned decision not to proceed with an investigation. As Sunga highlights: "In order to discharge their solemn responsibility towards fair and effective international criminal justice, international criminal investigators and prosecutors cannot afford to ignore information from UN human rights sources".²⁶⁵

Unfortunately, the Prosecutor's failure to fully assess the HRC Report and other materials available to her had enormous impact not only on her assessment of facts but also, as shown above, on her assessments with respect to the elements of the alleged crimes. This has, among others, affected her analysis regarding the gravity factors. These failures have been captured by the Principal Counsel's thorough analysis of the Prosecutor's evaluations and assessments with regard to the present situation. With respect to the Prosecutor's evaluation of the available information, she makes the following four crucial points:

1. The Prosecutor failed to consider and refer to all relevant information available to her;
2. The Prosecutor failed to distinguish and deal properly with the Reports;
3. The Prosecutor failed to consider and apply the correct evidentiary standard to the Reports; and
4. The Prosecutor unreasonably assessed the elements of the alleged crimes.²⁶⁶

Besides, the Principal Counsel identified further significant failures in the Prosecutor's legal analysis in the situation at question:

1. The Prosecutor's failure to take into account the continuous character of alleged crimes;

²⁶⁴ The OTP Report, para. 9, see *supra* note 13.

²⁶⁵ Sunga, 2013, p. 401, see *supra* note 262.

²⁶⁶ For a detailed account see Office of Public Counsel for Victims, "Observations on behalf of victims in the proceedings for the review of the Prosecutor's decision not to initiate an investigation", paras. 27–68, see *supra* note 20.

2. The Prosecutor’s failure to consider the temporal dimension of the alleged crimes;
3. The Prosecutor’s failure to take a position on the lawfulness of the blockade;
4. The Prosecutor’s analysis is almost entirely premised on the lawful nature of the blockade;
5. The Prosecutor’s failure to address the link between the alleged crimes and the characterization of the armed conflict;
6. The Prosecutor’s failure to address the contextual elements of the alleged crimes against humanity; and
7. The Prosecutor failed to properly weigh the gravity factors.²⁶⁷

Likewise, Comoros’s application for review impugned the preliminary examination of the Prosecutor, among others, on the following grounds:

- Not considering “all available evidence”;
- Giving “no weight to the most relevant aggravating factors”;
- Failure to take account the wider context in which the crimes have been committed;
- Failure to not making any reference to any potential perpetrators who could be held to bear the greatest responsibility;
- Making an error with regard to the systematic or planned nature of the alleged crimes despite the information that “the IDF fired live ammunition from the boats and the helicopters before the boarding of the *Mavi Marmara*”; and
- Making “an astonishingly narrow interpretation of the impact of the attack”.²⁶⁸

All in all, our analysis so far suggests significant flaws in the Prosecutor’s appreciation of facts and in her assessments of the relevant legal question, which have had an impact on the overall quality of the preliminary examination in general, and her analysis of the gravity in the situation at question in particular.

²⁶⁷ For a detailed account, see *ibid.*, paras. 68–140.

²⁶⁸ See further Kattan, 2016, pp. 69 ff., see *supra* note 10.

17.6.2. Analysis of the Prosecutor's and Pre-Trial Chamber I's Gravity Assessments

Neither the Rome Statute nor the Rules of Procedure and Evidence define the notion of “gravity”. It is widely acknowledged that the concept of gravity remains largely unclear.²⁶⁹ That said, gravity has turned into one of the central themes for selection of situations in the practice of the OTP. As stated by PTC I: “[...] the gravity notion was introduced in order to assure States Parties that the Court would not prosecute crimes that could be handled more expeditiously at a national level”.²⁷⁰ The assessment with regard to gravity is, therefore, a mandatory component for the determination of the question of admissibility. Yet, the assessment of gravity is exercised only when there are substantial grounds to believe that at least of the ICC crimes have been committed in a given situation. Thus, the context within which the said crimes have been committed, that is, their *modus operandi*, lies at the heart of the gravity test. Overall, although the Court generally has rejected the application of a high threshold in defining gravity, the Prosecutor has been invoking gravity as a justification for a reluctance to proceed with investigations.²⁷¹ In the present situation gravity was invoked by the Prosecutor as well. The decision not to initiate an investigation stated that: “considering the scale, impact and manner of the alleged crimes, the Office is of the view that the flotilla incident does not fall within the intended and envisioned scope of the Court’s mandate”.²⁷² In the Gaza flotilla situation, the Prosecutor for the first time decided not to proceed with an investigation following a State Party referral.²⁷³

According to the practice of the OTP, any assessment of the gravity needs to take both quantitative perspective and qualitative dimension of the crime into account.²⁷⁴ Similarly, PTC I in *Abu Garda* stated that: “[...]”

²⁶⁹ For references see ICC, Situation in the Republic of Côte d’Ivoire, *The Prosecutor v. Charles Blé Goudé*, Defence application pursuant to Articles 19(4) and 17(1)(d) of the Rome Statute, 27 September 2014, ICC-02/11-02/11-171, para. 15 (<http://www.legal-tools.org/doc/be1618/>); see further Ambos, 2016, pp. 288 ff., see *supra* note 4.

²⁷⁰ ICC, Defence application pursuant to Articles 19(4) and 17(1)(d) of the Rome Statute, para. 16, see *supra* note 269.

²⁷¹ See Schabas, 2016 pp. 462 ff., see *supra* note 184.

²⁷² The OTP Report, para. 142, see *supra* note 13.

²⁷³ Cf. Schabas, 2016, pp. 465 ff., see *supra* note 184.

²⁷⁴ ICC, Defence application pursuant to Articles 19(4) and 17(1)(d) of the Rome Statute, para. 20, see *supra* note 269.

the gravity of a given case should be assessed only from a quantitative perspective, that is, by considering the number of victims; the qualitative dimension of the crime should also be taken into consideration when assessing the gravity of a given case”.²⁷⁵ Thus, both the OTP and the Court has moved away from the magic number approach, which took only the number of victims into account, by focusing upon both qualitative and quantitative criteria. This interpretation of the gravity threshold is correct, since it aptly takes into account the circumstances in which the crimes committed.

Regulation 29(2) of the Regulations of the Office stipulates with respect to assessment of gravity, among others, following guiding factors for the Prosecutor’s assessment: scale, nature, manner of commission and impact of the crimes. In 2013, the Office developed its analytical scheme respecting its gravity criteria, which takes quantitative and qualitative factors into account.²⁷⁶ That provides some guidance with respect to interpretation of these factors.²⁷⁷ The scale of crimes, for instance, may be

²⁷⁵ ICC, *The Prosecutor v. Bahar Idriss Abu Garda*, Pre-Trial Chamber I, Public Redacted Version of Decision on the Confirmation of Charges, 8 February 2010, ICC-02/05-02/09-243-Red, para. 31 (<http://www.legal-tools.org/doc/cb3614/>).

²⁷⁶ OTP, *Policy Paper on Preliminary Examinations*, 2013, paras. 9, 59 ff., see *supra* note 251; see further Ambos, 2016, pp. 285 ff., see *supra* note 4.

²⁷⁷ *Policy Paper on Preliminary Examinations* provide some interpretation with regard to these notions:

1. The scale of the crimes may be assessed in light of, *inter alia*, the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, and their geographical and temporal spread (intensity of crimes over a brief period or low intensity over an extended period);
2. The nature of the crimes refers to the specific elements of each offence such as killings, rapes and other crimes involving sexual or gender violence and crimes committed against children, or the imposition of conditions of life on a community calculated to bring about its destruction;
3. 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 in its commission, the extent to which the crimes were systematic or result from a plan or organized 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;
4. The impact of crimes may be assessed in light of, *inter alia*, the sufferings endured by the victims and their increased vulnerability, the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities.

assessed, according to the OTP Policy Paper on Preliminary Examinations, in the light of, among others, the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families.²⁷⁸ While the Prosecutor shall not limit her assessment to the number of killings, the numbers of victims of other crimes, especially crimes against physical integrity, need to be taken into consideration as well.²⁷⁹ Regarding the nature of crimes, the OTP considers that, while all the Rome Statute crimes are grave, the nature of some crimes, such as crimes committed against women or children, are of particular concern.²⁸⁰

Regarding the manner of commission of the crimes, the OTP provides some guidance: “[...] the means employed to execute the crime, the degree of participation and intent of the perpetrator, the extent to which the crimes were systematic or result from a plan or organized 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”.²⁸¹ Indeed, the vulnerability of victims has played a significant role in the practice of the OTP and it is an important qualitative factor in the gravity assessment. It shows that this assessment is not fixed to the number of victims. An example of this occurred when the Prosecutor applied for arrest warrants concerning the September 2007 attack on the African Union Mission in Sudan, which involved the killing of 12 peacekeepers and the wounding of eight others. The Prosecutor referred to Article 8(1) and stated that in applying the provision “the issues of nature, manner and impact of the attack are critical”.²⁸² Attacks on peacekeepers are regarded as intolerable and are inherently grave.²⁸³

OTP, *Policy Paper on Preliminary Examinations*, 2013, paras. 62–65, see *supra* note 251.

²⁷⁸ *Ibid.*, para. 62.

²⁷⁹ Cf. Stegmiller, 2011, pp. 339 ff., see *supra* note 174.

²⁸⁰ Ambos, 2016, pp. 286 ff., see *supra* note 4.

²⁸¹ OTP, *Policy Paper on Preliminary Examinations*, 2013, para. 64, see *supra* note 251.

²⁸² OTP, Situation in Darfur, Sudan, Summary of the Prosecutor’s Application under Article 58, 20 November 2008, ICC-02/05-162, para. 7 (<http://www.legal-tools.org/doc/613cd2/>); William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford, 2010, pp. 201–02.

²⁸³ Stegmiller, 2011, pp. 340 ff., see *supra* note 174.

With respect to the impact of crimes, the Prosecutor will, among other things, consider the broader impact of crimes on the international community and on regional peace and security as well as the social economic and environmental damage inflicted on the affected communities, and the extent of responsibility of the perpetrator, that is, the so-called most responsible person criterion.²⁸⁴

The OTP's practice regarding the interpretation of the notion of gravity so far has been criticised as being a cherry-picking approach, which chooses both criteria and its interpretation thereof on a per case basis. As Azarova and Mariniello write: "Indeed, its *ad hoc* approach to the application of the gravity test affirms the view that "gravity" is merely a fig leaf for what is really a form of unaccountable discretion – one that basically allows prosecutors to make dramatic decisions about the destinies of individuals and the future of nations without engaging in the politics that this should entail".²⁸⁵ Here, in her OTP Report, the Prosecutor considers all factors in turn and reaches negative conclusions in each and every aspect of her gravity assessment. This is not surprising if one reads her contextualisation and her disregard of plain facts of situation closely.²⁸⁶ Her approach is reflected in her following remarks:

With respect to the flotilla incident, according to the available information, it does not appear that the criteria of Article 8(1) are satisfied, especially considering *that the Court's jurisdiction does not extend to other alleged crimes committed in the context of the conflict between Israel and Hamas nor in the broader context of any conflict between Israel and Palestine*. Therefore, the Office is not entitled to assess the gravity of the alleged crimes committed by the IDF on the *Mavi Marmara* in reference to other alleged crimes falling

²⁸⁴ *Ibid.*, pp. 337 ff.; Ambos, 2016, p. 287., see *supra* note 4.

²⁸⁵ Valentina Azarova and Triestino Mariniello, "Why the ICC Needs A 'Palestine Situation' (More Than Palestine Needs the ICC): On the Court's Potential Role(s) in the Israeli-Palestinian Context", in *Diritti umani e diritto internazionale*, 2017, vol. 11, no. 1, pp. 115 ff.

²⁸⁶ For a brief overview of the Prosecutor's gravity analysis, see Marco Longobardo, "Everything Is Relative, Even Gravity: Remarks on the Assessment of Gravity in ICC Preliminary Examinations, and the *Mavi Marmara* Affair", in *Journal of International Criminal Justice*, 2016, vol. 14, no. 4, pp. 1011, 1014 ff., 1018 ff.

outside the scope of the referral and the jurisdiction of the ICC.²⁸⁷

While the situation with regard to the civilian population is a matter of international concern, this issue must be distinguished from the Office's assessment which was limited to evaluating the gravity of the alleged crimes committed by Israeli forces on board the vessels during the interception of the flotilla.²⁸⁸

This very contextualisation almost equates the question of jurisdiction and the assessment of gravity, and it turns the situation at hand, inevitably, into an attack committed against a group of civilians sailing on the high seas by a group of armed people for no particular reason. This would be at best piracy but not one of core international crimes under the Rome Statute. Therefore, it is an evident contradiction to acknowledge on the one hand that the attack against the flotilla was a war crime in the context of the international armed conflict between Israel and Hamas, and not to take the nature of the conflict and human tragedy in Gaza, on the other. This contraction is also identified by PTC I in its review decision:

The stance that the Prosecutor cannot consider for the assessment of gravity any information in relation to facts occurring elsewhere than on the three vessels over which the Court may exercise territorial jurisdiction on an untenable understanding of jurisdiction. The rules of jurisdiction in part 2 of the Statute limit the Court's power to make judgment, i.e. to examine given conduct and make a judicial finding of whether such conduct constitutes a crime, but do not preclude the Court from considering facts that in themselves occur outside of its jurisdiction for the purpose of determining a matter within its jurisdiction. Thus, the rules of jurisdiction do not permit the Court to conduct proceedings in relation to possible crimes, which were committed elsewhere than on the three vessels falling into its jurisdiction, *but the Court has the authority to consider all necessary information, including as concerns extra-jurisdictional facts for the purpose of establishing crimes within its competence as well as their gravity.*²⁸⁹

²⁸⁷ The OTP Report, para. 137, see *supra* note 13 (emphasis added).

²⁸⁸ *Ibid.*, para. 147.

²⁸⁹ ICC, "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", para. 17, see *supra* note 21 (emphasis added).

And PTC I emphasizes the evaluative contradiction caused by the Prosecutor's wrong contextualization of her assessment of gravity, when it contends that:

By articulating in the Decision Not to Investigate a principle without basis in the law, the Prosecutor committed an error. However, the Chamber observes that the Prosecutor did not in fact apply the principle she announced, and did take into account certain facts "outside the Court's jurisdiction" for the purposes of her analysis under Article 53(1) of the Statute, such as for her conclusion that crimes were committed only on the *Mavi Marmara* and that no serious injuries occurred on the other vessels in the flotilla [...], or for her conclusion that the identified crimes had no significant impact on the population in Gaza [...].²⁹⁰

Accordingly, the Prosecutor's assessment of gravity was mistaken at the outset, for she did not take the context of the alleged crimes correctly and properly into account. As shown above, aggravating factors that should have been evaluated include the nature of Israel's interception of the flotilla, Israel-Gaza conflict, international reaction and deliberate plan and policy to use violence by the Israeli forces. There is indeed a legal and moral difference between stating that "merely" 10 people were killed, on the one hand, and that four of the 10 civilians were shot dead by Israeli forces even though they posed by no means a threat to Israeli forces by close range execution type shootings, on the other. If one considers the number of victims alone, as the Prosecutor did, without taking due account of the qualitative dimension the Comoros referral, it is not likely to exceed the gravity threshold. As the Prosecutor failed to do so, it was not a difficult task for her to reach the conclusion that the referred situation is not of sufficient gravity.

As put by PTC I, the fundamental evaluative and methodological error of the Prosecutor was to divorce the attack against the flotilla from the underlying conflict of Israel and Palestine by linking the gravity assessment to the issue of jurisdiction. This excessively restrictive approach would have barred the international criminal tribunals to take the historical and contextual background of any conflict before them. In *Akayesu*, for instance, the ICTR took the facts and the alleged crimes that were beyond its jurisdiction into account in order to explain the wider context

²⁹⁰ *Ibid.*, para. 18.

of the genocide in Rwanda. Although the ICTR's temporal jurisdiction was limited to the events that took place between 1 January 1994 and 31 December 1994,²⁹¹ the Tribunal has utilized events and historical background of the crimes for the contextualization and for proving the existence of a genocidal policy. The ICTR considered, for example, the crimes and preceding events that are committed well beyond its temporal jurisdiction:

In the early 1930s, Belgian authorities introduced a permanent distinction by dividing the population into three groups which they called ethnic groups, with the Hutu representing about 84% of the population, while the Tutsi (about 15%) and Twa (about 1%) accounted for the rest. In line with this division, it became mandatory for every Rwandan to carry an identity card mentioning his or her ethnicity. The Chamber notes that the reference to ethnic background on identity cards was maintained, even after Rwanda's independence and was, at last, abolished only after the tragic events the country experienced in 1994.

From the late 1940s, at the dawn of the decolonization process, the Tutsi became aware of the benefits they could derive from the privileged status conferred on them by the Belgian colonizers and the Catholic Church. They then attempted to free themselves somehow from Belgian political stewardship and to emancipate the Rwandan society from the grip of the Catholic Church. The desire for independence shown by the Tutsi elite certainly caused both the Belgians and the church to shift their alliances from the Tutsi to the Hutu, a shift rendered more radical by the change in the church's philosophy after the second world war, with the arrival of young priests from a more democratic and egalitarian trend of Christianity, who sought to develop political awareness among the Tutsi-dominated Hutu majority.

To make the economic, social and political conflict look more like an ethnic conflict, the President's entourage, in particular, the army, persistently launched propaganda campaigns which often consisted of fabricating events. Dr. Alison Desforges in her testimony referred to this as "mirror politics", whereby a person accuses others of what he or she

²⁹¹ Security Council Resolution 955 (1994), UN Doc. S/RES/955 (1994), 8 November 1994 (<http://www.legal-tools.org/doc/f5ef47/>).

does or wants to do. In this regard, in the morning hours of 5 October 1990, the Rwandan army simulated an attack on Kigali and, immediately thereafter, the Government claimed that the city had just been infiltrated by the RPF, with the help of local Tutsi accomplices. Some eight thousand Tutsi and members of the Hutu opposition were arrested the next morning. Several dozens of them died in jail. *Another example of mirror politics is the March 1992 killings in Bugesera which began a week after a propaganda agent working for the Habyarimana government distributed a tract claiming that the Tutsi of that region were preparing to kill many Hutu. The MRND militia, known as Interahamwe, participated in the Bugesera killings. It was the first time that this party's militia participated in killings of this scale. They were later joined by the militia of other parties or wings of Hutu extremist parties, including, in particular, the CDR militia known as the Impuzamugambi.*²⁹²

The consideration of events that took place before 1 January 1994 by the ICTR did not mean that those crimes were also tried by the Tribunal. Yet, it was inevitable for the Tribunal to take note of the history and context of the crimes in order to explain and justify the *chapeau* element of the crime of genocide. Similarly, the Prosecutor of the ICC should have taken into consideration the wider context of the attack against flotilla just as she did it for the legal analysis with respect to jurisdiction *ratione materiae*. Thus, the following argument of the Prosecutor is mistaken and overly restrictive: “[...] the Office is not entitled to assess the gravity of the alleged crimes committed by the IDF on the *Mavi Marmara* in reference to other alleged crimes falling outside the scope of the referral and the jurisdiction of the ICC”.²⁹³

The Prosecutor did not take into account the wider context of the crimes committed aboard *Mavi Marmara*, presumably, because of the fact that only a glimpse of events two years preceding to the attack against the flotilla would show the organized and planned nature of the crimes of Israel committed by its ablest and disciplined armed forces. In December 2008, Israel's Operation Cast Lead, for instance, resulted in the deaths of

²⁹² International Criminal Tribunal for Rwanda, *The Prosecutor v. Jean-Paul Akayesu*, Trial Chamber, Judgment, 2 September 1998, ICTR-96-4-T (emphasis added) (<http://www.legal-tools.org/doc/b8d7bd/>).

²⁹³ The OTP Report, para. 137, see *supra* note 13.

1,400 Palestinians – of whom at least 850 were civilians, including 300 children and 110 women – and the wounding of over 5,000 Palestinians.²⁹⁴ The UN Fact Finding Mission on the Gaza Conflict established by the Human Rights Council²⁹⁵ called the UN Security Council and the ICC to take action to prevent impunity for most serious crimes allegedly committed by Israel. It is worth labouring over the exact language used by the report:

1957. The Mission was struck by the repeated comment of Palestinian victims, human rights defenders, civil society interlocutors and officials that they hoped that this would be the last investigative mission of its kind, because action for justice would flow from it. It was struck, as well, by the comment that *every time a report is published and no action follows, this “emboldens Israel and her conviction of being untouchable”*. *To deny modes of accountability reinforces impunity, and tarnishes the credibility of the United Nations and of the international community*. The Mission believes these comments ought to be at the forefront in the consideration by Member States and United Nations bodies of its findings and recommendations and action consequent upon them.

[...]

1964. The Mission believes that, in the circumstances, there is little potential for accountability for serious violations of international humanitarian and human rights law through domestic institutions in Israel and even less in Gaza. The Mission is of the view that *long-standing impunity* has been a key factor in *the perpetuation of violence* in the region and in the reoccurrence of violations, as well as in the erosion of confidence among Palestinians and many Israelis concerning prospects for justice and a peaceful solution to the conflict.

[...]

1966. *The Mission considers that the serious violations of international humanitarian law recounted in this report fall within the subject-matter jurisdiction of the International*

²⁹⁴ For analysis of crimes against humanity and war crimes allegedly committed by the Israel Defense Forces during the Operation Cast Lead by an Israeli lawyer, see Oded Friedmann, *The Possibility of the ICJ and the ICC Taking Action in the Wake of Israel’s Operation “Cast Lead” in the Gaza Strip: A Jurisdiction and Admissibility Analysis*, Peter Lang AG Internationaler Verlag der Wissenschaften, Frankfurt am Main, 2013.

²⁹⁵ The Goldstone Report, see *supra* note 94.

Criminal Court [...] The Mission is of the view that the prosecution of persons responsible for serious violations of international humanitarian law would contribute to ending such violations, to the protection of civilians and to the restoration and maintenance of peace.

[...]

1969. [...] (e) The Mission recommends that, upon receipt of the committee's report, the Security Council should consider the situation and, in the absence of good-faith investigations and that are independent and in conformity with international standards having been undertaken or being under way within six months of the date of its resolution under Article 40 by the appropriate authorities of the State of Israel, again acting under Chapter VII of the Charter of the United Nations, *refer the situation in Gaza to the Prosecutor of the International Criminal Court pursuant to Article 13 (b) of the Rome Statute.*

1970. *To the Prosecutor of the International Criminal Court, with reference to the declaration under Article 12 (3) received by the Office of the Prosecutor of the International Criminal Court from the Government of Palestine, the Mission considers that accountability for victims and the interests of peace and justice in the region require that the Prosecutor should make the required legal determination as expeditiously as possible.*²⁹⁶

Yet neither the Security Council nor the ICC took action. And after eight months of the HRC Report's publication, the Gaza Freedom flotilla sailed – a group of individuals who represent the conscience of international community tried to channel humanitarian help to the Gazans, who were suffering under strict illegal and disproportionately harsh blockade imposed by Israel upon them.

After identifying that the gravity contextualization adopted by the Prosecutor as mistaken, PTC I decided to proceed with an assessment of single gravity conclusions of the Prosecutor on the ground that, despite the articulation of the erroneous abstract principle, the Prosecutor did in fact consider the extra-jurisdictional factors.²⁹⁷ Therefore, PTC I went on

²⁹⁶ Emphasis added.

²⁹⁷ ICC, "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", para. 19, see *supra* note 21.

analysing the second argument of the Comoros, namely, the alleged failure of the Prosecutor to properly address the factors relevant to the determination of gravity under Article 17(1)(d) of the Rome Statute. Also, the issue of contextualization of the gravity analysis will be a matter of interest, since it is the basis upon which the single gravity factors are evaluated.²⁹⁸

Indeed, the remainder of the gravity analysis of the Prosecutor contains omissions and failures with respect to the single factors of gravity. For example, although the Prosecutor affirms in her Report that an evaluation of gravity also includes “whether the individuals or groups of persons that are likely to be the object of an investigation, include those who may bear the greatest responsibility for the alleged crimes committed”, she failed to assess this factor in the present situation, which is criticized by Comoros in following terms:

The Prosecutor has not at any stage in the Decision considered and referred to any potential perpetrators at any level of command, let alone those who could be held to bear the greatest responsibility. This is a glaring omission that demonstrates that the Prosecutor has not applied the very criteria for assessing the gravity which she herself identified [...] ²⁹⁹

The Applicant had highlighted in its submissions to the Prosecutor that senior IDF commanders and Israeli leaders could be investigated for planning, directing and overseeing the attack on the Flotilla [...] ³⁰⁰

²⁹⁸ Longobardo argues that the situation specific conditions should be taken into account. He proposes, for instance, an assessment of the gravity issue in the *Mavi Marmara* incident with reference to alleged crimes that occurred on board other vessels. He, therefore, looks for examples from case law of Nuremberg and Tokyo tribunals which dealt with war crimes committed during naval warfare. Yet, the author himself admits the fact that “the OTP should have examined the gravity issues in the *Mavi Marmara* case in comparison with crimes committed on board vessels, it is difficult to find case law and state practice that is relevant”. That said, he is, though without sufficient reasoning, of the opinion that if the Prosecutor could have mentioned the Nuremberg and Tokyo regarding unrestricted naval warfare “in order to strengthen its opinion regarding the lack sufficient gravity with regard to the alleged crimes that occurred during the *Mavi Marmara* boarding”. Longobardo, 2016, pp. 1026 ff., see *supra* note 286.

²⁹⁹ ICC, “Public redacted version of application for review pursuant to Article 53(3)(a) of the Prosecutor’s decision of 6 November 2014 not to initiate an investigation in the situation”, para. 85, see *supra* note 14.

³⁰⁰ *Ibid.*, para. 86.

PTC I affirmed Comoros's argument and criticized the Prosecutor's failure to consider "whether the persons likely to be the object of the investigation into the situation would include those who bear the greatest responsibility for the identified crimes".³⁰¹ According to PTC I, then, the Prosecutor misinterpreted the criteria at stake when she came to the conclusion 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. Yet, according to the PTC, this assessment does not answer the question at hand. What is at stake here, according to the Chamber, is whether the Prosecutor shall be able to investigate and prosecute those most responsible for the crimes under consideration; hence, the issue is not the seniority or hierarchical position of those who may be responsible for such crimes.³⁰² Besides, it is not clear how the Prosecutor could categorically exclude the involvement of senior officials from the alleged offences committed aboard *Mavi Marmara* incident without conducting an investigation into the situation.³⁰³

With respect to the scale of crimes, PTC I found that 10 killings, 50–55 injuries, and possibly hundreds of instances of outrages upon personal dignity, or torture or inhuman treatment should have been taken into account by the Prosecutor in favour of sufficient gravity. By failing to correctly assess the factor of scale, according to PTC I, the Prosecutor committed a material error. Indeed, if one considers cases from the relevant case law such as *Bahar Idriss*, *Abu Garda* and *Abdallah Banda*, as PTC I did, it will be evident that in such instances cases were not only investigated but even prosecuted by the Prosecutor.³⁰⁴

Concerning the nature of the alleged crimes committed on the *Mavi Marmara*, there are a number of aggravating factors that have not been considered by the Prosecutor.³⁰⁵ Her conclusion was that: "[...] the information available does not indicate that the treatment inflicted on the affected passengers amounted to torture or inhuman treatment".³⁰⁶ It is hard

³⁰¹ ICC, "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", para. 23, see *supra* note 21.

³⁰² *Ibid.*, para. 24.

³⁰³ Cf. Azarova and Mariniello, 2017, pp. 115 ff., see *supra* note 285.

³⁰⁴ ICC, "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", para. 26, see *supra* note 21.

³⁰⁵ Cf. Longobardo, 2016, pp. 1019 ff., see *supra* note 286.

³⁰⁶ The OTP Report, para. 139, see *supra* note 13.

to comprehend why she chose to ignore the following findings in the HRC Report:

The Mission thus determines that the treatment of passengers on board the *Mavi Marmara* and in certain instances on board the *Challenger 1*, *Sfendoni* and the *Eleftheri Mesogios*, by the Israeli forces amounted to *cruel, inhuman and degrading treatment* and, insofar as the treatment additionally applied as a form of punishment, *torture*.³⁰⁷ (Emphasis added)

The same report, which is the most reliable among the four reports in consideration, concerning the manner of commission of crimes stated that: “*The conduct of the Israeli military and other personnel towards the flotilla passengers was not only disproportionate to the occasion but demonstrated levels of totally unnecessary and incredible violence. It betrayed an unacceptable level of brutality. Such conduct cannot be justified or condoned on security or any other grounds.*”³⁰⁸

In its assessment regarding the nature of crimes, PTC I found that there is merit in the following statement of Comoros, which highlights the error and omission in the Prosecutor’s conclusion above:

In dismissing that the nature of the crimes shows that they were of a sufficient gravity to warrant investigation, the Prosecutor has taken the definitive position that the treatment inflicted on the passengers did not amount to torture or inhumane treatment, as it lacked severity.

This is a surprisingly premature judgment to make; especially when the Prosecutor has herself indicated that she need not draw any conclusions at the Preliminary Examination phase.³⁰⁹

Again, in its assessment with respect to the nature of crimes, PTC I made clarifications regarding the nature of preliminary examinations and a proper investigation, and opined that:

At this stage, the correct conclusion would have been to recognize that there is a reasonable basis to believe that acts

³⁰⁷ The HRC Report, para. 181, see *supra* note 5.

³⁰⁸ *Ibid.*, para. 263.

³⁰⁹ ICC, “Public redacted version of application for review pursuant to Article 53(3)(a) of the Prosecutor’s decision of 6 November 2014 not to initiate an investigation in the situation”, paras. 94–95, see *supra* note 14.

qualifying as torture or inhuman treatment were committed, and to take this into account for the assessment of the nature of the crimes as part of the gravity test. The Prosecutor thus erred in not reaching this conclusion.³¹⁰

Likewise, in its assessment with regard to the manner of commission of crimes, PTC I found significant errors and omissions in the Prosecutor's decision not to investigate. PTC I commenced its analysis in this regard with one of the most significant issues of the flotilla incident, that is, use of live fire by the Israeli Defence Forces prior to boarding. In this regard, the Comoros submitted that:

There is information available to the Prosecutor that the IDF fired live ammunition from the boats and the helicopters *before* the IDF forces boarded the *Mavi Marmara*, which is plainly consistent with a deliberate intent and plan to attack and kill unarmed civilians.³¹¹

As shown above, the conclusions of the HRC Report as well as autopsy reports indicate that persons were shot from above. Thus being so, the Prosecutor gave preference to the Israeli Commission Report which records that the IDF denied that any live rounds were fired from the helicopters,³¹² that soldiers faced fierce resistance when boarding, and that the IDF never anticipated at the time of planning the attack that excessive force would be used. Comoros' Request for Review submits the following with regard to the Prosecutor's prioritization of the Israeli Commission Report:

[...] The Prosecutor should have resisted placing reliance on this report to the exclusion of evidence that was supplied to her by the Applicant and which was available from other sources including the two UN reports. The autopsy reports alone, for example, indicate that persons were shot from above. The damage to the *Mavi Marmara* is also consistent

³¹⁰ ICC, "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", para. 30, see *supra* note 21.

³¹¹ ICC, "Public redacted version of application for review pursuant to Article 53(3)(a) of the Prosecutor's decision of 6 November 2014 not to initiate an investigation in the situation", para. 101, see *supra* note 14.

³¹² The OTP Report, para. 41, see *supra* note 13.

with firing downwards from the helicopters and with excessive force being used on boarding.³¹³

After considering these arguments, PTC I emphasized the importance of the issue of use of live fire by the IDF prior to boarding as follows:

[...] there may be some merit already in the Comoros' assertion that the Prosecutor, for the purpose of assessing the gravity of the identified crimes, willfully ignored this information. In the view of the Chamber, the question whether live fire was used by the IDF prior to the boarding of the *Mavi Marmara* is material to the determination of whether there was a prior intent and plan to attack and kill unarmed civilians – something that informs the Prosecutor's conclusions with respect to the manner of commission of crimes and, in turn, the ultimate determination that the potential case(s) would not be of sufficient gravity.³¹⁴

In addition, PTC I underlined the methodological error in the Prosecutor's assessment:

[...] if the Prosecutor, as she states in the Response, had indeed set aside the issue of live fire prior to the boarding on the grounds that the "significantly conflicting accounts" make it "difficult to establish the exact chain of events", such position would be equally erroneous. Indeed, it is inconsistent with the wording of Article 53(1) of the Statute and with the object and purpose of the Prosecutor's assessment under this provision for her to disregard available information other than when that information is manifestly false. In the present instance, however, there is no indication that the witness statements, the UN Human Rights Council Report, or the autopsy reports are manifestly false.³¹⁵

It is only upon investigation that it may be determined how the events unfolded. For the purpose of her decision under Article 53(1) of the Statute, the Prosecutor should have accepted that live fire may have been used prior to the board-

³¹³ ICC, "Public redacted version of application for review pursuant to Article 53(3)(a) of the Prosecutor's decision of 6 November 2014 not to initiate an investigation in the situation", para. 115, see *supra* note 14.

³¹⁴ ICC, "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", para. 34, see *supra* note 21.

³¹⁵ *Ibid.*, para. 35.

ing of the *Mavi Marmara*, and drawn the appropriate inferences. This fact is extremely serious and particularly relevant to the matter under consideration, as it may reasonably suggest that there was, on the part of the IDF forces who carried out the identified crimes, a prior intention to attack and possibly kill passengers on board the *Mavi Marmara*.³¹⁶

Indeed, the emphasis put on the issue of premeditation in gravity assessments by PTC I is extremely important for any comprehensive analysis of the situation at hand. Remarkably, as Buchan writes, the Israeli conduct “was not momentary or ephemeral, but instead perpetrated over a 12 h period”.³¹⁷ This point is a strong indicator for the amount of premeditation and planning, which is an important aspect for the assessment of gravity.³¹⁸ Furthermore, the Comoros referral also pointed to the existence of such a deliberate plan and policy by stating that: “[...] the actions of the IDF were manifestations of a plan or policy to use violence to dissuade the humanitarian flotillas to directly reach a blockaded Gaza”.³¹⁹

PTC I also identified the following the following errors of fact with regard to the Prosecutor’s analysis of the manner of commission of the identified crimes:

- The Prosecutor unreasonably failed to consider that the fact that the detained passengers suffered cruel and abusive treatment in Israel reasonably suggests that the identified crimes may not have occurred as individual excesses of IDF soldiers; and
- The Prosecutor unreasonably failed to recognize the fact that the unnecessarily cruel treatment of passengers on the *Mavi Marmara*, the attempts of the perpetrators of the identified crimes to conceal the crimes, and the fact that the events did not unfold on other vessels in the flotilla in the same as they did on the *Mavi Marmara*, are compatible with the hypothesis that the identified crimes were planned.³²⁰

³¹⁶ *Ibid.*, para. 36.

³¹⁷ Buchan, 2014, p. 498, see *supra* note 11.

³¹⁸ Stegmiller, 2011, p. 343, see *supra* note 174.

³¹⁹ ICC, “Public redacted version of application for review pursuant to Article 53(3)(a) of the Prosecutor’s decision of 6 November 2014 not to initiate an investigation in the situation”, para. 25, see *supra* note 14.

³²⁰ ICC, “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation”, para. 44, see *supra* note 21.

Lastly, PTC I found error in the Prosecutor's assessment with respect to the impact of the crimes. Concerning this issue, the Prosecutor submitted that the supplies were later distributed in Gaza and, according to her, "in these circumstances, the interception of the flotilla cannot be considered to have resulted in blocking the access of Gazan civilians to any essential humanitarian supplies on the vessels in the flotilla".³²¹ Yet again, she failed to recognize the fact that the Israel's violent interception of the Freedom flotilla had "the consequence of deterring other humanitarian agencies from attempting to deliver to this population. As both the guidance of the OTP and decisions of the Court have made clear, the impact of international crimes on the local population is relevant to the gravity assessment".³²² The impact of crimes on the direct victims and their impact on Gazan people, therefore, are relevant to the gravity assessment as well as the significant impact of the identified crimes on the lives of the victims and their families. Comoros' request for review also made such an argument:

It is arguable that the acts of the IDF on the Flotilla would have sent a clear message to those in Gaza that the occupation of Gaza was in full force and that even if humanitarian aid was to get through to the Gaza, its delivery would be controlled and supervised by the Israeli authorities, and could be stopped at any point. Such an impact on the civilian population of Gaza must at least be compatible with the effects on peacekeeping of single attack in Haskanita, Darfur.³²³

Moreover, the Prosecutor also failed to recognize the considerable social alarm caused by the Israeli attack in the international community. She ignored, among other things, that the attack on the *Mavi Marmara* of Comoros, was condemned by the Security Council during its 6325th and 6326th meetings,³²⁴ and the Israeli action condemned by many States. In-

³²¹ The OTP Report, para. 141, see *supra* note 13.

³²² Buchan, 2014, p. 497, see *supra* note 11.

³²³ ICC, "Public redacted version of application for review pursuant to Article 53(3)(a) of the Prosecutor's decision of 6 November 2014 not to initiate an investigation in the situation", para. 135, see *supra* note 14.

³²⁴ Statement [Made on Behalf of The Security Council, at The 6326th Meeting, 1 June 2010, in Connection with the Council's Consideration of the Item Entitled "The Situation in the Middle East, Including the Palestinian Question"], UN Doc. S/PRST/2010/9, 1 June 2010 (<http://www.legal-tools.org/doc/356fb8/>); UN Security Council, "Security Council Con-

deed, Turkey, Mexico, Brazil, Austria, Russia, Uganda, France, Bosnia and Herzegovina, and Lebanon all condemned the use of force by Israel aboard the *Mavi Marmara* in the UN Security Council.³²⁵ France, for instance, stated that the human toll of the operation had led the country to believe that there had been an unjustifiable and disproportionate use of force.³²⁶ The attack on the flotilla has had further serious international repercussions. As stated by the Comoros referral, these include, among others, Security Council resolutions, debates in the UN Human Rights Council, and the appointment of a commission of inquiry by the Secretary-General of the United Nations. This is important for the assessment of gravity, for this fact shows the alleged crimes committed by the IDF forces are among the most serious crimes of truly international concern, which to be sure is in line with the philosophical underpinning of the ICC.³²⁷ Yet, aside from the four reports, which exacerbated the social alarm surrounding the attack against *Mavi Marmara* rather alleviating it, there is no legal action taken to address the Israeli attack.³²⁸ PTC I arrived at similar conclusion with regard to the impact of crimes when it held that:

[...] the commission of the identified crimes on the *Mavi Marmara*, which were highly publicised, would have sent a clear and strong message to the people in Gaza (and beyond) that the blockade of Gaza was in full force and that even the delivery of humanitarian aid would be controlled and supervised by the Israeli authorities. Also, the international concern caused by the events at issue, which, inter alia, resulted in several fact-finding missions [...] is somewhat at odds with the Prosecutor's simplistic conclusion that the impact of identified crimes points towards the insufficient gravity of the potential case(s) on the mere grounds that the supplies carried by the vessels in the flotilla were ultimately later distributed to the population in Gaza.³²⁹

demns Acts Resulting in Civilian Deaths during Israeli Operation against Gaza-Bound Aid Convoy, Calls for Investigation, in Presidential Statement,” 31 May 2010, SC/9940.

³²⁵ Security Council, 65th year: 6325th meeting, Monday, 31 May 2010, New York, UN Doc. S/PV.6325, 31 May 2010, pp. 4–12 (<http://www.legal-tools.org/doc/1a733c/>).

³²⁶ *Ibid.*

³²⁷ See ICC Statute, Preamble, paras. 3 and 4, and Articles 1 and 5, see *supra* note 250.

³²⁸ Cf. Buchan, 2014, p. 497, see *supra* note 11.

³²⁹ ICC, “Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation”, para. 48, see *supra* note 21.

Despite the positive formulation of Article 53, by ignoring fundamental facts or overlooking them as well as misinterpreting the existing information and the law, the Prosecutor had regarded the present situation not grave enough to justify an investigation. Nevertheless, the number of aggravating factors speak against this decision: a deliberate plan and policy to use violence in order to enforce an unlawful blockade, vulnerability of victims, impact on the local people, and manner of commission of crimes (close range execution type killings against unarmed civilians who were hiding from the IDF forces), continuous degradation and outrages upon human dignity even after the taking control of the flotilla ships that shows the systematic character of the conduct, 12-hour duration of criminal conduct which has been committed at behest of the highest authorities of the State of Israel, among others. These aggravating factors, for the reasons given above, are indeed sufficiently grave to justify attention of the Court.³³⁰

As shown above, PTC I requested the Prosecutor to reconsider her decision not to initiate an investigation by taking due note of her false contextualization of the gravity requirement. PTC I has adopted a quantitative-qualitative approach in identifying the errors contained in the Prosecutor's decision with regard to the factors of assessment, namely, the nature, scale, manner of commission and impact of identified crimes.³³¹

In conclusion, by way of final note, PTC I shed light upon the fundamental flaw in the Prosecutor's gravity assessment:

[...] 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 event.³³²

The Prosecutor is now re-considering her decision not to investigate into the flotilla situation in light of the reasoning of PTC I in its request to

³³⁰ For a similar view see Buchan, 2014, p. 498, see *supra* note 11.

³³¹ ICC, "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", paras. 49–50, see *supra* note 21.

³³² *Ibid.*, paras. 51.

the Prosecutor to review her prior decision based upon the Office's *de novo* review of all the information available to it prior to 6 November 2014, upon which the 6 November 2014 report was based.

As a final note, in his dissenting opinion, agreeing with the Prosecutor, Judge Kovacs denies the gravity in the present situation on the ground that the situation is narrow in scope with much less qualitative impact than other situations. Remarkably, Judge Kovacs' observations are heavily drawn from the Israeli Commission Report and the Prosecutor's decision not to open an investigation, which in turn adopts the Israeli narrative in key aspects regarding the situation. The core of the Judge Kovacs' approach, I suggest, could be found in his following remarks concerning the incidents that took place aboard *Mavi Marmara*:

The injuries sustained by the individuals on board the *Mavi Marmara* were apparently incidental to lawful action taken in conjunction with protection of the blockade.³³³

[...] Israeli forces had a right to capture the vessel in protection of their blockade. Furthermore, irrespective of this right, it was a logical reaction. Faced with a potential breach of the blockade, the IDF acted out of necessity.³³⁴

As I have extensively dealt with such assumptions in the preceding sections, I will not deal with the arguments advanced by Judge Kovacs, which are largely drawn from the Israeli Commission Report and the Prosecutor's decision not to investigate.³³⁵

17.6.3. Prosecutorial Discretion and Judicial Review

Comoros' application for review and PTC I's request from the Prosecutor to reconsider her decision not to initiate an investigation were first of their kind. Indeed, for the first time, the ICC Prosecutor decided not to open an

³³³ ICC, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Pre-Trial Chamber I, Corrigendum of Annex to the Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation: Partly Dissenting Opinion of Judge Péter Kovács, 16 July 2015, ICC-01/13-34-Anx-Corr, para. 31 (<http://www.legal-tools.org/doc/0fceb2/>); cf. Ambos, 2016, p. 291 ff., see *supra* note 4.

³³⁴ ICC, Corrigendum of Annex to the Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation: Partly Dissenting Opinion of Judge Péter Kovács, para. 32, see *supra* note 333.

³³⁵ For a critical analysis of the Judge Kovacs assessments, see Kattan, 2016, pp. 84 ff., see *supra* note 10.

investigation after having received a referral by a State Party, thus giving the opportunity to the judges to review the decision.³³⁶ I shall now proceed with an analysis of the findings of PTC I and the Appeals Chamber's findings with regard to the nature and scope of the judicial review and the limits of prosecutorial discretion as set out in Article 53 of the Rome Statute.

17.6.3.1. Pre-Trial Chamber I's Decision

PTC I made significant clarifications regarding the nature and scope of the review process under Article 53(3)(a) of the Statute. Indeed, given the fact that the Prosecutor enjoys a very significant degree of autonomy and discretion, the proper exercise and limits of this discretionary power should have been determined by the very first decision of PTC I based on the principle of *kompetenz-kompetenz*. I argue that PTC I's review decision in the situation at question has contributed to a better understanding concerning the limits of the discretion through a proper exercise of institutional checks and balances of the Court, which has in fact also contributed to the institutional integrity and credibility of the Court as a court of law.³³⁷

After stating the statutory basis and the subject-matter of the review, the Chamber provided its interpretation in respect of the object and purpose of the judicial review contained in Article 53(3)(a) of the Statute. According to PTC I's interpretation, such a review provides "referring entities the opportunity to challenge, and have the Chamber test, the validity of the Prosecutor's decision not to investigate".³³⁸ In this vein, PTC I has limited the scope of its review to the issues that are raised in the request for review and have a bearing on the Prosecutor's conclusion not to investigate,³³⁹ thereby adopted the standard of review applied by the Appeals Chamber with regard to interlocutory appeals.³⁴⁰

³³⁶ See further, Meloni, 2016, p. 5, see *supra* note 9.

³³⁷ Cf. Giulia Pecorella, "The Comoros Situation, the Pre-Trial Chamber and the Prosecutor: The Rome Statute's system of checks and balances is in good health", in *An International Law Blog*, 30 November 2015.

³³⁸ ICC, "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", paras. 9–10, see *supra* note 21.

³³⁹ *Ibid.*, para. 10; see further, Ambos, 2016, p. 382, see *supra* note 4.

³⁴⁰ See *ibid.*, pp. 382 ff. footnote 486 and pp. 569 ff.

Furthermore, PTC I shed light upon the limits of prosecutorial discretion, and in this regard I argue that PTC I's interpretation concerning the limits of the prosecutorial discretion is more in line with the wording and the scheme of the preliminary examinations as set out in Article 53 of the Statute. Indeed, a close reading of PTC I's decision reveals that, in the interpretation of the Chamber, in the present situation, the Prosecutor should have either commenced an investigation on the ground of the presumption for investigation as expressed in Article 53(1) by the use of the word "shall" or, as set out in Article 53(1)(c), should have based her decision not to initiate an investigation on the interests of justice clause. In this regard, PTC I held that:

[...] If 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. This is further demonstrated by the fact that only during the investigation may the Prosecutor use her powers under Article 54 of the Statute, conversely powers are more limited under Article 53 (1) of the Statute.

Indeed, this interpretation reflects a correct reading of Article 53(1)'s *chapeau*, according to which a principle of legality is incumbent on the Prosecutor, which is designed to rule out any arbitrary decision making by the Prosecutor regarding the appropriateness of an investigation.³⁴¹

On this issue, the following significant remarks have been made in a leading commentary of the Rome Statute:

The use of the imperative verb 'shall' emphasises that the sole discretion in the *chapeau* is whether there is reasonable basis to proceed with a full investigation. If such a reasonable basis is found to exist, the prosecutor is obliged with an investigation with a view to formulating an indictment [...] The provision does not give the Prosecutor room for arbitrary decision-making if he or she deems that the preliminary

³⁴¹ See Karel De Meester, "Article 53: Initiation of an investigation", in Mark Klamberg (ed.), *Commentary on the Law of the International Criminal Court*, Torkel Opsahl Academic EPublisher, Brussels, 2017, p. 387.

information a reasonable basis on which to proceed under the Statute.³⁴²

Yet, despite this plain meaning interpretation of the imperative verb ‘shall’, there is an ongoing debate regarding whether there is room for prosecutorial discretion based on the principle of opportunity, or whether the principle of legality, as the wording suggests, shall prevail.³⁴³ In the Rome Statute context, the debate should go beyond the legality-opportunity divide.³⁴⁴ Although these notions may inform the debates concerning the limits of prosecutorial discretion of the Prosecutor, the *sui generis* structure of the statutory scheme needs to be recognized, which can be dubbed as ‘managed adversarialism’. In such a scheme, the role of the Prosecutor as the master of proceedings is limited by the managerial powers of judges.³⁴⁵ Nonetheless, whether the existing scheme of investigations and preliminary examinations is compatible with the realities of an amorphous international community is a subject of another debate, that is, the politics of institutional design. Accordingly, PTC I’s reading of Article 53 – more concretely, its interpretation of the scope and effects of the judicial review and the limits of prosecutorial discretion, based upon the existing canon of juridical interpretation – is correct. PTC I held that the proper place of exercise of the prosecutorial discretion in the Article 53 context is to be found the interests of justice clause, in line with the wording of Article 53, yet in contravention to the prior practice of the Prosecutor (which solely relied on the gravity test):

The Chamber recognises that the Prosecutor has discretion to open an investigation but, as mandated by Article 53(1) of the Statute, *that discretion expresses itself only in paragraph (c)*, i.e. in the Prosecutor’s evaluation of whether the opening of an investigation would not serve the interests of justice. Conversely, paragraphs (a) and (b) require *the application of exacting legal requirements*. [Emphases added]

³⁴² See Bergsmo, Kruger and Bekou, 2016, margin no. 6, see *supra* note 174; see further De Meester, 2017, see *supra* note 341.

³⁴³ *Ibid.*

³⁴⁴ Cf. Frank Meyer, “Discretion”, in Markus D. Dubber and Tatjana Hörnle (eds.), *The Oxford Handbook of Criminal Law*, Oxford University Press, Oxford, 2014, pp. 914, 919.

³⁴⁵ Cf. Carsten Stahn, “Judicial Review of Prosecutorial Discretion: Five Years On”, in Carsten Stahn and Göran Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden, 2009, pp. 247, 253 ff., 264.

Consequently, in the interpretation of the Chamber, if there are reasonable grounds that the crime within the Court's jurisdiction have been committed and the situation is admissible, but the Prosecutor does not want to initiate an investigation, then she should base her decision on the interests of justice clause, which has been never utilised by the Prosecutor so far. Thus, the Prosecutor's discretion is in fact subject to restrictions set out in the Statute and potential review by the Chamber, which will check the application of exacting legal requirements. This interpretation, if put into practice, would be beneficial for the Court's institutional checks and balances, as a review that will take place within the ambit of the interests of justice clause shall make the effectiveness of the Prosecutor's decision not to initiate an investigation depend on the PTC's determination. Besides, such a review would enhance the balance between the institutional independence of the Prosecution and its accountability as an agent of justice.³⁴⁶

Yet, as will be shown, in the review proceedings concerning the *flo-tilla* situation, the Prosecutor has the final say as it takes place within the ambit of Article 53(3)(a) of the Statute.³⁴⁷

Finally, the Chamber made its approach plain in respect of the nature of judicial review set out in Article 53(1) when it stated that:

[...] the Chamber considers it necessary to add that there is also no valid argument for the proposition that in order not to encroach on the independence of the Prosecutor, the Chamber should knowingly tolerate and not request reconsideration of decisions under Article 53(1) of the Statute which are erroneous, but within some filed of deference. *The role of the Chamber in the present proceedings is to exercise independent judicial oversight* [italics added].

17.6.3.2. The Appeals Chamber

Presumably due to the strong rejection of almost every argument made by the Prosecutor in her gravity assessment by PTC I, and the Chamber's findings in respect of the nature and scope of the judicial review, the Prosecutor filed an appeal against the decision by PTC I. As there is no express right to appeal against the PTC's decision, the Prosecutor requested a right appeal by drawing an analogy between the present case and that of

³⁴⁶ See *ibid.*, pp. 258 ff.

³⁴⁷ See further Meloni, 2016, p. 10, *supra* note 9.

admissibility decisions, which may be directly appealed under Article 82(1)(a) of the Statute. In her appeal the Prosecutor, among other things, asserted that:

This appeal is important because the Decision not only purports to rule on the admissibility of many potential case(s) arising from this situation, but interprets the law in a manner that alters the Prosecution's mandate under the Statute and dramatically expands the scope of the Court's operations.³⁴⁸

As Articles 53 and 82 of the Statute do not expressly provide a right of appeal against decisions rendered pursuant to Article 53(3)(a), the Appeals Chamber, without discussing the merits of the Prosecutor's appeal, dealt solely with the question whether PTC I's decision is a decision with respect to admissibility within the meaning of Article 82(1)(a) of the Statute. In light of the letter, drafting history and the Appeals Chamber's prior jurisprudence, the Chamber held by majority that PTC I's Article 53(3)(a) decision is not appealable, and therefore it dismissed the appeal *in limine*.³⁴⁹

The Appeals Chamber commenced its analysis with its own case law including its Kenya Appeal Decision and the Libya Appeal Decision. The Chamber underlined its consistent jurisprudence which requires that decisions with respect to admissibility "consist of or are based upon a ruling that a case is admissible or inadmissible and that the operative part of the decision must pertain directly to a question on the jurisdiction of the Court or the admissibility of a case".³⁵⁰ And the decision of PTC I in the Comoros referral case, as put by the Appeals Chamber, did not consist of, nor was it based upon, a ruling on admissibility which could be appealed under Article 82(1)(a). While taking the Prosecutor's argument with respect to the language and tone of PTC I's decision³⁵¹ into consideration, the Appeals Chamber did not consider such factors to alter the na-

³⁴⁸ ICC, "Notice of appeal of 'Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation' (ICC-01/13-34)", para. 4, see *supra* note 22.

³⁴⁹ ICC, "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'", paras. 40, 66, see *supra* note 23.

³⁵⁰ *Ibid.*, para. 49.

³⁵¹ OTP, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, Prosecution's Further Submissions concerning Admissibility, ICC-01/13-47, 14 August 2015, para. 28 (<http://www.legal-tools.org/doc/a2a58c/>).

ture of the proceedings. Furthermore, the Appeals Chamber made it plain that the PTC's decision "is a request to the Prosecutor to reconsider her decision not to initiate an investigation and [...] the ultimate decision as to whether to do so is for her".³⁵² The Chamber put the emphasis in the present case on the operative part of the Article 53 decisions,³⁵³ when it contends that:

While the Impugned Decision might conceivably have an effect on the admissibility of potential cases arising out of the situation, in that it could potentially lead to the Prosecutor coming to a different conclusion in relation to admissibility (pursuant to Article 53 (1) (b)) at the time that she reconsiders her initial decision not to initiate an investigation, the Impugned Decision is not by its nature a decision determining admissibility.³⁵⁴

In other words, as aptly put by the Appeals Chamber, PTC I's decision does not determine admissibility. It requests the Prosecutor to reconsider her decision as provided in statutory scheme for review of prosecutorial decisions not to investigate in Article 53.³⁵⁵ Indeed, the Appeals Chamber enforces the operational effect argument with a lexical and systematic interpretation of Article 53, when it states that:

Article 53 of the Statute provides a distinct scheme for the judicial review by the Pre-Trial Chamber of negative admissibility determinations by the Prosecutor, i.e. where she finds that such cases are not or would not be admissible. Article 53 makes no express provision for an appeal of the decision of the Pre-Trial Chamber requesting the Prosecutor to reconsider her decision not to initiate an investigation, where such decision is based on the admissibility or the inadmissibility of the case, or indeed in any other circumstances.³⁵⁶

In its analysis of the statutory structure, the Appeals Chamber makes the following significant clarifications with regard to the extent of the prosecutorial discretion within the scheme of Article 53:

³⁵² ICC, "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'", para. 50, see *supra* note 23.

³⁵³ *Ibid.*, para. 51.

³⁵⁴ *Ibid.*, para. 50.

³⁵⁵ *Ibid.*, paras. 51, 53.

³⁵⁶ *Ibid.*, para. 55.

The Appeals Chamber further notes that the Pre-Trial Chamber's review of the Prosecutor's decision must be triggered by a request for review from the referring State or the Security Council. In the absence of such a request, the Pre-Trial Chamber has no power to enter into a review of the Prosecutor's decision not to proceed with an investigation on its own motion, irrespective of how erroneous it may consider the Prosecutor's admissibility determination to be. In addition, in the event that, upon review, the Pre-Trial Chamber disagrees with the findings or conclusions of the Prosecutor, it may request reconsideration of that decision. Rule 108 (3) of the Rules of Procedure and Evidence then provides that the "final decision" is for the Prosecutor.³⁵⁷

Put in plain terms, if, after reconsidering the situation, the Prosecutor still holds on to her prior decision not to investigate, this will be the end of the procedures; if, in the flotilla situation, she would decide not to initiate an investigation again, this would be the end of the matter. As put by the Appeals Chamber: "[...] the prosecutor is obliged to reconsider her decision not to investigate, but retains ultimate discretion over how to proceed".³⁵⁸ The Appeals Chamber further held that:

*[...] to allow the present appeal to be heard on the grounds that the Impugned Decision is a decision with respect to admissibility would rupture the scheme for judicial review of decisions of the Prosecutor as explicitly set out in Article 53, introducing an additional layer of review by the Appeals Chamber that lacks any statutory basis. To find that the impugned Decision was a decision with respect to admissibility would also fail to respect the discretion that has been granted to the Prosecutor in the context of Article 53.*³⁵⁹

As well, the drafting history analysis of the Appeals Chamber confirmed the above understanding of Article 53(3)(a) of the Statute. Indeed, the commentary on the corresponding article in the 1994 draft statute for an international criminal court prepared by the Working Group of the International Law Commission provides the part of *raison d'être* of the review process contained in Article 53, relevant part of which reads:

³⁵⁷ *Ibid.*, para. 56.

³⁵⁸ *Ibid.*, para. 59.

³⁵⁹ *Ibid.*, para. 60 (emphasis added).

This reflects the view that there should be some possibility of judicial review of the Prosecutor's decision not to proceed with a case. On the other hand, for the Presidency to direct a prosecution would be inconsistent with the independence of the Prosecutor, and would raise practical difficulties given that responsibility for the conduct of the prosecution is a matter for the Prosecutor. Hence paragraph 5 provides that the Presidency may request the Prosecutor to reconsider the matter, but leaves the ultimate decision to the Prosecutor.³⁶⁰

The body responsible for the review under Article 53(3)(a) of the Statute was subsequently changed from the Presidency to the PTC. Yet, the nature and content of the review remained one to be carried out with a view to determining whether to request the Prosecutor to reconsider her decision not to initiate an investigation.³⁶¹ In addition, the Appeals Chamber noted that a proposal by France to include an express provision to clarify that Article 82(1)(a) would apply to review decisions under Article 53(3)(a) was not adopted.³⁶²

Consequently, three significant clarifications flow from the Appeals Chamber's decision: firstly, the Chamber held that the reviews of Article 53 by the PTC are not appealable; secondly, if the PTC requests from the Prosecutor to reconsider her decision to initiate an investigation, the ultimate decision as to whether to do so is her decision (the Prosecutor is, if she chooses to do so, not bound by the PTC's decision); and thirdly, as the Prosecutor's decision upon reconsideration is final, the referring State would not be entitled to request a further review.

There is also support in the literature for such a reading of the scope of Prosecutor's obligation to reconsider her decision not to initiate an investigation. Bergsmo, Kruger and Bekou, for instance, make in this regard the following observations:

[...] Whilst the Prosecutor indeed be bound to reconsider his or her decision not to investigate or prosecute, he or she would not, strictly speaking, be obliged to come to a different conclusion. If the reconsideration would lead to the same conclusion as before, this would be a permissible exercise of prosecutorial independence, provided that the Prosecutor had

³⁶⁰ *Ibid.*, para. 62.

³⁶¹ *Ibid.*, para. 63.

³⁶² *Ibid.*, para. 65.

properly applied his or her mind in coming to the conclusion.³⁶³

If, in the Gaza flotilla situation, the Prosecutor bases her final decision on gravity, it will be the end of the matter, and as Schabas writes: “Can anything further be done if the Prosecutor ‘reconsiders’ and decides to maintain her decision? It seems that as long as the Prosecutor bases her decision on the grounds of jurisdiction and admissibility, this is where the matter ends. These issues are relatively straightforward with the exception of the vague, nebulous and quintessentially subjective notion of ‘gravity’. A prosecutor who does not wish to proceed with an investigation of a situation referred to by a State Party or the Security Council will have every interest in relying upon the gravity ground”.³⁶⁴

It is questionable whether it is a wise strategy for the integrity and legitimacy of the Court to squeeze the throat of the gravity ground each and every time, even when there are compelling reasons that situational gravity exists. As clarified by the PTC I Decision, if the Prosecutor wishes to exercise her discretion, it will be within the confines of Article 53(1)(c), whereas Article 53(1)(a) and (b) require the application of exacting legal requirements. There is also support for the idea that the Prosecutor should abandon her restrictive interpretation of the interests of justice clause and refrain from trumping judicial oversight.³⁶⁵ Indeed, the judicial review exercised by PTC I in the Gaza flotilla situation made the significance of the judicial oversight envisaged by the drafters of the Rome Statute explicit, contributing to transparency. Thanks to the review process, there is possibility for the referring State Party to express its arguments concerning the Prosecutor’s decision. The intervention of the PTC as an independent and impartial instance would, I think, enhance the overall quality of preliminary examinations, at least for referrals ensuing from the Security Council or a State Party.

³⁶³ See Bergsmo, Kruger and Bekou, 2016, margin no. 39, see *supra* note 174.

³⁶⁴ William A. Schabas, *An Introduction to the International Criminal Court*, 5th ed., Cambridge University Press, Cambridge, 2017, pp. 241–42.

³⁶⁵ Cf. Cale Davis, “Political Considerations in Prosecutorial Discretion at the International Criminal Court”, in *International Criminal Law Review*, 2015, vol. 15, no. 1, p. 170; Talita de Souza Dias, “‘Interests of justice’: Defining the scope of Prosecutorial discretion in Article 53(1)(c) and (2)(c) of the Rome Statute of the International Criminal Court”, in *Leiden Journal of International Law*, 2017, vol. 30, no. 3, p. 731.

17.7. The Turkish-Israeli Agreement: An Amnesty?

The Turkish-Israeli Agreement is significant. The *Procedural Agreement on Compensation between the Republic of Turkey and the State of Israel*, which required a prior approval by Parliament by law and ratification by a decree of the Council of Ministers signed by the President of the Republic (Article 104) after completion of ratification process,³⁶⁶ was published in the Official Gazette of Turkey on 9 September 2016, and is now part of Turkish law.³⁶⁷ According to the Turkish Constitution of 1982, ratified international treaties rank above ordinary statutes and below the Constitution. Accordingly, international treaties duly put into effect have the same legal value as domestic laws.³⁶⁸ Yet, the Constitution exempts international treaties from the constitutional review, when it states that: “No appeal to the Constitutional Court shall be made with regard to these agreements”. The rationale for this limitation rests on the idea of upholding the principle of *pacta sunt servanda*. Put in plain terms, the Turkish-Israeli Agreement is exempt from constitutional review by the otherwise active Turkish Constitutional Court.

With regard to the main obligation of the State of Israel, Article 1 of the Agreement provides that:

The Government of Israel shall make an *ex gratia* payment of 20 million US dollars to an account opened by the Government of Turkey to compensate the bereaved families during the flotilla (*Mavi Marmara*) incident that took place on 31 May 2010.

This enables the parties to normalise their deteriorated relationship and provide to the victims a kind of relief, or a consolation, as it were, in recognition of their losses through a compensatory payment. Yet, the priorities and the conduct of negotiations followed the suit of traditional diplomacy, which excluded the individuals involved from the entire process.

Article 4 of the Agreement contains an amnesty requirement for Israeli citizens in relation to the flotilla incident:

³⁶⁶ See, for the ratification process of international treaties in Turkish law, Ergun Özbudun, *The Constitutional System of Turkey: 1876 to Present*, Palgrave Macmillan, New York, 2011, p. 69.

³⁶⁷ The Official Gazette of the Republic of Turkey, no. 29826, 9 September 2016.

³⁶⁸ Türkiye Cumhuriyeti Anayasası (Constitution of the Republic of Turkey), 7 November 1982, Article 90 (<http://www.legal-tools.org/doc/678fed/>); see further Özbudun, 2011, see *supra* note 366.

[...] this agreement will constitute full release from any liability of Israel, its agents and citizens with respect to any and all claims, civil or criminal, that have been or will be filed against them in Turkey, direct or indirect, by the Republic of Turkey or Turkish real and legal persons, in relation to the flotilla incident.

An amnesty in Turkish law has “the effect of discontinuing the criminal proceedings and setting aside any penalty imposed and its consequences”.³⁶⁹ Thus, the Istanbul Court, on 9 December 2016, dropped the pending case relating to the flotilla incident in accordance with Article 223(8) of the Turkish Criminal Procedure Code. The Court relied on Article 4 of the Turkish-Israeli Agreement in its decision, using the term “release from liability” (*muafiyet*, exemption) in its reasoning. Thus, the relevant article of the Agreement has had the effect of amnesty in terms of its legal consequence.

The high-ranking Israeli military officials Rau Aluf Gabiel Ashknazi, Eliezer Alfred Marom, Amos Yadlin and Avishay Levi were being tried *in absentia*³⁷⁰ for inciting under the following charges:

- 10 counts of murder through cruelty or through torment (the Turkish Penal Code (‘TPC’), Article 82/1-b);
- 114 counts of Intentional bodily injury with weapon (the TPC, Article 86/1, Article 86/3-e);
- 14 counts of intentional bodily injury results in the fracture or dislocation of a bone (the TPC, Articles 87/3, 86/1, 86/3-e);
- 490 counts of qualified deprivation of liberty (the TPC, Article 109/2, 109/3-a, b);
- one count of prevention of communication (the TPC, Article 124);
- 490 counts of torment (the TPC, Article 96);
- 490 counts of robbery (the TPC, Article 149/1/a, b, c, h);
- one count of qualified damage to property (the TPC, Article 152-2-a); and
- torment, and damage to property.

³⁶⁹ Türk Ceza Kanunu (Turkish Penal Code), 26 September 2004, Article 65 (<http://www.legal-tools.org/doc/d7732f/>).

³⁷⁰ Ceza Muhakemesi Kanunu (Turkish Criminal Procedure Code), 4 December 2004, Article 247 (<http://www.legal-tools.org/doc/918cad/>).

Although the TPC contains international crimes such as the crime of genocide and crimes against humanity, the prosecutors have chosen to accuse the defendants for ordinary crimes listed above.

The trial began on 6 November 2012, and although the Court has requested in May 2014 issuance of a red notice, the Foreign Affairs Ministry has not passed the notice onto Interpol. On 9 December 2016, following the entry into force of the Agreement, the Court decided, upon request by the Prosecutor (who made reference to Article 4 of the Agreement), to drop the case.³⁷¹ The victims have protested the decision of the Court and appealed against the judgment.

This state of affairs begs the question of whether the present Agreement is in conformity with international law at all. One can look for an answer in the Vienna Convention on the Law of Treaties of 1969, to which neither Turkey nor Israel is party. The relevant parts of the Treaty would, however, be considered as binding on both States as part of customary international law. Of the reasons of invalidity of a treaty in the Convention, the most relevant one is the provision concerning *jus cogens*. Article 53 of the Convention provides that:

A treaty is void, if at time of its conclusion, it conflicts with a norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

This article was a novelty of the Convention rather than a codification of existing law. France, for instance, raised objections to the existence of such a concept in international law. There is, however, no sufficient evidence whether in this regard Turkey and Israel can be qualified as persistent objectors. It is frequently asserted that some or all of the crimes under customary international law of genocide, crimes against humanity, war crimes, and aggression enjoy the status of *jus cogens*.³⁷²

³⁷¹ “Turkish Court drops flotilla raid case against Israel”, in *Hürriyet Daily News*, 10 December 2016.

³⁷² Roger O’Keefe, *International Criminal Law*, Oxford University Press, Oxford, 2015, p. 81.

Assuming, therefore, that the Agreement derogates from the peremptory norms of international law, then, the next question would be whether parties to the present Agreement would ever invoke the procedure of nullity of a Treaty under the Convention. Indeed, the Convention provides that only a treaty whose invalidity is established under the Convention is void. Accordingly, before the invalidity procedure is terminated, no party may treat the agreement as a nullity. The invalidation procedure in the Convention is solely foreseen for the parties to a treaty, which means that third States and international courts may disregard a treaty because it conflicts with a rule of *jus cogens* without having any procedural hurdle.³⁷³ Besides, Article 34 of the Vienna Convention expresses a basic rule of law of treaties: “A treaty does not create either obligations or rights for a third State without its consent”. These are significant arguments, since they open new legal avenues for prosecutions of alleged crimes committed aboard *Mavi Marmara* by, for example, the ICC or by another domestic court under the principle of universal jurisdiction. Israeli lawyers, who are taking account of such alternative legal avenues that can be utilised by the victims, have suggested that:

[...] With this [the *Mavi Marmara* incident] and any other claims of international law violations, the best way to protect Israeli soldiers from prosecution abroad is conducting impartial and effective investigations in Israel. Without such investigations, no international agreement can protect soldiers against legal proceedings taking place around the world.³⁷⁴

Indeed, the present Agreement in and of itself does not shield the alleged offenders against criminal proceedings that may be initiated in other countries, including the possible investigations in Israel, or the ICC. Moreover, the validity of national amnesties before the ICC is a contested issue, which was first debated in the context of the transitional justice process in South Africa. Amnesties have been discussed in the ICC context in terms of transitional justice so far. It is debatable whether the *ex gratia* payment made to the victims may be qualified as a transitional justice or restorative justice measure. The Prosecutor may, however, consider the present Agreement in the context of Article 53(1)(c). That said,

³⁷³ Jochen A Frowein, “Ius Cogens”, in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, 2013.

³⁷⁴ Amichai Cohen and Tal Mimran, “Israel’s Agreement with Turkey: Does it Protect IDF Soldiers from Prosecution?”, in *Jerusalem Post*, 4 July 2016.

this will likely to open the Pandora's box about the recognition of national amnesties, and more general debate with respect to the sense and sensibility of criminal justice on the international plane.

17.8. Concluding Remarks

In making his or her determination concerning the initiation of an investigation, the Prosecutor is required to consider the following criteria:

1. the available information must provide a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed (Article 53(1)(a));
2. the admissibility must be examined, taking into account gravity and complementarity as to national proceedings (Article 53(1)(b), Article 17); and
3. the “interests of justice”, taking into account “gravity of the crime and the interests of victims”, must be analysed (Article 53(1)(c)).³⁷⁵

In this regard, the determination shall be made on the basis of four-fold filtering process advanced by the OTP.³⁷⁶ Phase 2 “entails a thorough factual and legal assessment of the alleged crimes committed in the situation at hand”.

As the preceding sections have shown, the preliminary examination conducted by the OTP in the Gaza flotilla situation suffers from various errors, failures and omission with enormous impact on the quality of the process. The Prosecutor, for instance, has failed to appreciate the weight of the United Nations Fact Finding Mission Report, and she has extensively relied on the Israeli Commission Report's factual and legal assessments. Furthermore, she failed to assess the evidence presented to her by Comoros and the victims. Unfortunately, the Prosecutor failed to consider and refer to all relevant information available to her, failed to apply the correct evidentiary standard to the Reports, and she unreasonably assessed the alleged crimes. Likewise, in her legal assessments with regard to the blockade, she has proceeded based upon the presumption of the legality of blockade. Besides, the OTP in the Gaza flotilla situation did not take the lower threshold of “a reasonable basis” embodied in Article 53(1)(a) *vis-à-vis* “sufficient basis” as required by Article 53(2)(a) into account, there-

³⁷⁵ See Stegmiller, 2011, pp. 214–15, see *supra* note 174.

³⁷⁶ OTP, *Policy Paper on Preliminary Examinations*, 2013, paras. 78–83, see *supra* note 251.

by failing to apply the legal requirements, which is in and of itself a significant cause of concern for the quality of the process.

Based upon such an incomplete analysis of facts and preliminary legal issues, her gravity analysis was destined to arrive at a negative conclusion with regard to admissibility. In her gravity analysis, first and foremost, her methodological approach of not considering facts and context outside the Gaza flotilla incident was parochial. As PTC I held, the Court has the authority to consider all necessary information, including extra-jurisdictional facts for the purpose of establishing crimes within the jurisdiction of the Court as well as their gravity. Indeed, what happened on 31 May 2010 on board the *Mavi Marmara* was an interlude between Operation Cast Lead and Operation Protective Edge. Against this background, it did not come as a surprise that the Prosecutor arrived at the negative conclusion with regard to each and every component of the gravity analysis.

The Decision of PTC I should, therefore, be welcomed. The Chamber found that the Prosecutor's decision was affected by significant errors of fact and law. The Chamber took note of (i) the Prosecutor's failure to consider that the persons likely to be the object of the investigation into the situation could include those who bear the greatest responsibility; (ii) the Prosecutor's error in appreciating the nature of identified crimes; (iii) the Prosecutor's error in fact in properly assessing the manner of commission of the identified crimes, in particular with respect to the question of whether the identified crimes may have been "systematic or resulted from a deliberate plan or policy to attack, kill or injure civilians"; and (iv) the Prosecutor's error in determining the impact of the identified crimes.³⁷⁷ Indeed, as Meloni rightly stated, the Gaza flotilla situation: "is not only relevant for its immediate impact on the passengers of the vessels and their relatives, but also for the broader context which generated it, namely the blockade of the Gaza Strip by Israel and its consequences on the Palestinian population of Gaza".³⁷⁸

The review of the Prosecutor's decision, which was the first of its kind, has demonstrated the significance of the system of checks and balances within the Court. Although the right to get the final word, as held by

³⁷⁷ ICC, "Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation", para. 49, see *supra* note 21.

³⁷⁸ Meloni, 2016, p. 17, see *supra* note 9.

the Appeals Chamber, belongs in the context of the present situation to the Prosecutor, the review of her decision has a potential to minimise the risk of arbitrary decision-making.

The Prosecutor has been often criticised for acting politically. Kearney and Reynolds, for instance, write: “The reality is that all international legal institutions are ‘intensely political actors’. The International Criminal Court is no different [...] The premise that international criminal justice can fully transcend international politics is a false one – it is inherently political. The International Criminal Court in both its constitution (its relationship to with the Security Council, for example) and its functioning (the Prosecutor’s exercise of discretion, for example) essentially serves to implement a form of foreign policy”.³⁷⁹ I am not in a position to pass analytical judgment on extra-legal considerations such as mutual accommodation between the big powers and prosecutorial behaviour,³⁸⁰ Orientalism,³⁸¹ double standards,³⁸² the general fall and decline of international law post-9/11,³⁸³ or inherent inability of criminal law to cope with large crises.³⁸⁴ But the low quality of the preliminary examination in the present situation cannot be explained by errors of fact or law made by the Prosecutor in Phases 2 and 3, or by an under-qualification on the part of those who have conducted the preliminary examination.

As Azarova and Mariniello observe: “The Comoros situation is emblematic of the OTP’s abuse of its discretionary powers by applying a double-standard for the selection of situations and cases. The OTP’s marked errors in the evaluation of gravity, together with the contradictions

³⁷⁹ See Michael Kearney and John Reynolds, “Palestine and the Politics of International Criminal Justice”, in William A. Schabas, Yvonne McDermott and Niamh Hayes (eds.), *The Ashgate Research Companion to International Criminal Law: Critical Perspectives*, Ashgate Publishing, Farnham, 2013, pp. 407, 430.

³⁸⁰ See David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics*, Oxford University Press, Oxford, 2014, *passim*.

³⁸¹ See Jean Allain, “Orientalism and International Law: The Middle East as the Underclass of the International Legal Order”, in *Leiden Journal of International Law*, 2004, vol. 17, no. 2, p. 391.

³⁸² Cf. Wolfgang Kaleck, *Double Standards: International Criminal Law and the West*, Torkel Opsahl Academic EPublisher, Brussels, 2015, *passim*.

³⁸³ See Gerry Simpson, “International Law in Diplomatic History”, in James Crawford and Martti Koskeniemi (eds.), *The Cambridge Companion to International Law*, Cambridge University Press, Cambridge, 2012, pp. 25, 42 ff.

³⁸⁴ See Martti Koskeniemi, “International Law and Hegemony: A Reconfiguration”, in *Cambridge Review of International Affairs*, 2014, vol. 17, no. 2, pp. 172, 210.

and inconsistencies of the Comoros decision in light of its other practice, beg the conclusion that gravity can constitute a mere *ex post* justification of a decision adopted by the Prosecutor so as to avoid bringing Israeli Forces before the Court”.³⁸⁵ Thus, if political considerations, as it has been suggested here, play a decisive role in the decision-making processes of the Prosecutor, these concerns should be made transparent by establishing them positively through the invocation of the interests of justice enshrined in Article 53(1)(c) of the Rome Statute. Accordingly, the Prosecutor’s decision shall be subjected to judicial oversight which is required for proper quality control of the exercise of prosecutorial discretion, which can contribute to the effectiveness and the legitimacy of the Court.

If the Prosecutor pretends that her decisions are divorced from policy considerations, and rely on the notion of gravity for such policy considerations, she would be arbitrary, biased and discriminatory. She must make her arguments with regard to the policy issues explicit within the ambit of the interests of justice clause, thereby sharing the heavy burden of being a single individual possessing extraordinary discretion in the selection of situations.

The creation of a permanent international criminal court based on the model of an independent prosecutor was a result of two main concerns: firstly, some small and medium powers sought to weaken the authority of big powers by reducing the influence of the Security Council; and secondly, the agenda of a prospective court could not be determined by political bodies without compromising its independence and impartiality.³⁸⁶ Judicial oversight is a product of these concerns – that is, the transfer of control over prosecutorial decisions from the Security Council to the Court itself. Without such judicial oversight, the only things we should rely on in the prosecution processes of the gravest offences that shock humanity as a whole would have been the integrity and credibility of the individual who is selected for the position.³⁸⁷ Therefore, greater judicial involvement is required so as to reduce inter-institutional distrust, to enhance the legitimacy of prosecutorial choices, and, more importantly, to minimise the risk of arbitrary decision-making.³⁸⁸

³⁸⁵ Azarova and Mariniello, 2017, p. 127 ff., see *supra* note 285.

³⁸⁶ Cf. Schabas, 2016, p. 830, see *supra* note 184.

³⁸⁷ Cf. *ibid.*; Ambos, 2016, p. 340, see *supra* note 4.

³⁸⁸ Stahn, 2009, p. 279, see *supra* note 345.

As it has been crystallised by PTC I in its judicial review regarding the present situation, the Prosecutor should apply exacting legal requirements, and cease invoking gravity where concerns other than gravity are the prevailing factors. Despite the evident political nature of a decision not to initiate an investigation, if the Prosecutor persists with the mantra that his or her sole function is to apply the law, such approach does more harm than good to the institutional accountability, effectiveness and legitimacy of the ICC, which has been already the case in the Iraq referral, the first Palestine referral, and perhaps even more so in the situation in question. The prosecutorial powers regarding the initiation of an investigation are not arbitrary, but rather discretionary, which means the Prosecutor's *espace de manoeuvre* is shaped by the rules and principles embodied in the Statute. Yet, in practice, as Stahn writes: "Many of the key factors guiding the selection of situations and cases were developed outside the box of legality requirements and thus moved from the domain of review to the area of prosecutorial policy".³⁸⁹ The judicial review is the only remedy provided in the Rome Statute that enables the referring entity to put its arguments forward. As in the present situation, if the Pre-Trial Chamber requests a reconsideration, the Prosecutor should take such a decision seriously.

Considering her wide discretionary powers and her role as a linchpin of the Court in the filtering process in the selection of situations, the Prosecutor has been dubbed as the "Gatekeeper of the ICC".³⁹⁰ Unfortunately, some practices of hers, including the low quality of preliminary examination performance in the present situation, inevitably conjure up Kafka's gatekeeper before the law.

17.9. Postscript

On 29 November 2017, after the manuscript of this chapter was submitted, the Prosecutor announced that the review had been completed, and that she had informed Pre-Trial Chamber I of her decision under Rule 108(3) of the Rules of Procedure and Evidence not to initiate an investigation in

³⁸⁹ *Ibid.*, p. 270.

³⁹⁰ Héctor Olásolo, "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. 2, pp. 87, 89; Lovisa Bådagård and Mark Klamberg, "The Gatekeeper of the ICC – Prosecutorial strategies for selecting situations and cases at the International Criminal Court", in *Georgetown Journal of International Law*, 2017, vol. 48, no. 5.

the situation.³⁹¹ Upon this decision, on 23 February 2018, the Government of the Union of Comoros submitted the “Application for Judicial Review by the Government of the Union of the Comoros”.³⁹² On 2 March 2018, Pre-Trial Chamber I ordered the Prosecutor and the victims’ legal representative, in case they wish to make submissions, to do so no later than 3 April 2018.³⁹³ On 13 March 2018, the Prosecutor applied to Pre-Trial Chamber I to dismiss the Government of Comoros’s application *in limine* for lack of jurisdiction.³⁹⁴ On 3 April 2018, representatives for victims submitted the victims’ response to the Application for Judicial Review by the Government of the Comoros.³⁹⁵

The present author shall not analyse the parties’ submissions here in detail. At this juncture, it would suffice to say that instead of reconsidering her decision not to initiate an investigation into the situation, she has invested considerable energy to respond to Pre-Trial Chamber I’s reconsideration decision, which is more or less a detailed account of the Prosecutor’s failed appeal to the Appeals Chamber. Her analysis in regard to the evidence made available to her after 6 November 2014 suffers from similar methodological and analytical errors that have been analysed in this study. It remains to be seen whether Pre-Trial Chamber I shall dismiss the Comoros’ and the victims’ application for review *in limine* or decide to review the Prosecutor’s decision not to proceed with an investigation. In any event, the central issue, as put by the victims’ representative, is

³⁹¹ OTP, Notice of Prosecutor’s Final Decision under Rule 108(3), Annex 1, ICC-01/13-57-Anx1, 30 November 2017 (<http://www.legal-tools.org/doc/298503/>).

³⁹² ICC, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia, Application for Judicial Review by the Government of the Union of the Comoros, ICC-01/13-58-Red, 23 February 2018 (<http://www.legal-tools.org/doc/24c550/>).

³⁹³ 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 for an Extension of Time, ICC-01/13-60, 2 March 2018 (<http://www.legal-tools.org/doc/1b168c/>).

³⁹⁴ ICC, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia, Prosecution’s Response to the Government of the Union of the Comoros’ “Application for Judicial Review” (ICC-01/13-58 (Lack of Jurisdiction)), ICC-01/13-61, 13 March 2018 (<http://www.legal-tools.org/doc/a17312/>).

³⁹⁵ ICC, Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic of Greece and the Kingdom of Cambodia, Victims’ Response to the Application for Judicial Review by the Government of the Comoros filed pursuant to the Pre-Trial Chamber’s “Decision on the Request for an Extension of Time” of 2 March 2018, ICC-01/13-66, 3 April 2018 (<http://www.legal-tools.org/doc/1fd1a7/>).

“whether the Prosecutor is entitled to dispute the errors identified by the Majority, and not address them, and take a different view on the applicable law and not follow the law ruled on by the Judges; and, whether the OTP is then entitled to be free of any further review by the Judges who so directed”.³⁹⁶

Indeed, the Chamber’s judgment will have repercussions with regard to efficiency of the Court’s system of checks and balances, and it may provoke *de lege feranda* thoughts with respect to the review process under Article 53(3)(a) of the Statute, which is in the end a product of a compromise between the negotiating parties.

³⁹⁶ *Ibid.*, para. 4.

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ISBN e-book: 978-82-8348-105-1

Morten Bergsmo and Carsten Stahn (editors):

Quality Control in Preliminary Examination: Volume 2

Torkel Opsahl Academic EPublisher

Brussels, 2018

Publication Series No. 33 (2018)

ISBN print: 978-82-8348-111-2

ISBN e-book: 978-82-8348-112-9

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Publication Series No. 32 (2018):

Quality Control in Preliminary Examination: Volume I

Morten Bergsmo and Carsten Stahn (editors)

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

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

ISBNs: 978-82-8348-123-5 (print) and 978-82-8348-124-2 (e-book).

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Torkel Opsahl Academic EPublisher
E-mail: info@toaep.org
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CILRAP: Centre for International
Law Research and Policy

ISBN 978-82-8348-123-5



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