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Discretion and State Influence at the International Criminal Court: The Prosecutor's Preliminary Examinations

*By David Bosco**

In November 2016, the Office of the Prosecutor (OTP) at the International Criminal Court (ICC) produced an extensive report documenting the status of ten "preliminary examinations" it is conducting. These examinations cover situations in which crimes under the jurisdiction of the Court may have been committed but the prosecutor has not yet decided to open a full investigation.[1] The OTP's reporting practice has shed additional light on a process that has been opaque for much of the Court's existence and that has attracted relatively limited scholarly and specialist attention.[2]

More regular and detailed OTP reporting, and information from other sources, makes closer consideration of the preliminary examination phase possible. Even if speculative in certain respects, this analysis is important given the attention and criticism that the ICC's process of selecting situations for full investigation has attracted. The Court's focus on African conflicts, in particular, has provoked tension between the Court and several African leaders and apparently contributed to several African states' withdrawal from the Rome Statute (the Statute).[3] Understanding the Court's situation-selection process requires greater scrutiny of the preliminary examination phase.

This article focuses on a particular aspect of the ICC's preliminary examinations: the distinction between examinations conducted on the prosecutor's own initiative (*proprio motu*) and those conducted as a result of member state or United Nations Security Council referral. The OTP has insisted that it conducts the same type of preliminary examination regardless of the way in which Court involvement was triggered. I argue that the prosecutor has, in practice, developed two quite different processes. For member state and Security Council referrals, the prosecutor conducts a review tilted sharply toward opening a full investigation. In *proprio*

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[1] ICC Office of the Prosecutor, Report on Preliminary Examination Activities 2016 [hereinafter 2016 Preliminary Examination Report].

[2] For notable exceptions, see Pavel Caban, *Preliminary Examinations by the Office of the Prosecutor of the International Criminal Court*, 2 Czech Y.B. Pub. & Private Int'l L. 199 (2011); James Goldston, *More Candour About Criteria*, 8 J. Int'l Crim. Just. 383 (2010); Human Rights Watch, *Course Correction: Recommendations to the ICC Prosecutor for a More Effective Approach to 'Situations Under Analysis'* (June 6, 2010); Héctor Olásolo, *The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of the Office of the Prosecutor*, 5 Int'l Crim. L. Rev. 121 (2005); Héctor Olásolo, *The Prosecutor of the ICC Before the Initiation of Investigations: A Quasi-judicial or a Political Body?*, 3 Int'l Crim. L. Rev. 87 (2003).

[3] *See, e.g.*, *Burundi Notifies U.N. of International Criminal Court Withdrawal*, Reuters (Oct. 26, 2016), *at* http://www.reuters.com/article/us-burundi-icc-idUSKCN12Q287; *African Union Summit on ICC Pullout over Ruto Trial*, BBC News (Sept. 20, 2013) *available at* http://www.bbc.com/news/world-africa-24173557; Nicholas Kulish, *Kenyan Lawmakers Vote to Leave International Court*, N.Y. Times, Sept. 5, 2013, *at* A10.

motu situations, the presumption appears to be reversed. This bifurcation has important implications for the Court's docket and, ultimately, for its independence. The ICC statute is an elaborate compromise between the prerogatives of states and the interests of justice, and the apparent deference given to state and Security Council referrals provides important perspective on how the prosecutor is striking that balance. The divergence between the OTP's stated policy and its record also sheds light on how the prosecutor's office is navigating the myriad pressures it faces.

I. The Preliminary Examination Process

Most international courts and adjudicative bodies reserve for member states the power to initiate court action. The International Court of Justice, the World Trade Organization's dispute settlement system, and the Law of the Sea Tribunal, for example, all require that member states affirmatively trigger adjudication.[4] By contrast, the Rome Statute "vests the power to investigate and prosecute the politically sensitive crimes within its broad territorial sweep in a single individual, its independent prosecutor."[5] The ICC prosecutor's responsibility to select investigations from a range of situations places her in a very different position from most international judicial officials—but also from the prosecutors of other international criminal tribunals. The instruments that created those tribunals, including for the former Yugoslavia and Rwanda, defined the territorial and temporal boundaries within which the prosecutors were to work; the ICC prosecutor has few such limitations.

The Rome Statute attempts to address this new reality in part through the preliminary examination, "an important and necessary innovation compared to the pre-trial procedure of former International Criminal Tribunals . . . ."[6] The Statute makes the prosecutor's office responsible for "receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court."[7] The phrase "preliminary examination" appears only once in the Statute and is not precisely defined.[8] It has been usefully described 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 . . . ."[9] There is little in the Statute regarding

[4] *See* Statute of the International Court of Justice, Art. 38, June 26, 1945, 59 Stat. 1055, 33 UNTS 99 (providing that the Court shall hear "such disputes as are *submitted to it* . . .") [hereinafter ICJ Statute]; Understanding on Rules and Procedures Governing the Settlement of Disputes, Annex 2 to Marrakesh Agreement Establishing the World Trade Organization, Art. 1, Apr. 15, 1994 (providing that "this Understanding shall apply to *disputes brought* pursuant to the consultation and dispute settlement provisions of the agreements . . . ") in World Trade Organization, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 354 (1999); United Nations Convention on the Law of the Sea, ann. VI, Art. 21, opened for signature Dec. 10, 1982, UN Doc. A/CONF.62/122, 21 ILM 1261 (1982) (providing that "[t]he jurisdiction of the Tribunal comprises all disputes and all applications *submitted to it* in accordance with this Convention . . .").

[5] Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AJIL 510 (2003).

[6] Kai Ambos & Ignaz Stegmiller, *Prosecuting International Crimes at the International Criminal Court: Is There a Coherent and Comprehensive Prosecution Strategy?*, 59 Crime L. Soc. Change 415, 420 (2013).

[7] Rome Statute of the International Criminal Court, Art. 42(1), July 17, 1998, 2187 UNTS 3, *reprinted* in 1 United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Official Records (1998) [hereinafter Rome Statute].

[8] The term appears only in Article 15(6) of the Rome Statute.

[9] Otto Triffterer, Commentary on the Rome Statute of the International Criminal Court 592 (2d ed. 2008).

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how the prosecutor should conduct this preliminary work, and one commentator has argued that the document "offers no real guidance on the criteria that the Prosecutor is to apply in making determinations about which situations to pursue and which ones to ignore."[10] Indeed, several provisions create confusion about the standards that apply to these examinations and, in particular, how much deference the prosecutor should give to state preferences.

The Statute provides that three well-known mechanisms may "trigger" ICC inquiries.[11] First, a member state may refer a situation to the Court. Second, the UN Security Council, acting under Chapter VII of the UN Charter, may do so. Finally, the prosecutor may seek to initiate an investigation on her own.[12] This *proprio motu* power of the prosecutor was debated at length during the Rome Conference; it survived despite the strong opposition of several countries, including the United States.[13] The three principal trigger mechanisms—Council referral, member state referral, and *proprio motu* initiation—correspond to very different environments for the Court in terms of state support for its work. At one end of the spectrum, a Security Council referral means that the leading international authority on peace and security—and therefore several of the most powerful states—desire Court involvement in a given situation.[14] A member state referral means that at least one government, likely although not necessarily one directly affected by alleged crimes, seeks Court action.[15] By contrast, a *proprio motu* situation could mean that the prosecutor has received information about possible crimes primarily from nongovernmental sources and that no member state supports—or is willing to acknowledge support for—Court action. A key question is whether the prosecutor should conduct preliminary examinations with the same receptivity to opening a full investigation notwithstanding these potentially significant differences in state support.

Certain provisions of the Statute suggest uniformity in the preliminary examination process. Article 53, which guides the prosecutor in determining whether to open a full investigation, provides only that the prosecutor shall evaluate "the information made available to him or her" and determine if there is a "reasonable basis" to proceed with a full investigation.[16] The wording of Article 53 suggests that this test is "applied in the same manner to all triggers . . . ."[17] The provision also implies that a full investigation is the default course of action; the prosecutor

[10] William A. Schabas, *Victor's Justice: Selecting 'Situations' at the International Criminal Court*, 43 J. MARSHALL L. REV. 535, 544 (2010).

[11] Article 12(3) of the Statute provides what can be considered a fourth trigger mechanism. It permits nonmember states to grant the Court jurisdiction with respect to specific crimes. The International Criminal Court (ICC) Office of the Prosecutor (OTP) has noted, however, that Article 12(3) should not be considered a trigger mechanism of its own but is merely a jurisdictional provision that requires some other trigger. *See* ICC OFFICE OF THE PROSECUTOR, POLICY PAPER ON PRELIMINARY EXAMINATIONS, n. 25. (2013) [hereinafter POLICY PAPER ON PRELIMINARY EXAMINATIONS].

[12] Rome Statute, *supra* note 7, Art. 15.

[13] For a statement of the U.S. concerns regarding the prosecutor's authority, see Marc Grossman, Under-Secretary for Political Affairs, American Foreign Policy and the International Criminal Court, Remarks to the Center for Strategic and International Studies (May 6, 2002), *available at* http://2001-2009.state.gov/p/us/rm/9949.htm.

[14] A Council referral does not mean that the territorial state will necessarily support an ICC role. The two Council referrals to date, in Sudan and Libya, were made in the face of opposition from the government on whose territory the crimes were alleged to have occurred.

[15] In practice, state referrals have always come from the state on whose territory the alleged crimes have been committed.

[16] Rome Statute, *supra* note 7, Art. 53(1).

[17] Ambos & Stegmiller, *supra* note 6, 421.

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shall initiate an investigation *unless* there is no reasonable basis to proceed.[18] Yet other elements of the Statute lead to the conclusion that the trigger mechanism should affect the preliminary examination process. Article 15, which describes the *proprio motu* power of the prosecutor, provides that the prosecutor shall petition to open a full investigation, "if [she] concludes that there is a reasonable basis to proceed."[19] Juxtaposing the phrasing of Articles 15 and 53, the OTP itself has noted that the prosecutor begins referral and *proprio motu* preliminary examinations at different points:

> Where the prosecutor receives a referral, Article 53 provides that the Prosecutor *shall* initiate an investigation *unless* he determines that there is no reasonable basis to proceed under the Statute . . . . When the Prosecutor receives a communication, the test is the same but the starting point is reversed: the Prosecutor shall not seek to initiate an investigation unless he first concludes that there is a reasonable basis to proceed.[20]

The statutory case for differentiated preliminary examinations does not rest solely on the relationship between Articles 15 and 53. The provision on preliminary admissibility challenges, Article 18, also distinguishes between different triggers. It provides mechanisms through which states can demonstrate to the Court that they are investigating a given situation and thereby prevent the prosecutor from opening a full investigation due to complementarity. Yet Article 18 refers only to investigations begun through member state referral or *proprio motu* action.[21] The omission of the Security Council trigger implies that states cannot challenge admissibility, at least at an early stage, when the Council has referred a situation. The unstated corollary is that the prosecutor need not conduct a full admissibility assessment during the preliminary examination of a Council referral.[22] The apparent removal of such a significant obstacle has led some observers to argue that the Statute creates a "fast-track" process for Council referrals.[23]

[18] Rome Statute, *supra* note 7, Art. 53(1).

[19] Rome Statute, *supra* note 7, Art. 15(3).

[20] ICC Office of the Prosecutor, Annex to the 'Paper on Some Policy Issues Before the Office of the Prosecutor': Referrals and Communications 1–2 (2004) [hereinafter Annex on Referrals and Communications]. *See also* Goldston, *supra* note 2, at 391; Human Rights Watch, *supra* note 2, at 4 (noting that the "Rome Statute creates a heavy presumption that the OTP is to open formal investigations into situations referred by governments and the Security Council . . .").

[21] Rome Statute, *supra* note 7, Art. 18. Article 19, which provides additional detail on challenges to the admissibility of cases, does not repeat that distinction between different types of referrals. Yet Article 19 also discusses only the admissibility of "cases" and not "situations," an indication that it is concerned with admissibility challenges at a later stage.

[22] There are several reasons that the drafters might have wanted to treat a Council referral differently in terms of admissibility challenges. The Council can create jurisdiction where none existed previously, so perhaps it can also override other barriers—such as admissibility concerns—to Court action. Indeed, some commentators have argued that the OTP should have *no* discretion about whether to launch a full investigation once the Council has referred. For an argument that the Rome Statute unacceptably limits the power of the Security Council by providing for any prosecutorial discretion even in the case of Council referrals, see Jens David Ohlin, *Peace, Security and Prosecutorial Discretion*, *in* The Emerging Practice of the International Criminal Court 185 (Carsten Stahn & Goran Sluiter eds., 2009).

[23] *See* Olásolo, *The Prosecutor of the ICC Before the Initiation of Investigations*, *supra* note 2, at 101. Whatever the textual merit of that view, the prosecutor's office has rejected the notion that it need not conduct a full admissibility analysis when there is a Council referral. *See* Sharon A. Williams & William A. Schabas, *Article 13: Exercise of Jurisdiction*, *in* Triffterer, *supra* note 9, at 570 ("The Prosecutor has made it abundantly clear, in his reports to the Security Council, that he believes he is required to determine whether the case is admissible pursuant to the provisions of Article 17. There have been no objections from members of the Council.").

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Viewed together, Articles 15, 18, and 53 suggest different levels of substantive review during the preliminary examination phase. One scholar has advocated several distinct standards, with Security Council referrals receiving the least scrutiny from the prosecutor and *proprio motu* situations the greatest.[24] In addition to the textual support described, this interpretation has a political logic, at least from a perspective that is respectful of state authority. The prosecutor might feel most confident that a proposed investigation has merit when the fifteen-member Security Council has recommended it. Referral by a member state also gives the prosecutor some reassurance but deserves greater independent analysis. The prosecutor should be most cautious when no state has referred. However plausible, the Statute certainly does not require this reading, and the uniformity suggested by Article 53 in isolation is an obstacle to this interpretation.

The relevance of trigger mechanisms to preliminary examinations is clearer in procedural terms. Most important, the prosecutor must seek the approval of a pretrial chamber of judges before opening a full investigation *proprio motu*.[25] This requirement was included to ease concerns about the danger of an unchecked prosecutor.[26] Unlike in referral situations, therefore, the OTP conducts its *proprio motu* preliminary examinations knowing that it must present evidence to a panel of judges in order to launch a full investigation. Procedural distinctions also appear when the prosecutor decides *not* to seek a full investigation. Absent a state or Security Council referral, the prosecutor has an obligation only to notify the sources of the information that led to the examination.[27] These sources have no recourse or means to appeal the decision.[28] By contrast, the Statute affords the Security Council and member states that have referred situations the opportunity to request—via the pretrial chamber—that the prosecutor reconsider her decision.[29] The prosecutor therefore faces enhanced scrutiny of the preliminary examination in two contexts: (1) when she affirmatively decides to pursue a *proprio motu* situation; and (2) when she decides *not* to pursue a referral situation.

Given clear procedural and plausible substantive distinctions between *proprio motu* and referral situations, the OTP might have articulated an explicit preference for opening investigations in referral situations. Instead, it has rejected the notion that a lesser degree of scrutiny should apply for state or Security Council referrals.

> As required by the Statute, the Office's preliminary examination activities are conducted in the same manner irrespective of whether the Office receives a referral from a State Party or the Security Council, or acts on the basis of information on crimes obtained pursuant to article 15.[30]

This interpretation amounts to an assertion of the OTP's independence in conducting preliminary examinations and determining which merit full investigation. I argue below that the prosecutor has struggled to maintain this interpretation in practice.

[24] *See* Olásolo, *The Prosecutor of the ICC Before the Initiation of Investigations*, *supra* note 2, at 100–03.
[25] Rome Statute, *supra* note 7, Art. 15(3).
[26] *See, e.g.*, Morten Bergsmo & Jelena Pejic, *Article 15: Prosecutor*, *in* TRIFFTERER, *supra* note 9, at 583.
[27] Rome Statute, *supra* note 7, Art. 15(6).
[28] The pretrial chamber can, on its own initiative, request that the prosecutor review a decision not to initiate an investigation when it is based solely on the "interests of justice."
[29] Rome Statute, *supra* note 7, Art. 53(3).
[30] 2016 PRELIMINARY EXAMINATION REPORT, *supra* note 1, para. 10.

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II. The Court's Divergent Record

To date, the prosecutor's office has made public twenty-three preliminary examinations. The table below lists all known preliminary examinations by their current status:

Below, data on the outcomes and duration of preliminary examinations are disaggregated into referral and *proprio motu* categories.

Table 1.
Preliminary Investigations by Status

Closed	Ongoing	Converted to Full Investigation
Honduras	Afghanistan	Central African Republic
Korea	Burundi	Central African Republic II
Venezuela	Colombia	Cote d'Ivoire
	Comoros[31]	Democratic Republic of Congo
	Gabon	Georgia
	Guinea	Kenya
	Iraq/United Kingdom	Libya
	Nigeria	Mali
	Palestine	Sudan (Darfur)
	Ukraine	Uganda

Table 2.
Preliminary Examinations of State or UNSC Referrals

Situation	Dates[32]	Duration	Status
Uganda	Jan. 2004–July 2004	6 months	**Full investigation**
Democratic Republic of Congo	Apr. 2004–June 2004	<3 months	**Full investigation**
Central African Republic	Jan. 2005–May 2007	>2 years	**Full investigation**
Darfur, Sudan	Mar. 2005–June 2005	<4 months	**Full investigation**
Libya	Feb. 2011–Mar. 2011	2 weeks	**Full investigation**
Mali	July 2012–Jan. 2013	6 months	**Full investigation**
Comoros (*MV Mavi Marmara*)	May 2013–present	>1 year	*Continuing*
Central African Republic II	May 2014–Sept. 2014	4 months	**Full investigation**
Gabon	Sept. 2016–present	7 months	*Continuing*

The picture changes considerably when prosecutor-initiated preliminary examinations are considered.

Several patterns emerge. First, preliminary examinations initiated by the prosecutor rather than by referral rarely lead to full investigations. Of the fourteen preliminary examinations initiated by the prosecutor, only three (21 percent) have led to full investigations. And in one of those three cases (Cote d'Ivoire), the sitting government had affirmatively sought an investigation through the use of an Article 12(3) declaration, making the situation

[31] The OTP identifies this situation as "Registered Vessels of Comoros, Greece, and Cambodia."

[32] In several situations, including Afghanistan, the OTP has noted a date or period when the preliminary examination was "made public," rather than when it was opened, leaving some uncertainty about when the office deemed the examination active.

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TABLE 3.
PRELIMINARY EXAMINATIONS OF *PROPRIO MOTU* SITUATIONS

Situation	Dates	Duration	Status
Cote d'Ivoire	May 2003–June 2011	8 years	**Full investigation**
Iraq/United Kingdom	2004–Feb. 2006; May 2014–present	>5 years	*Closed, then reopened*
Venezuela	July 2003–Feb. 2006	2.5 years	Closed
Colombia	2004–present	>12 years	*Continuing*
Afghanistan	2007–present	>9 years	*Continuing*
Georgia	Aug. 2008–Oct. 2015	>7 years	**Full investigation**
Guinea	Oct. 2009–present	>7 years	*Continuing*
Honduras	Nov. 2010–Oct. 2015	>4 years	Closed
Nigeria	Nov. 2010–present	>6 years	*Continuing*
Korea	Dec. 2010–June 2014	3.5 years	Closed
Kenya	Jan. 2008–Nov. 2009	>1 year	**Full investigation**
Ukraine	Apr. 2014–present	>3 years	*Continuing*
Palestine	Jan. 2015–present	>2 years	*Continuing*
Burundi	Apr. 2016–present	>1 year	*Continuing*

functionally equivalent to a referral. By contrast, seven of the eight examinations initiated by state or Security Council referral have been followed by full investigations (87 percent). The pace at which a final determination is made also varies dramatically between the two sets of situations. The average duration of a preliminary examination initiated by the prosecutor is almost five years. The average duration of a preliminary examination initiated by state or UN Security Council referral is less than eight months. In cases of Security Council referral, the prosecutor has moved particularly fast. The Darfur preliminary examination lasted about three months, and the Libya inquiry became a full investigation in a matter of days.

The differences in the prosecutor's approach to these groups of situations are stark enough to suggest that, effectively if not formally, there are two distinct preliminary examination processes. In cases of state or Council referral, the office moves relatively quickly and with an eye to opening a full investigation. Without state support, however, the prosecutor proceeds slowly and is disinclined to open a full investigation. There are a range of possible explanations for the disparity in the outcomes of preliminary examinations, and this section considers several of the most likely.

Substantive: The Scale of the Alleged Crimes

The simplest—and, legally, the most satisfactory—explanation for the divergence would be differences in the nature or scale of the alleged crimes. The ICC is designed to address the world's most serious crimes but must prioritize certain situations over others. It is possible that situations involving the most severe and widespread crimes arrive at the Court either via state or Security Council referral while the prosecutor herself tends to initiate inquiries into somewhat less grave situations. There are several reasons this might be the case. First, some of the most serious situations can *only* reach the Court via Security Council referral, which is required when there is no territorial or nationality basis for Court involvement. Second, member states facing serious and sustained civil conflict may see Court involvement

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as a way of attracting broader international support and may therefore refer those situations to the Court.[33] Finally, the OTP's practice of soliciting state referrals may have encouraged referral in situations where the prosecutor had already determined that a situation was grave enough to warrant Court involvement. In the Democratic Republic of Congo and Uganda, the OTP has described "the use of *proprio motu* powers to identify a situation followed by a [solicited] referral by the territorial State . . . ."[34] This dynamic means that a full investigation effectively prompted by the OTP's independent action would be formally categorized as a referral.

Assessing whether relative severity accounts for the disparity in outcomes raises several conceptual and methodological challenges. A wide range of possible crimes come within the Court's jurisdiction, and the Statute provides little guidance on whether certain of these crimes should be considered the most serious. The concept of "gravity," referenced at several points in the Statute, is the most relevant to this inquiry, yet neither the Statute nor the Court have made clear how to determine the gravity of given situations. In early discussions of the concept, the prosecutor outlined several relevant factors:

> The most obvious of these is the number of persons killed as this tends to be the most reliably reported. However, we will not necessarily limit our investigations to situations where killing has been the predominant crime. We also look at number of victims of other crimes, especially crimes against physical integrity. The impact of the crimes is another important factor.[35]

The OTP's description of its gravity analysis has changed relatively little since that time. According to a 2007 policy paper, "the Office considers the scale of the crimes, the nature of the crimes, the manner of their commission and their impact."[36] That formulation is repeated almost verbatim in the more recent OTP analyses.[37] ICC judges have also entered the debate on gravity, but ultimately have insisted that that the term must be interpreted flexibly and is not susceptible to a precise formula.[38] Most analyses have concluded that gravity should incorporate both quantitative and qualitative factors.[39]

[33] There is evidence that the Ugandan government referred the situation of the Lord's Resistance Army as a way of seeking to attract broader international support for its counterinsurgency effort. *See* DAVID BOSCO, ROUGH JUSTICE: THE INTERNATIONAL COURT IN A WORLD OF POWER POLITICS 97 (2014).

[34] *See* ICC OFFICE OF THE PROSECUTOR, DRAFT POLICY PAPER ON PRELIMINARY EXAMINATIONS, para. 81. (2010) [hereinafter DRAFT POLICY PAPER ON PRELIMINARY EXAMINATIONS].

[35] Quoted in William Schabas, *Prosecutorial Discretion and Gravity*, *in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 22, at 231–32.

[36] ICC OFFICE OF THE PROSECUTOR, POLICY PAPER ON THE INTERESTS OF JUSTICE 5 (2007).

[37] *See, e.g.*, ICC OFFICE OF THE PROSECUTOR, THE SITUATION IN MALI: ARTICLE 53(1) REPORT, para. 11. (Jan. 2013) [hereinafter THE SITUATION IN MALI]. For an argument that the OTP in practice relied heavily on the number of victims in making gravity determinations during its first several years, see Kevin Jon Heller, *Situational Gravity Under the Rome Statute*, *in* FUTURE PERSPECTIVES IN INTERNATIONAL CRIMINAL JUSTICE (Carsten Stahn & Larissa Van Den Herik eds., 2010).

[38] The pretrial chamber in the *Lubanga* case imposed a fairly rigid formulation of gravity that was rejected by the appellate chamber. *See* Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58," Case No. ICC-01/04-169, paras. 69–79 (under seal July 13, 2006; reclassified public Sept. 23, 2008).

[39] *See, e.g.*, William Schabas, *Prosecutorial Discretion and Gravity*, *in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 22, at 231–34; Ray Murphy, *Gravity Issues and the International Criminal Court*, 17 CRIM. L. F. 281, 282–83 (2006).

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TABLE 4.
COMPARATIVE GRAVITY OF REFERRALS AND *PROPRIO MOTU* SITUATIONS

Situation	Estimated Civilian Deaths
Referrals (full investigations in bold)	
Central African Republic[40]	>1,000
Comoros[41]	9
Democratic Republic of Congo[42]	5,000–10,000
Gabon[43]	<50
Libya[44]	200–500
Mali[45]	>100
Darfur, Sudan[46]	>10,000
Uganda[47]	>2,000
Central African Republic II[48]	2,700–2,800
Proprio Motu (full investigations in bold)	
Afghanistan[49]	>24,000
Burundi[50]	>430
Colombia[51]	>3,000
Cote d'Ivoire[52]	700–1,000
Georgia[53]	500–1,000
Guinea[54]	>150
Honduras[55]	<50
Iraq/United Kingdom[56]	<50
Kenya[57]	>1,000
Korea[58]	2
Nigeria[59]	>3,000
Palestine[60]	>1,000
Ukraine[61]	2,000
Venezuela[62]	45

Here I use estimated civilian deaths as a proxy for the severity of a situation. Civilian deaths are defined as those deaths produced as a direct result of violence and exclude broader measures incorporating, for example, excess mortality rates and deaths as a result of deteriorating

[40] *See* Human Rights Watch, *State of Anarchy: Rebellion and Abuses Against Civilians* (Sept. 14, 2007) (noting several hundred civilian deaths).

[41] ICC OFFICE OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2013, para. 97 [hereinafter 2013 PRELIMINARY EXAMINATION REPORT].

[42] PLOUGHSHARES FUND, DEMOCRATIC REPUBLIC OF THE CONGO (1990-FIRST COMBAT DEATHS), *at* http://ploughshares.ca/pl_armedconflict/democratic-republic-of-the-congo-1990-first-combat-deaths/#Deaths.

[43] Opposition sources claimed that several dozen people died in postelection violence. The government reports that only three died. *See Returning Gabon Opposition Chief Still Claims He Won*, DAILY MAIL (Nov. 26, 2016).

[44] Estimates for civilian deaths during the Libyan conflict vary widely. For the period between February 15, 2011, and March 2, 2011, when the prosecutor announced an investigation, it appears that at least two hundred civilians were killed. *See* Report of the International Commission of Inquiry on Libya, UN Doc. A/HRC/19/68 (Mar. 8, 2012). Initial estimates cited in some media accounts were much higher but subsequent reporting cast doubt on these. *See* Alan J. Kuperman, *A Model Humanitarian Intervention? Reassessing NATO's Libya Campaign*, 38 INT'L SECURITY, 105–36 (2013).

[45] In announcing the opening of a formal investigation, the OTP did not provide estimates for civilian casualties but did outline a range of alleged war crimes. The incident that it examined in greatest detail was the execution of between 70 and 153 captured government security forces. *See* THE SITUATION IN MALI, *supra* note 37, paras. 90–93.

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health and sanitation conditions. This metric is imperfect in several respects. It does not take into account grave crimes, including torture and rape, which do not necessarily produce civilian deaths. It does not distinguish between accidental killing of civilians (which might not be criminal) and intentional killings (which likely are criminal). It also omits consideration of important war crimes such as execution of military personnel who have surrendered. Yet number of civilian deaths is a measure that the Court and other international actors use frequently, and it allows for a broad comparison of very different situations. For full investigations, the estimates provided are for civilian deaths between the time the Court acquired jurisdiction and the time the investigation was launched. For ongoing or closed preliminary

[46] Estimates of direct civilian deaths for the relevant time period vary widely, and the OTP did not produce its own estimate. The arrest warrant for Sudanese president Omar al-Bashir, for example, only references "thousands" of civilian deaths. The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, Warrant of Arrest, 6 (Mar. 4, 2009). The UN Commission of Inquiry for Darfur, which focused on 2003 and 2004, referenced "mass killing" of civilians and provides estimates for certain individual attacks but no aggregate figures. *See* International Commission of Inquiry on Darfur, Report to the Secretary-General Pursuant to Security Council Resolution 1564, Jan. 25, 2005. For a more concrete estimate, see PLOUGHSHARES FUND, SUDAN-DARFUR (2003-FIRST COMBAT DEATHS), *available at* http://ploughshares.ca/pl_armedconflict/sudan-darfur-2003-first-combat-deaths/#Deaths.

[47] In 2005, the prosecutor cited a total of 2,200 deaths in LRA attacks between mid-2002 and June 2004. *See* Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Fourth Session of the Assembly of States Parties, 28 November – 3 December 2005, The Hague, Nov. 28, 2005, 2.

[48] ICC OFFICE OF THE PROSECUTOR, SITUATION IN CENTRAL AFRICAN REPUBLIC II: ARTICLE 53(1) REPORT (Sept. 2014).

[49] UNITED NATIONS, ASSISTANCE MISSION TO AFGHANISTAN, AFGHANISTAN—ANNUAL REPORT 2016—PROTECTION OF CIVILIANS IN ARMED CONFLICT [hereinafter PROTECTION OF CIVILIANS IN ARMED CONFLICT: ANNUAL REPORT] 3 (Feb. 2017).

[50] ICC Office of the Prosecutor, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on Opening a Preliminary Examination into the Situation in Burundi (Apr. 25, 2016).

[51] *See* PROJECT PLOUGHSHARES, COLOMBIA (1964–FIRST COMBAT DEATHS), *available at* http://ploughshares.ca/pl_armedconflict/colombia-1964-first-combat-deaths/#Deaths. It is important to note that the ICC only acquired jurisdiction over war crimes in Colombia after 2009. Colombia was one of two countries to request a waiver of jurisdiction over war crimes that was made available in the Rome Statute. The determination of whether alleged killings were war crimes or crimes against humanity therefore becomes critical.

[52] International Criminal Court, Pre Trial Chamber III, "Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire" (Oct. 3, 2011), para. 64.

[53] The OTP reports have not included an estimated civilian death toll for the conflict. Outside sources estimate that a total of 850 people were killed in the fighting, many of them civilians. *See* REPORT OF THE INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA (vol. 1) 5 (2009).

[54] 2013 PRELIMINARY EXAMINATION REPORT, *supra* note 41, at para. 183.

[55] *Id.*, para. 64.

[56] ICC Office of the Prosecutor, Letter Concerning Situation in Iraq (Feb. 9, 2006).

[57] 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, para. 131 (Mar. 31, 2010).

[58] 2013 PRELIMINARY EXAMINATIONS REPORT, *supra* note 41, para. 107.

[59] *See, e.g.*, Human Rights Watch, *Spiraling Violence: Boko Haram Attacks and Security Force Abuses in Nigeria* 9 (Oct. 2012) (citing evidence of more than 2,800 deaths, primarily civilian).

[60] ICC OFFICE OF THE PROSECUTOR, REPORT ON PRELIMINARY EXAMINATION ACTIVITIES 2015, para. 63 [hereinafter 2015 PRELIMINARY EXAMINATION REPORT].

[61] 2016 PRELIMINARY EXAMINATION REPORT, *supra* note 1, para. 178.

[62] In its letter closing the preliminary investigation, the OTP reported that it had received information about forty-five murders as well as several dozen cases of torture and other forms of persecution. *See* ICC Office of the Prosecutor, Letter Concerning Situation in Venezuela 3 (Feb. 9, 2006).

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examinations, the totals are for civilian deaths for the period during which the ICC likely has jurisdiction. Whenever possible, the OTP's own estimates of civilian deaths are employed.

The data suggests that the relative severity of conflicts does help to explain the divergence in preliminary examination outcomes. Several *proprio moto* situations have markedly lower civilian death totals than those triggered by referrals. The situations in Guinea, Honduras, Korea, Iraq (taking into account significant jurisdictional limitations), and Venezuela have produced relatively low civilian death tolls. In several of these situations, there were allegations of other serious crimes, including torture and rape, but these crimes were also alleged to have occurred on a relatively limited scale.

There remain significant anomalies, however. Afghanistan has been the most salient; the civilian death toll there has long exceeded that in most other situations the ICC has chosen to investigate and yet the prosecutor has deliberated for more than nine years. Georgia also remained a preliminary examination for a period far in excess of the average. Colombia and Nigeria, which remain in the preliminary examination phase, feature civilian death tolls that are comparable to situations that have been investigated. These situations make consideration of other possible explanations for the pattern important, even if they are not susceptible to a similar kind of analysis.

Procedural: Admissibility and the Pretrial Chamber

The Statute's differing procedural requirements, discussed above, represent another possible explanation for the divergence between *proprio motu* situations and referrals. One important procedural factor is the OTP's admissibility analysis, and particularly its assessment of whether a state is undertaking its own investigation of alleged crimes. The OTP and the judges have determined that a self-referral that occurs in the absence of state action to prosecute relevant crimes constitutes an effective waiver of complementarity.[63] "The absence of national proceedings, i.e. domestic inactivity, is sufficient to make the case admissible."[64] That interpretation significantly simplifies the OTP's analysis during the preliminary examination and may therefore facilitate the move to a full investigation in referral contexts. In *proprio motu* situations, by contrast, the OTP has often spent considerable time and effort monitoring national proceedings and attempting to determine whether they constitute an adequate response. The prosecutor has also embraced the concept of "positive complementarity," which encourages the prosecutor not simply to determine whether adequate national investigations are occurring but to encourage them, sometimes through extended dialogue.[65] Territorial states that oppose ICC involvement can draw out the complementarity analysis by altering their accountability policy or announcing new initiatives that require further OTP analysis.

The role of the pretrial chamber in *proprio motu* situations may be even more consequential. As discussed, the prosecutor must seek authorization from a pretrial chamber before opening a full investigation *proprio motu*, a requirement that does not exist for investigations triggered by referral. One of the drafters of that provision has argued that the requirement

[63] *See, e.g.*, Claus Kress, *Self-Referrals and Waivers of Complementarity—Some Considerations in Law and Policy*, 2 J. Int'l Crim. Just. 944 (2004).

[64] Policy Paper on Preliminary Examinations, *supra* note 11, para. 47.

[65] *See* ICC Office of the Prosecutor, Prosecutorial Strategy: 2009–2012, para. 17 (2010).

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"was intended to provide judicial 'internal' safeguards for the Prosecutor's decisions and compensate for the absence of a referral from external actors."[66]

The judges have not treated this process as a mere formality. The situation in Kenya presented the judges the first opportunity to consider whether to authorize a *proprio motu* investigation. The chamber deliberated for four months before authorizing an investigation, and one of the three judges dissented. [67] German judge Hans-Peter Kaul acknowledged that the prosecutor faces a low evidentiary threshold but insisted that the Statute "requires a full, genuine and substantive determination" that is not "of a mere administrative or procedural nature."[68] With respect to Kenya, Kaul was not convinced that a state or organizational policy of attacking civilians existed. Without this element, he did not believe the prosecutor had demonstrated a reasonable basis to believe that crimes against humanity had been committed.[69] More broadly, he worried that a court that did not rigorously police its reach might become a "hopelessly overstretched, inefficient" institution.[70]

If the judges have indicated that they will scrutinize prosecutorial requests to open investigations *proprio motu*, they have also questioned prosecutorial decisions *not* to investigate in referral contexts. In 2015, the prosecutor announced her decision not to open an investigation of the 2010 Israeli raid on a flotilla of ships bound for the Gaza Strip. That incident was referred to the Court by the Union of the Comoros, an ICC member. Comoros sought reconsideration of the prosecutor's decision, and a panel of judges supported that request. In so doing, the judges criticized aspects of the prosecutor's reasoning for declining an investigation.[71] Together, the Kenya and Comoros experiences might give the prosecutor pause about seeking a full investigation in a *proprio motu* context or declining to investigate when there is a referral. In the context of limited resources and situations of comparable gravity, a prosecutor might be inclined to favor referral situations as the path of lesser resistance from the judges.

Practical: Investigations Without State Support

A third potential explanation for the pattern relates more to the feasibility of potential investigations than to procedural requirements. *Proprio motu* investigations may be rarer because the absence of a referral implies a lack of logistical and administrative support from key state actors. In an environment of state disinterest or hostility, the OTP may be simply unable to pursue an investigation even if it desires to do so. A full investigation generally requires access to the territory, the provision of security, government information, and official permission to conduct interviews. In some contexts, the OTP has suggested that the

[66] *See* Judge Silvia 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 Cote d'Ivoire, para. 9, Case No. ICC-02/11 (Oct. 3, 2011).

[67] Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, Case No. ICC-01/09, Dissenting Opinion of Hans-Peter Kaul (Mar. 31, 2010).

[68] *Id.*, paras. 14, 19.

[69] Because it was determined that no armed conflict existed in Kenya, the judges did not consider whether war crimes had been committed.

[70] *Id.*, para. 10.

[71] Decision on the Request of the Union of the Comoros to Review the Prosecutor's Decision Not to Initiate an Investigation, Case No. ICC-01/13-34, Diss. Op., Kaul, J., para. 44 (July 16, 2015).

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lack of state support might militate against a full investigation purely on these feasibility grounds:

> Will the necessary assistance from the international community be available, including on matters such as the arrest of suspects? In short, will it be possible in all reality to initiate an investigation at all? These are not matters which need normally trouble a domestic prosecutor, but they are all relevant to an ICC prosecution and they all underline the necessity of State support for the Office of the Prosecutor in the bringing of any investigation.[72]

The OTP has also noted the corollary: that when there has been a referral, and particularly when that referral comes from the state where the alleged abuses occurred, the office can be confident that some political will exists to support an investigation.[73] The office has also suggested that a referral from a state other than the territorial state has relevance in terms of the feasibility of an investigation. "Even if a referral comes from a third State not involved in the alleged crimes, the referral will indicate support for the involvement of the Court from that part of the international community."[74] While they have not crystalized into an explicit policy of privileging referrals, these formulations strongly suggest that the OTP considers the likelihood that states will support investigations but also, more speculatively, their willingness to support eventual enforcement of arrest warrants.

The institutional logic of this approach is evident: a Court investigation in the absence of a referral may put the Court in an untenable position. The prosecutor may lack the state support required to pursue and secure indictments. Even if indictments do eventually issue, these may remain unenforced, weakening the Court's credibility. According to a former OTP official, "if we wade into [situations] without the support or enthusiasm of the states involved, it's not likely to succeed."[75] Practical and procedural factors may also run together; if the OTP cannot secure cooperation from key states during a preliminary examination, it may lack the information necessary to satisfy the pretrial chamber's standards for a full investigation. Absent state support for an investigation, the prosecutor faces a difficult choice. She could seek to authorize an investigation nonetheless and insist that member states cooperate, perhaps even by publicly chiding them for failing to provide needed information and support. Alternatively, the prosecutor could simply wait until cooperation materializes, shifting her attention in the meantime to situations where an investigation is more feasible.

The OTP has interpreted the Rome Statute in ways that accentuate the prosecutor's already heavy reliance on state support during preliminary examinations and may render *proprio motu* investigations even less likely. First, the OTP has concluded that it "cannot invoke the forms of cooperation specified in Part 9 of the Statute from States" at the preliminary examination stage.[76] This interpretation of the Statute's provisions is surprisingly weak. Article 86 obliges member states to "cooperate fully with the Court in its investigation and

[72] ICC Office of the Prosecutor, Paper on Some Policy Issues Before the Office of the Prosecutor 2 (Sept. 2003).

[73] Annex on Referrals and Communications, *supra* note 20, at 5.

[74] *Id.* at 5.

[75] Bosco, *supra* note 33, at 175.

[76] Policy Paper on Preliminary Examinations, *supra* note 11, para. 85.

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prosecution of crimes within the jurisdiction of the Court."[77] The use of the word "investigation" does raise the question of whether member state cooperation obligations apply while the prosecutor is deciding whether to fully investigate. Several observers see a narrow reading as consistent with broader state concerns during the negotiations.[78] For states, the reassurance that is provided by the pretrial chamber's role in authorizing *proprio motu* investigations might be reduced if the prosecutor can make legally binding demands of states during preliminary examinations. A broader interpretation is also plausible, however. Member states with no obligation to cooperate during preliminary examinations could withhold vital information with the express intent of preventing a full investigation, an outcome difficult to reconcile with the object and purpose of the Statute.[79]

The OTP has also downplayed its own investigative authority during the preliminary examination phase. The Statute provides that the prosecutor may "take testimony at the seat of the court" during preliminary examinations. One commentator has noted the "exceptional" nature of the authority to take testimony "at a stage in which no investigation is open."[80] To date, the OTP has not acknowledged using this authority during its preliminary examinations and has instead stated that information during examinations "is largely obtained from external sources rather than the Office's own evidence gathering powers. . . ."[81] Moreover, the OTP has concluded that as a statutory matter it "does not enjoy investigative powers at the preliminary examination stage."[82] These interpretations on state obligations and the OTP's investigative authority put the prosecutor in a weak position during preliminary examinations and may, as a consequence, increase the practical obstacles to launching *proprio motu* investigations.

Political: Deferring to State Preferences

A related but distinct factor may also help explain the pattern of preliminary examination outcomes: the prosecutor may have decided to defer in most cases to the judgments of states about when the Court can play a useful role. The OTP has insisted that the interests of states will not influence its situation selection, but the pattern described above requires consideration of that possibility. The dramatic differences in the outcomes and lengths of preliminary examinations "give rise to the impression that the Prosecutor has been influenced by non-legal factors."[83]

There are several different ways in which state political preferences might bear on the OTP decisions regarding preliminary examinations. In a case of violence involving nonstate actors on the territory of an ICC member, the prosecutor may decide that a referral from that

[77] Rome Statute, *supra* note 7, Art. 86.

[78] Claus Kress & Kimberly Prost, *Article 86: General Obligation to Cooperate*, *in* TRIFFTERER, *supra* note 9, at 1515.

[79] *See* Olásolo, *The Triggering Procedure*, *supra* note 2, at 144 (arguing that member states' cooperation obligations extend to the preliminary examination phase).

[80] Giuliano Turone, *The Powers and Duties of the Prosecutor*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY (Antonio Cassese, Paola Gaeta & John R.W.D. Jones eds., 2002).

[81] POLICY PAPER ON PRELIMINARY EXAMINATIONS, *supra* note 11, para. 31.

[82] 2016 PRELIMINARY EXAMINATION REPORT, *supra* note 1, para. 11.

[83] CLAIRE GRANDISON, CENTER FOR HUMAN RIGHTS & HUMANITARIAN LAW, MAXIMIZING THE IMPACT OF ICC PRELIMINARY EXAMINATIONS 1 (2012).

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government is essential to its investigation having the political legitimacy it requires. Viewed from this perspective, a referral is a signal to the Court that an investigation would, in the judgment of the government, serve a useful purpose and not unduly disrupt ongoing political and social processes. The prosecutor, however, has several times indicated that the office cannot incorporate these considerations into its decision-making and that doing so is the responsibility of the Security Council. The OTP has insisted, for example, that the prosecutor cannot "assume the role of a mediator in political negotiations: such an outcome would run contrary to the explicit judicial functions of the Office and the Court as a whole."[84] By privileging referral situations, however, the prosecutor may have identified a way to take those concerns into account without doing so in a formal sense.

Political considerations could also impact the OTP in a much broader sense. The office might consider, for example, the preferences of states with strong interests in a given situation. This could particularly be the case when those states are major or regional powers whose support the prosecutor needs in a variety of contexts. The Court was born with weak support—if not active opposition—from several major powers, including the United States, Russia, China, and India. In order to build a relationship with these and other important states, the prosecutor may seek to avoid situations where major powers do not desire Court involvement and to engage with situations where they do. For the prosecutor, prioritizing referral situations for investigations may indirectly serve this broader strategic purpose. If they are so inclined, powerful states can employ political, economic, and diplomatic pressure to influence whether and when other states refer situations to the Court. A prosecutor that privileges referrals may be indirectly rewarding those efforts. To consider whether and how these factors have played out in practice, this article now turns to a more detailed examination of the long-standing preliminary examination in Afghanistan.

III. The Afghanistan Situation

Since at least late 2001, a state of armed conflict has existed in Afghanistan. That conflict has passed through several distinct phases and has involved multiple actors, including the Afghan government, Taliban and other antigovernment forces (based both in Afghanistan and Pakistan), and forces from a UN-authorized multinational coalition. Throughout its evolution, the conflict has produced significant civilian casualties. The United Nations estimates that almost 25,000 civilians have been killed since 2009, when it began regular reporting.[85] Afghanistan acceded to the Rome Statute in February 2003, and the Statute came into force for the country in May of that year.[86] Given the high civilian toll and the Court's broad jurisdiction, Afghanistan constitutes a notable case of ICC inaction in the face of large-scale crimes. It merits closer examination not because it is representative of all situations, but because it may make more visible possible determinants of OTP decision-making.[87]

[84] Draft Policy Paper on Preliminary Examinations, *supra* note 34, para. 74.

[85] *See* Protection of Civilians in Armed Conflict: Annual Report, *supra* note 49, at 3.

[86] See Assembly of States Parties, International Criminal Court, *at* https://asp.icc-cpi.int/en_menus/asp/states%20parties/fgha%20states/Pages/fghanistan.aspx; International Criminal Court, Preliminary Examination: Afghanistan, *at* https://www.icc-cpi.int/Afghanistan.

[87] For a discussion of the "extreme case" approach to case studies, see, e.g., Jason Seawright & John Gerring, *Case Selection Techniques in Case Study Research*, 61 Pol. Res. Q. 294, 301–02 (2008).

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ICC Involvement

From the time the ICC opened in July 2002 through mid-2009, Court officials released little information about the conflict in Afghanistan or potential Court involvement. In September 2009, then prosecutor Luis Moreno-Ocampo first offered detail by indicating that the office was considering a range of potential crimes, including intentional killing of civilians and torture. He also described the inquiry as "exceedingly complex."[88] In December 2011, as part of its first comprehensive report on preliminary examinations, the OTP classified Afghanistan as being in Phase II of the examination process, during which the office focuses on whether relevant crimes have been committed. The office cited allegations of deliberate targeting of civilians, torture, attacks on humanitarian targets and other protected objects, and recruitment of child soldiers but described the process of verifying allegations as "challenging and time-consuming."[89] A year later, the OTP's update on Afghanistan added several other categories of alleged crimes but repeated verbatim much of the 2011 analysis, including its description of the inquiry as particularly difficult. It also noted that resource constraints had significantly complicated its effort to verify allegations of crimes.[90]

The OTP's 2013 and 2014 assessments of the Afghanistan situation provided much more detail. They determined that there exists "a reasonable basis to believe that crimes within the Court's jurisdiction have been committed . . . " and moved the examination from Phase II to Phase III, during which the office addresses admissibility issues.[91] The OTP provided additional legal analysis of the conflict, including a determination that the conflict should be considered internal rather than international in nature.[92] The office also refined considerably the categories of alleged criminal activity under examination. The OTP found no reasonable basis to believe that pro-government forces had committed crimes against humanity or that they had intentionally targeted civilians. The office therefore left open only a few categories of crimes, including a range of potential crimes by Taliban forces and certain detention practices by the Afghan government and international forces. In its 2015 report, the OTP specifically identified U.S. detention practices as an area of interest and included brief analysis of how the United States had addressed those practices through internal investigations.[93] The next year, the OTP expanded its focus to include certain U.S. detention practices outside of Afghanistan (but related to the conflict) and indicated that its decision on whether to launch a full investigation was "imminent."[94] But to date, no decision has been made.

State Cooperation

The Afghan government and states with forces in the country have given no indication that they support an ICC investigation. At least initially, the knowledge of Afghan officials about

[88] *Court to Probe Afghan War Crimes*, BBC NEWS (Sept. 10, 2009), *at* http://news.bbc.co.uk/2/hi/south_asia/8247793.stm.

[89] ICC OFFICE OF THE PROSECUTOR, 2011 PRELIMINARY EXAMINATION REPORT, para. 30.

[90] ICC OFFICE OF THE PROSECUTOR, 2012 PRELIMINARY EXAMINATION REPORT, para. 38 [hereinafter 2012 PRELIMINARY EXAMINATION REPORT].

[91] 2013 PRELIMINARY EXAMINATION REPORT, *supra* note 41, para. 35.

[92] *Id.*, para. 39.

[93] 2015 PRELIMINARY EXAMINATION REPORT, *supra* note 60, paras. 128–30.

[94] 2016 PRELIMINARY EXAMINATION REPORT, *supra* note 1.

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the ICC's potential jurisdiction was limited. According to the former prosecutor, a senior Afghan ambassador at first was not even aware that the country was a party to the Rome Statute.[95] For their part, foreign governments involved in Afghanistan have focused almost entirely on attempting to rebuild and reform the country's institutions.[96] No significant donor state or troop contributor has expressed support for an ICC role in the country or substantively addressed accountability for serious crimes. "The United States and most of its allies have been largely silent on the law. In fact, it appears that a desire for a quick exit by NATO has stifled all discussion of the critical need to link reconciliation with accountability and to tackle Afghanistan's longstanding culture of impunity."[97]

The evident reluctance of both the Afghan government and its international partners to support an ICC role has manifested itself in limited and slow cooperation with the OTP. When the prosecutor first discussed the Afghanistan examination he indicated that he would "welcome" information from any involved states about potential crimes committed in the country. According to former OTP officials, the office sent at least one formal request for information to states with forces in the country. These officials indicate that its requests were mostly met with silence.[98] In its formal reports, the office has characterized state cooperation carefully but has referred to the lack of state enthusiasm. In its 2011 report, the OTP noted only that it is in contact with the Afghan government. The next year, it reported that "several requests for information sent by the Office the past two years to various States, including the Government of Afghanistan and States with troops in Afghanistan, have been dismissed or remain pending." The office did note that five states had replied to formal requests for information, although it did not characterize the quality of those responses.[99] In its most recent update, the office noted that it was still waiting for requested information from the Afghan government regarding national proceedings. It indicated that it had emphasized to relevant states that "effective cooperation is of the utmost importance for the work of the Office in this situation."[100] In keeping with its interpretation of the Statute, the OTP has never suggested that member states who do not provide information to the office are violating their legal obligations.

Interactions with the United States

The United States has played a critical role in Afghanistan since early 2002 and continues to have the largest foreign troop presence in the country. U.S. forces have engaged in a broad range of military action to root out Taliban and Al Qaeda forces in the country and to support the Afghan government. The central U.S. role poses a potential diplomatic challenge for the

[95] *See* Bosco, *supra* note 33, at 162–63.

[96] For a critical analysis of these efforts, see International Crisis Group, *Reforming Afghanistan's Broken Judiciary* 1 (Nov. 17, 2010) (noting that "resource allocation has been miserly, funding plans unrealistic and implementation weak").

[97] Candace Rondeaux & Nick Grono, *Prosecuting Taliban War Criminals*, N.Y. Times (Mar. 23, 2010), *at* http://www.nytimes.com/2010/03/24/opinion/24iht-edgrono.html.

[98] See Bosco, *supra* note 33, at 163.

[99] 2012 Preliminary Examination Report, *supra* note 90, para. 37.

[100] 2016 Preliminary Examination Report, *supra* note 1, para. 100; 2013 Preliminary Examination Report, *supra* note 41, paras. 226, 228. Since that update appeared, there are indications that the Afghan government has provided additional information to the prosecutor on national proceedings. *See* Stephanie van den Berg, *ICC: New Information Delays Decision on Afghan War Crimes Investigation* Reuters (July 5, 2017).

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prosecutor. Since early 2005, the United States has moved gradually but steadily from hostility toward the Court to support for most of its investigations. That shift has been important for the Court, and senior officials have publicly and privately welcomed the improved relationship.[101] However, there are indications that deeper ICC involvement in Afghanistan could complicate that relationship.

Several factors appear to be at play. The United States has devoted significant diplomatic resources to encouraging the stable development of Afghan politics. A Court investigation could complicate that process if it scrutinized the actions of former warlords and militia commanders now serving in government and their backers.[102] Likely as important from Washington's perspective, an ICC investigation could bring unwelcome scrutiny to certain U.S. practices. Independent observers and the Afghan government have complained repeatedly about targeting practices by international forces and the high level of civilian casualties. Human rights groups have also documented a series of alleged abuses by U.S. personnel on Afghan soil, primarily related to the detention and interrogation of individuals believed to be associated with the Taliban and Al Qaeda.[103]

Since 2013, there has been an ongoing dialogue between senior OTP staff and U.S. officials about Afghanistan that is not reflected in official OTP reports.[104] As the prosecutor's office prepared the Afghanistan section of its annual report on preliminary examinations in 2013, OTP officials sent the United States material they were considering including in their new report.[105] That material directly referenced allegations of American abuse of detainees, mostly between 2003 and 2006. Receipt of that material created alarm in Washington and prompted the United States to dispatch several senior officials to The Hague, where they discouraged the OTP from including the material in their draft report.[106] The report issued by the OTP several months later did not directly reference allegations against U.S. forces. A year later, however, the OTP did specifically identify possible crimes by U.S. forces as an area of interest. That clarification in turn produced expressions of concern and disappointment from U.S. officials, who argued that the Court cannot exercise jurisdiction over U.S. nationals.[107] These interactions provide a glimpse of the informal pressures the OTP can face as it considers whether to convert a preliminary examination into a full investigation.

"Slow-Walking" an Investigation?

The very high civilian death toll in Afghanistan all but rules out gravity as an explanation for the Court's failure to open an investigation. Given the scale of the alleged crimes, it does

[101] For a discussion of the improved relationship, see David Kaye, *American's Honeymoon with the ICC*, FOREIGN AFF. (Apr. 16, 2013), *at* http://www.foreignaffairs.com/articles/139170/david-kaye/americas-honeymoon-with-the-icc.

[102] For a recent exploration of the role of current and former warlords and commanders in Afghanistan's political transition, see DIPALI MUKHOPADHYAY, WARLORDS, STRONGMAN GOVERNORS, AND THE STATE IN AFGHANISTAN (2014).

[103] *See* Human Rights Watch, *Getting Away with Torture: The Bush Administration and Mistreatment of Detainees* (July 12, 2011).

[104] *See* David Bosco, *Is the ICC Investigating Crimes by U.S. Forces in Afghanistan?*, FOREIGN POL'Y (May 15, 2014).

[105] *Id.*

[106] *Id.*

[107] David Bosco, *The War over U.S. War Crimes in Afghanistan Is Heating Up*, FOREIGN POL'Y (Dec. 3, 2014).

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not appear that procedural requirements have restrained the prosecutor from seeking a full investigation. While judges have carefully reviewed past prosecution requests to open *proprio motu* investigations, it is unlikely that a panel of judges would refuse to authorize an investigation in the very bloody Afghanistan conflict. Moreover, the existence of a state of armed conflict in Afghanistan significantly expands the range of crimes the prosecutor could pursue. With the broad category of war crimes available, the difficult question of organizational policy that troubled Judge Kaul as he considered crimes against humanity in the Kenya situation would not be determinative.[108] Practical and political factors are therefore the most likely factors in the decision to delay a full investigation.

The practical obstacles to an Afghanistan investigation are formidable, and former OTP officials have cited these concerns as a reason for the office's delay.[109] The difficult security environment means that conducting an investigation would pose significant challenges for the OTP in terms of the safety of both its staff and witnesses. The situation in Afghanistan may also be less susceptible to investigation from outside than was the situation in Sudan, where the OTP was able to collect significant testimony from a large and mostly confined refugee population in neighboring Chad. Yet the Court's quick decision to launch an investigation in Libya—in the midst of intense conflict and without the support of the then government—stands as an important precedent. In the right political context, the OTP has proved willing to proceed with investigations even in the face of daunting practical obstacles. It is difficult to avoid the conclusion that political factors have at least contributed to the prosecutor's slow pace in Afghanistan.[110]

Conclusion

The ICC's situation selection has emerged as a critical issue for the Court's legitimacy and has produced sharp critiques from both certain governments and outside observers. This article has identified the preliminary examination process as a critical piece of the situation-selection puzzle. It has demonstrated that the Court is much less likely to initiate investigations in *proprio motu* situations than when there are referrals. It has explored a range of possible explanations for this pattern, including substantive, procedural, practical, and political factors. A precise weighting of these factors is not possible, but the available evidence suggests that substantive and procedural factors do not fully account for the disparity and that practical and political factors may have discouraged the OTP from at least certain *proprio motu* investigations. The gap between the Court's claim of evenhanded treatment of preliminary examinations and its record may grow. The difficulties that have surrounded the Court's Kenya investigation—one of only two investigations launched without either a Council referral or territorial state request—will likely serve as a cautionary experience for the Court.[111] The prosecutor's record thus far stands as a notable pattern for the study of the Court and,

[108] *See supra* text at notes 67–70.

[109] Author interview with former OTP official (on file with author).

[110] Kevin Jon Heller has argued that "[t]here is only one plausible answer [for the delay]: a desire to avoid angering the West, which has been militarily involved in Afghanistan for more than a decade." *The OTP's Remarkable Slow-Walking of the Afghanistan Examination*, Opinio Juris (Dec. 1, 2013).

[111] *See, e.g.*, *ICC Drops Uhuru Kenyatta Charges for Kenya Ethnic Violence*, BBC News (Dec. 5, 2014), *at* http://www.bbc.com/news/world-africa-30347019.

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more broadly, for inquiries into how formally independent international officials manage their relationships with states.

For the Court, this pattern forms part of a broader policy challenge: proving itself effective while also maintaining an appropriate distance from state power and influence. The OTP's unwillingness to acknowledge an evident preference for referrals suggests sensitivity about the office's independence and the perception that it might be yielding to state interests; a Court that responds primarily to state requests may appear to be less a pillar of global justice than a provider of judicial services to member states and to the Security Council. For the prosecutor, the most ambitious alternative to the current practice would be pursuing more full investigations absent a referral. To do so, however, the OTP would likely need to bolster its investigative capacity during preliminary examinations and perhaps even revisit its interpretation of its own authority and state obligations during this phase. More robust preliminary examinations would help the prosecutor proceed in an environment of state passivity or opposition and provide the type of evidence that the judges have required before authorizing investigations. Seeking to launch more *proprio motu* investigations would likely increase political friction between the Court and a number of states. If the prosecutor pursues this route, there is a high probability that several investigations will fail—and the distinct possibility that some states will seek to undermine the Court.

The Court may be better served simply by showing greater openness about its limitations. Explicitly acknowledging a preference for referral situations need not exclude the OTP from relevance in nonreferral contexts. Through its embrace of positive complementarity, the OTP has recognized that a preliminary examination can be more than a mere precursor to an investigation. As Christopher Keith Hall has written, "[t]he Court was not to be simply a passive institution, simply waiting for the Security Council, States parties and Article 12 (3) States or others to seize the Court."[112] The OTP has noted that the preliminary examination phase "offers a first opportunity for the Office to act as a catalyst for national proceedings" and that the office can "better identify the steps required to meet national obligations to investigate and prosecute serious crimes."[113]

Acknowledging a reluctance to launch *proprio motu* investigations would inevitably diminish the prosecutor's implicit threat to investigate situations on her own. But the Court's catalytic potential does not rest entirely on that possibility, and the OTP could still generate public awareness, share expertise, and, in certain circumstances, assist national judiciaries. During several long-running preliminary examinations, including in Colombia and Nigeria, the Court has interacted repeatedly with national authorities to monitor and encourage accountability. Whether and when those interactions are effective—and to what degree effectiveness hinges on the perceived threat of a full investigation—deserves greater attention.

[112] Christopher Keith Hall, *Developing and Implementing an Effective Positive Complementarity Prosecution Strategy*, *in* THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 22, at 220.

[113] ICC OFFICE OF THE PROSECUTOR, PROSECUTORIAL STRATEGY, 2009–2012, para. 38 (2010).

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