



**Cour  
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**International  
Criminal  
Court**

Le Bureau du Procureur  
The Office of the Prosecutor

## **Policy Paper on Preliminary Examinations**

November 2013

<http://www.legal-tools.org/doc/acb906/>

## Table of Contents

- Executive Summary**
- I. Introduction**
- II. The Rome Statute System**
- III. General Principles**
  - (a) Independence*
  - (b) Impartiality*
  - (c) Objectivity*
- IV. Article 53(1)(a)–(c) Factors**
  - (a) Jurisdiction*
  - (b) Admissibility*
    - (i) Complementarity*
    - (ii) Gravity*
  - (c) Interests of Justice*
- V. Conduct of Preliminary Examination**
  - (a) Initiation of Preliminary Examination*
  - (b) Procedure: a Statutory-Based Approach*
  - (c) Preliminary Examination Activities*
  - (d) Termination of Preliminary Examination*
- VI. Policy objectives**
  - (a) Transparency*
  - (b) Ending Impunity*
  - (c) Prevention*

## Policy Paper on Preliminary Examinations

### Executive Summary

1. In accordance with the Rome Statute, the Office of the Prosecutor (“OTP”) of the International Criminal Court (“ICC”) is responsible for determining whether there is a reasonable basis to proceed with an investigation into a situation pursuant to the criteria established by the Rome Statute, subject to judicial authorisation as appropriate. As reflected in the principle of complementarity, national jurisdictions have the primary responsibility to end impunity for the crimes listed under the Rome Statute, namely genocide, crimes against humanity, and war crimes. However, in the absence of genuine national proceedings, the OTP will seek to ensure that justice is delivered for crimes within the jurisdiction of the Court.
2. The Office will conduct, on the basis of its *proprio motu* powers under article 15 of the Statute, a preliminary examination of all situations that are not manifestly outside the jurisdiction of the Court. 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 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.
3. This policy paper describes the relevant Rome Statute principles, factors and procedures applied by the Office in the conduct of its preliminary examination activities.
4. The preliminary examination of a situation by the Office may be initiated on the basis of: (a) information sent by individuals or groups, States, intergovernmental or non-governmental organisations; (b) a referral from a State Party or the Security Council; or (c) a declaration accepting the exercise of jurisdiction by the Court pursuant to article 12(3) lodged by a State which is not a Party to the Statute.
5. Article 53(1)(a)-(c) of the Statute establishes the legal framework for a preliminary examination. It provides that the Prosecutor shall consider: jurisdiction (temporal, material, and either territorial or personal jurisdiction); admissibility (complementarity and gravity); and the interests of justice. The standard of proof for proceeding with an investigation into a situation under the Statute is ‘reasonable basis’.
6. Jurisdiction relates to whether a crime within the jurisdiction of the Court has been, or is being, committed. It requires an assessment of (i) temporal jurisdiction (date of entry into force of the Statute, namely 1 July 2002 onwards, date of entry into force for an acceding State, date specified in a Security Council referral, or in a declaration lodged pursuant to article 12(3)); (ii) material jurisdiction as defined in article 5 of the Statute; and (iii) either territorial or personal jurisdiction, which entails

that the crime occurs on the territory, or 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.

7. Admissibility comprises complementarity and gravity.

8. Complementarity involves an examination of the existence of relevant national proceedings in relation to the potential cases being considered for investigation by the Office. This will be done bearing in mind the Office's policy of focusing investigative efforts on those most responsible for the most serious crimes under the Court's jurisdiction. Where relevant domestic investigations or prosecutions exist, the Office will assess their genuineness.

9. Gravity includes an assessment of the scale, nature, and manner of commission of the crimes, and their impact, bearing in mind the potential cases that would be likely to arise from an investigation of the situation.

10. The 'interests of justice' are a countervailing consideration. The Office must assess whether, taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

11. There are no other statutory criteria. Factors such as geographical or regional balance are not statutory criteria for a determination that a situation shall be investigated by the Court. While lack of universal ratification means that crimes may occur in situations outside the territorial and personal jurisdiction of the ICC, this can only be remedied by the relevant State's becoming a Party to the Statute or lodging a declaration accepting the exercise of jurisdiction by the Court, or through a referral by the Security Council.

12. Preliminary examination activities will be 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. In all circumstances, the Office will independently evaluate the information available and analyse the seriousness of the information received. The Office does not enjoy full investigative powers at this stage, but may seek additional information from States, organs of the United Nations, intergovernmental and non-governmental organisations, and other reliable sources that are deemed appropriate. The Office may also receive written and oral testimony at the seat of the Court.

13. Before making a determination on whether to initiate an investigation, the Office will also seek to ensure that the States and other parties concerned have had the opportunity to provide the information they consider appropriate.

14. There are no timelines provided in the Statute for bringing a preliminary examination to a close. Depending on the facts and circumstances of each situation,

the Prosecutor may decide either to: (i) decline to initiate an investigation where the information fails to satisfy the factors set out in article 53(1)(a)-(c); (ii) continue to collect information on crimes and relevant national proceedings in order to establish a sufficient factual and legal basis to render a determination; or (iii) initiate the investigation, subject to judicial authorisation as appropriate.

15. In order to promote transparency of the preliminary examination process, the Office will provide reasoned decisions either to proceed or not to proceed with investigations, and will issue regular reports on its activities.

16. In the course of its preliminary examination activities, the Office will seek to contribute to the two overarching goals of the Rome Statute: the ending of impunity, by encouraging genuine national proceedings, and the prevention of crimes.

17. 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 State(s) concerned in relation to these crimes.

18. The Office will also seek to react promptly to upsurges of violence by reinforcing early interaction with States, international organisations and non-governmental organisations in order to verify information on alleged crimes, to encourage genuine national proceedings, and to prevent the recurrence of crimes.

## I. Introduction

19. This paper describes the OTP's policy and practice in the conduct of preliminary examinations, i.e., how the Office applies the statutory criteria to assess whether a situation warrants investigation.<sup>1</sup> The paper is based on the Rome Statute ("Statute"), the Rules of Procedure and Evidence ("Rules"), the Regulations of the Court ("RoC"), the Regulations of the Office of the Prosecutor, the Office's prosecutorial strategy and policy documents, and its experience over the first years of its activities.

20. This is a document reflecting an internal policy of the OTP. As such, it does not give rise to legal rights, and is subject to revision based on experience and in light of legal determinations by the Chambers of the Court.

21. The Office has made this policy paper public in the interest of promoting clarity and predictability regarding the manner in which it applies the legal criteria set out in the Statute.

## II. The Rome Statute System

22. As affirmed in its preamble, the goal of the Rome Statute is to put an end to impunity for the most serious crimes of international concern, and thus to contribute to their prevention. To achieve this goal, the Statute created an innovative system of international justice. This system is based on States interacting with an independent and permanent international criminal court, supported by international organisations and a global civil society. First, States committed to punish such crimes themselves, recalling "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes".<sup>2</sup> Second, they established the ICC to be "complementary to national criminal jurisdictions",<sup>3</sup> accepting that, should a State remain inactive or otherwise be unwilling or unable genuinely to investigate and prosecute crimes under the Court's jurisdiction, the ICC could independently decide to step in. Finally, they resolved "to guarantee lasting respect for and the enforcement of international justice", thus committing to cooperate with the ICC whenever and wherever it decides to act.<sup>4</sup>

23. Within this framework, national jurisdictions have the primary responsibility to investigate and prosecute the crimes listed in the Statute. The Court will intervene only in the absence of genuine national proceedings. It is the responsibility of the Office to determine whether the statutory criteria for the opening of investigations

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<sup>1</sup> The term 'preliminary examination' appears in article 15(6) of [the Statute](#), while article 42(1) provides that the Office shall be responsible for 'examining' referrals and any substantiated information on crimes within the jurisdiction of the Court.

<sup>2</sup> Preamble, para. 6, Statute.

<sup>3</sup> Articles 1 and 17, Statute.

<sup>4</sup> Part 9, Statute.

are met, subject to judicial authorisation as appropriate.<sup>5</sup> In the absence of genuine national proceedings, the OTP will seek to ensure that justice is delivered for crimes within the jurisdiction of the Court.

24. This role of the Prosecutor is a unique trait of the ICC. The ability of national and international courts to define their own jurisdiction within statutory parameters - *compétence de la compétence* - is well established. The International Military Tribunals in Nuremberg and Tokyo,<sup>6</sup> the International Criminal Tribunal for the Former Yugoslavia (“ICTY”),<sup>7</sup> the International Criminal Tribunal for Rwanda (“ICTR”),<sup>7</sup> the Special Court for Sierra Leone (“SCSL”),<sup>8</sup> and the Extraordinary Chambers in the Courts of Cambodia<sup>9</sup> (“ECCC”) were provided jurisdiction only over a specific situation.<sup>10</sup> The concerned States or the Security Council of the United Nations defined those situations, and decided that the intervention of a judicial mechanism was appropriate. These courts were neither in a position to decide against investigating, nor to expand their focus to other situations. By contrast, the Statute

<sup>5</sup> Articles 15(3), 42(1), 53(1) Statute. Judicial authorisation for the commencement of investigations is required where the Prosecutor wishes to proceed *proprio motu* pursuant to article 15, which requires the Pre-Trial Chamber to be satisfied that there is a reasonable basis to proceed; article 15(4), Statute.

<sup>6</sup> The IMT at Nuremberg was established by the Allied Powers for the “trial and punishment of the major war criminals of the European Axis” arising from World War II; Article 1, *Agreement by the Government of the United Kingdom of Great Britain and Northern Ireland, the Government of the United States of America, the Provisional Government of the French Republic and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis* (8 August 1945), [82 UNTS 280](#). The IMTFE was established for the “trial and punishment of the major war criminals in the Far East” arising from World War II; article 1, Charter of the International Military Tribunal for the Far East, [TIAS No. 1589](#). It was constituted by Special Proclamation by General MacArthur, Supreme Commander for the occupying Allied Powers in the Far East, acting on the authority granted him by the Moscow Conference of 26 December 1945; *Communiqué on the Moscow Conference of the three Foreign Ministers, signed at Moscow on 27 December 1945, and Report of the Meeting of the Ministers of Foreign Affairs of the Union of Soviet Socialist Republics, the United States of America and the United Kingdom, dated 26 December 1945, together constituting an Agreement relating to the preparation of peace treaties and to certain other problems*, [1948 UNTS 319](#).

<sup>7</sup> The ICTY and ICTR were established by the Security Council pursuant to Chapter VII of [the UN Charter](#) for the prosecution, respectively, of “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991”, [S/RES/827 \(1993\)](#), and “persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States between 1 January 1994 and 31 December 1994”, [S/RES/955 \(1994\)](#).

<sup>8</sup> The SCSL was established “to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996”; article 1, [Agreement between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on 16 January 2002](#).

<sup>9</sup> The ECCC was established by an agreement between the United Nations and the Government of Cambodia for the prosecution of “senior leaders of Democratic Kampuchea and those who were most responsible for the crimes and serious violations of Cambodian penal law, international humanitarian law and custom, and international conventions recognized by Cambodia, that were committed during the period from 17 April 1975 to 6 January 1979”; article 1, [Law on the Establishment of the Extraordinary Chambers](#).

<sup>10</sup> In the instance of the Special Tribunal for Lebanon (“STL”), the tribunal was, moreover, established to hear one or more specific cases, namely “persons responsible for the attack of 14 February 2005 resulting in the death of former Lebanese Prime Minister Rafiq Hariri and in the death or injury of other persons” and other connected cases; article 1, Statute of the Special Tribunal for Lebanon, [S/RES/1757](#).

does not predefine specific situations for investigation: it is the ICC that ultimately determines when and where the Court should intervene in accordance with the statutory criteria, which are the essence of the Office's preliminary examination process.<sup>11</sup>

### III. General Principles

25. The preliminary examination process is conducted on the basis of the facts and information available, and in the context of the overarching principles of independence, impartiality and objectivity.

#### (a) Independence

26. Article 42 of the Statute provides that the OTP shall act independently of instructions from any external source.<sup>12</sup> Independence goes beyond not seeking or acting on instructions: it means that decisions shall not be influenced or altered by the presumed or known wishes of any party, or in connection with efforts to secure cooperation.

27. The scope of the Prosecutor's examination, moreover, cannot be limited in a manner contrary to the Statute. Where a referral is accompanied by supporting documentation that identifies potential perpetrators, the Office is not bound or constrained by the information contained therein when conducting investigations in order to determine whether specific persons should be charged.<sup>13</sup> The same applies to any information received under article 15. While the Office interacts with, and may seek information from, States, organs of the United Nations, intergovernmental or non-governmental organisations, or other reliable sources,<sup>14</sup> any information received is subject to critical analysis and evaluation.

#### (b) Impartiality

28. The principle of impartiality, which flows from article 21(3) of the Statute, means that the Office will apply consistent methods and criteria, irrespective of the States or parties involved or the person(s) or group(s) concerned. No adverse distinction is drawn on grounds prohibited under the Statute.<sup>15</sup>

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<sup>11</sup> This was the subject of lengthy deliberations during the negotiation of the Statute. See, e.g., *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 50th Sess., Supp. No. 22, [U.N. Doc. A/50/22](#), ¶ 113 (1995); *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 51st Sess., Supp. No. 22, Vol. I, [U.N. Doc. A/51/22](#), ¶ 35 (1996).

<sup>12</sup> Article 42(1)-(2), Statute.

<sup>13</sup> Article 14(1)-(2), Statute. As the Statute indicates, the scope of the Prosecutor's investigation may encompass any crimes within the jurisdiction of the Court that are of relevance to the situation; articles 12, 13, 14(1), 15, 42(1), and 54(1)(a), Statute; rule 44(2), RPE.

<sup>14</sup> Articles 14(2) and 15(2), Statute; rule 104, RPE.

<sup>15</sup> Article 21(3) provides that the application and interpretation of the law pursuant to the Statute must be consistent with internationally recognised human rights, and be without any adverse distinction founded on grounds such as gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.



29. For instance, geo-political implications, or geographical balance between situations, are not relevant criteria for determining whether to open an investigation into a situation under the Statute.

*(c) Objectivity*

30. In accordance with article 54(1), the Office will investigate incriminating and exonerating circumstances equally in order to establish the truth.<sup>16</sup> The same principle of objectivity is applied at the preliminary examination stage in relation to information that could form the basis of a determination to proceed with an investigation.

31. As information evaluated at the preliminary examination stage is largely obtained from external sources, rather than through the Office's own evidence-gathering powers, (which are only available at the investigation stage),<sup>17</sup> the Office pays particular attention to the assessment of the reliability of the source and the credibility of the information.

32. The Office uses standard formats for analytical reports, standard methods of source evaluation, and consistent rules of measurement and attribution in its crime analysis. It checks internal and external coherence, and considers information from diverse and independent sources as a means of bias control.

33. 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.

#### **IV. Statutory Factors**

34. This section examines each of the factors set out in article 53(1)(a)-(c) that are applied at the preliminary examination stage in order to determine whether there is a reasonable basis to proceed with an investigation, based on the information available. 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'".<sup>18</sup>

35. These factors, described below, are applied to all situations, irrespective of whether the preliminary examination was initiated on the basis of information

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<sup>16</sup> Article 54(1)(a), Statute; regulation 34(1), [Regulations of the Office of the Prosecutor](#).

<sup>17</sup> A notable exception is testimony collected by the Office at the seat of the Court pursuant to article 15(2), Statute; rule 104, RPE.

<sup>18</sup> Situation in the Republic of Kenya, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, [ICC-01/09-19-Corr](#), 31 March 2010, para. 35.

received on crimes, by a referral, or by a declaration lodged pursuant to article 12(3).<sup>19</sup>

(a) *Jurisdiction*

36. In accordance with article 53(1)(a) of the Statute, the Prosecutor must determine whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been, or is being, committed.<sup>20</sup> Accordingly, there must be a reasonable basis to believe that the information fulfils all jurisdictional requirements, namely, temporal, subject-matter, and either territorial or personal jurisdiction.<sup>21</sup>

37. The temporal jurisdiction of the Court applies from the date of entry into force of the Statute, which for most States will be from 1 July 2002 onwards.<sup>22</sup> Temporal jurisdiction with respect to a particular situation may depend on the date of entry into force of the Statute for the State Party concerned in the case of a later ratification or accession, the date specified in a Security Council referral, or the date indicated in a declaration lodged pursuant to article 12(3).<sup>23</sup>

38. The subject-matter jurisdiction of the Court, as set out in article 5 of the Statute, extends to: (a) the crime of genocide, as defined in article 6; (b) crimes against humanity, as defined in article 7; (c) war crimes, as defined in article 8; and (d) the crime of aggression, with respect to which the Court shall exercise jurisdiction once the provision adopted by the Assembly of States Parties enters into force.<sup>24</sup>

39. Accordingly, for the purpose of assessing subject-matter jurisdiction, the Office considers, on the basis of available information, the relevant underlying facts and factors relating to the crimes that appear to fall within the jurisdiction of the Court; contextual circumstances, such as the nexus to an armed conflict or to a widespread or systematic attack directed against a civilian population, or a manifest pattern of similar conduct directed at the destruction of a particular protected group or which could itself effect such destruction; alleged perpetrators, including the *de jure* and *de*

<sup>19</sup> As rule 48 of the RPE provides: “[i]n 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).”

<sup>20</sup> In accordance with article 15(4), the Pre-Trial Chamber must also consider whether “the case appears to fall within the jurisdiction of the Court”. In the Situation in the Republic of Kenya, the Chamber observed that this requirement would be understood as relating to ‘potential cases’ within the situation at stake; [ICC-01/09-19-Corr](#), para. 64. See below, Section IV (b) “Admissibility”.

<sup>21</sup> Articles 12 and 13(b), Statute. See also *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment on the Appeal of Mr. Thomas Lubanga Dyilo against the Decision on the Defence Challenge to the Jurisdiction of the Court pursuant to article 19 (2) (a) of the Statute of 3 October 2006, [ICC-01/04-01/06-772](#), paras. 21 and 22; *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, [ICC-01/09-19-Corr](#), 31 March 2010, para. 39.

<sup>22</sup> Articles 11 and 24, Statute.

<sup>23</sup> See also article 11(2), Statute.

<sup>24</sup> The Court can exercise jurisdiction over the crime of aggression one year after the 30th ratification of the relevant amendment to the Rome Statute adopted at the Kampala Review Conference (2010), and no earlier than 2017: see [RC/Res.6](#) (28 June 2010); articles 15 *bis* and 15 *ter*, Statute.

*facto* role of the individual, group or institution and their link with the alleged crimes, and the mental element, to the extent discernable at this stage.

40. Territorial or personal jurisdiction of the Court applies if a crime referred to in article 5 of the Statute is committed on the territory or by a national of a State Party (article 12(2)) or a State not Party to the Statute which has lodged a declaration accepting the exercise of jurisdiction by the Court (article 12(3)).<sup>25</sup> In addition, the Court may exercise its jurisdiction in relation to any territory or national where the Security Council refers a situation, acting under Chapter VII of the UN Charter.<sup>26</sup> Only the Security Council may set aside the territorial and personal parameters set out in article 12 of the Statute. When using its *proprio motu* powers, the Office is bound by those parameters.

41. The establishment of the Court's jurisdictional scope in accordance with article 53(1)(a) defines in objective terms the parameters within which the Office conducts its investigative activities, i.e. the 'situation.'

(b) *Admissibility*

42. As set out in article 17(1) of the Statute, admissibility requires an assessment of complementarity (subparagraphs (a)-(c)) and gravity (subparagraph (d)). In line with its prosecutorial strategy, the Office will assess complementarity and gravity in relation to the most serious crimes alleged to have been committed and those most responsible for those crimes.<sup>27</sup> The Statute does not stipulate any mandatory sequence in the consideration of complementarity and gravity. The Prosecutor must be satisfied as to admissibility on both aspects before proceeding.

43. In determining whether to open an investigation, article 53(1)(b) requires the Office to consider whether "the case is or would be admissible under article 17." At the preliminary examination stage there is not yet a 'case', as understood to comprise an identified set of incidents, suspects and conduct.<sup>28</sup> Therefore the consideration of admissibility (complementarity and gravity) will take into account potential cases

<sup>25</sup> See also rule 44, RPE. It should be noted that article 12(3) is a jurisdictional provision, not a trigger mechanism. As such, declarations of the sort should not be equated with referrals, but will require a separate triggering by the Prosecutor *proprio motu* or by a State Party. See also regulation 45-46, RoC, which provide for the constitution of a Pre-Trial Chamber only following the Prosecutor's notification of a referral or of an intention to submit an article 15 request.

<sup>26</sup> Article 13(b), ICC Statute.

<sup>27</sup> *Situation in the Republic of Kenya*, Request for authorisation of an investigation pursuant to Article 15, [ICC-01/09-3](#), 26 November 2009, paras. 55 and 78; *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, [ICC-01/09-19-Corr](#), 31 March 2010, para. 50.

<sup>28</sup> The concept of a case has been defined by PTCI in the *Lubanga case* as including "specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects," and that the admissibility assessment consists of an examination of "both the person and the conduct which is the subject of the case before the Court;" *Prosecutor v. Thomas Lubanga Dyilo*, Decision on the Prosecutor's Application for Warrant of Arrest, Article 58, ICC-01/04-01/06 (10 February 2006), paras. 21, 31, 38, incorporated into the record by Decision [ICC-01/04-01/06-8-Corr](#).

that could be identified in the course of the preliminary examination based on the information available and that would likely arise from an investigation into the situation.<sup>29</sup> Similarly, Pre-Trial Chambers have held, in the context of their decisions on the Prosecutor's applications for authorisation to open an investigation into the Situation in the Republic of Kenya and the Situation in the Republic of Côte d'Ivoire, "admissibility at the situation phase should be assessed against certain criteria defining a 'potential case' such as: (i) the groups of persons involved that are likely to be the focus of an investigation for the purpose of shaping the future case(s); and (ii) the crimes within the jurisdiction of the Court allegedly committed during the incidents that are likely to be the focus of an investigation for the purpose of shaping the future case(s)."<sup>30</sup>

44. The identification of such potential cases is without prejudice to such individual criminal responsibility as may be attributed as a result of subsequent investigations. The assessment is by definition preliminary in nature, conducted for the specific purpose of preliminary examinations, and is not binding for future admissibility determinations or the subsequent conduct of investigations.<sup>31</sup>

45. As part of its preliminary examination of the Situation in the Republic of Kenya and the Situation in the Republic of Côte d'Ivoire, the Office similarly considered admissibility in the light of its stated policy of focussing on those bearing the greatest responsibility for the most serious crimes.<sup>32</sup>

*(i) Complementarity*

46. Pursuant to the requirements of articles 53(1)(b) and 17(1)(a)-(c), the complementarity assessment is case-specific and relates to whether genuine investigations and prosecutions have been or are being conducted in the State concerned in respect of the case(s) identified by the Office.<sup>33</sup> As described above, at the preliminary examination stage, this is assessed with respect to potential cases

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<sup>29</sup> *Situation in the Republic of Kenya*, Request for authorisation of an investigation pursuant to Article 15, [ICC-01/09-3](#), 26 November 2009, paras. 51 and 107; *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, [ICC-01/09-19-Corr](#), 31 March 2010, paras. 50, 182 and 188.

<sup>30</sup> [ICC-01/09-19-Corr](#), para. 50. See also *ibid*, 182 and 188; *Situation in the Republic of Côte d'Ivoire*, Corrigendum to "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-Corr](#) (3 October 2011), paras. 190-191 and 202-204.

<sup>31</sup> *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, [ICC-01/09-19-Corr](#), 31 March 2010, para. 50.

<sup>32</sup> *Situation in the Republic of Kenya*, Request for authorisation of an investigation pursuant to Article 15, [ICC-01/09-3](#), 26 November 2009, paras. 51-59; *Situation in the Republic of Kenya*, Prosecution's Response to Decision Requesting Clarification and Additional Information, [ICC-01/09-16](#) (3 March 2010); *Situation in the Republic of Côte d'Ivoire*, Request for authorisation of an investigation pursuant to article 15, [ICC-02/11-3](#) (23 June 2011), paras. 45-46.

<sup>33</sup> It should be noted, in line with the wording of articles 18(1) and 19(2)(b), that the complementarity principle extends to any State which has jurisdictional competence over a case and applies irrespective of whether that State is a Party to the Statute.

that would likely arise from an investigation into the situation.<sup>34</sup> An admissibility determination is not a judgement or reflection on the national justice system as a whole. If an otherwise functioning judiciary is not investigating or prosecuting the relevant case(s), the determining factor is the absence of relevant proceedings.

47. As confirmed by the Appeals Chamber, the first question in assessing complementarity is an empirical question: whether there are or have been any relevant national investigations or prosecutions.<sup>35</sup> This is expressly stated in articles 17(1)(a) ("being investigated or prosecuted"), 17(1)(b) ("has been investigated") and 17(1)(c) ("tried"). The absence of national proceedings, i.e. domestic inactivity, is sufficient to make the case admissible.<sup>36</sup> The question of unwillingness or inability does not arise and the Office does not need to consider the other factors set out in article 17. The Chambers of the Court have stated, moreover, 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.<sup>37</sup> The determination is, as already noted, case specific. This requires an examination of whether the national proceedings encompass the same persons for the same conduct as that which forms the basis of the proceedings before the Court.<sup>38</sup>

48. Inactivity in relation to a particular case may result from numerous factors, including the absence of an adequate legislative framework; the existence of laws that serve as a bar to domestic proceedings, such as amnesties, immunities or statutes

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<sup>34</sup> [ICC-01/09-19-Corr](#), paras. 50 and 182; [ICC-02/11-14-Corr](#) (3 October 2011), paras. 190-191.

<sup>35</sup> *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 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, [ICC-01/04-01/07-1497](#), 25 September 2009, para. 78.

<sup>36</sup> *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 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, [ICC-01/04-01/07-1497](#), 25 September 2009, para. 78. As noted in para. 100 below, 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.

<sup>37</sup> *Prosecutor v. Joseph Kony et al.*, 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.

<sup>38</sup> *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", [ICC-01/09-01/11-307](#), 30 August 2011, paras. 1, 47; *Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute;" [ICC-01/09-02/11-274](#), 30 August 2011, paras. 1, 46. See also *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision on the Admissibility of the Case Against Abdullah Al-Senussi," [ICC-01/11-01/11-466-Red](#), 11 October 2013, para. 66: "for the Chamber to be satisfied that the domestic investigation covers the same 'case' as that before the Court, it must be demonstrated that: a) the person subject to the domestic proceedings is the same person against whom proceedings before the Court are being conducted; and b) the conduct that is subject to the national investigation is substantially the same conduct that is alleged in the proceedings before the Court ... The determination of what is 'substantially the same conduct as alleged in the proceedings before the Court' will vary according to the concrete facts and circumstance of the case and, therefore, requires a case-by-case analysis."

of limitation; the deliberate focus of proceedings on low-level or marginal perpetrators despite evidence on those more responsible; or other, more general issues related to the lack of political will or judicial capacity.

49. Where there are or have been national investigations or prosecutions, the Office shall examine whether such proceedings relate to potential cases being examined by the Office and in particular, whether the focus is on those most responsible for the most serious crimes committed. If so, the Office shall then assess whether such national proceedings are vitiated by an unwillingness or inability to genuinely carry out the proceedings.<sup>39</sup>

50. For the purpose of assessing unwillingness to investigate or prosecute genuinely in the context of a particular case, pursuant to article 17(2), the Office shall consider whether (a) the proceedings were or are being undertaken for the purpose of shielding the person concerned from criminal responsibility for crimes within the ICC jurisdiction, (b) 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, and (c) the proceedings were or are not conducted independently or impartially and in a manner consistent with an intent to bring the person concerned to justice. In so doing, the Office may consider a number of factors.

51. Intent to shield a person from criminal responsibility may be assessed in light of such indicators as, manifestly insufficient steps in the investigation or prosecution; deviations from established practices and procedures; ignoring evidence or giving it insufficient weight; intimidation of victims, witnesses or judicial personnel; irreconcilability of findings with evidence tendered; manifest inadequacies in charging and modes of liability in relation to the gravity of the alleged conduct and the purported role of the accused; mistaken judicial findings arising from mistaken identification, flawed forensic examination, failures of disclosure, fabricated evidence, manipulated or coerced statements, and/or undue admission or non-admission of evidence; lack of resources allocated to the proceedings at hand as compared with overall capacities; and refusal to provide information or to cooperate with the ICC.

52. Unjustified delay in the proceedings at hand 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.

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<sup>39</sup> Pre-Trial Chamber I has observed that “the evidence related, *inter alia*, to the appropriateness of the investigative measures, the amount and type of resources allocated to the investigation, as well as the scope of the investigative powers of the persons in charge of the investigation ... which are significant to the question of whether there is no situation of ‘inactivity’ at the national level, are also relevant indicators of the State’s willingness and ability genuinely to carry out the concerned proceedings”; *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, “Decision on the Admissibility of the Case Against Abdullah Al-Senussi”, [ICC-01/11-01/11-466-Red](#), 11 October 2013, para. 210.

53. Independence in the proceedings at hand may be assessed in light of such indicators as, *inter alia*, the alleged involvement of the State apparatus, including those department responsible for law and order, in the commission of the alleged crimes; the constitutional role and powers vested in the different institutions of the criminal justice system; the extent to which appointment and dismissal of investigators, prosecutors and judges affect due process in the case; the application of a regime of immunity and jurisdictional privileges for alleged perpetrators belonging to governmental institutions; political interference in the investigation, prosecution or trial; recourse to extra-judicial bodies; and corruption of investigators, prosecutors and judges.

54. Impartiality in the proceedings at hand may be assessed in light of such indicators as, *inter alia*, connections between the suspected perpetrators and competent authorities responsible for investigation, prosecution or adjudication of the crimes as well as public statements, awards, sanctions, promotions or demotions, deployments, dismissals or reprisals in relation to investigative, prosecutorial or judicial personnel concerned.

55. Respect for principles of due process may be assessed in light of the provision of article 67 of the Statute as well as of the principles of due process recognised by international law as elaborated in relevant international instruments and customary international law.

56. For the purpose of assessing inability to investigate or prosecute genuinely in the context of a particular case, the Office will consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to collect the necessary evidence and testimony, unable to obtain the accused, or is otherwise unable to carry out its proceedings.

57. In conducting its evaluation, the Office may consider, *inter alia*, the ability of the competent authorities to exercise their judicial powers in the territory concerned; the absence of conditions of security for witnesses, investigators, prosecutors and judges or the lack of adequate protection systems; the absence of the required legislative framework to prosecute the same conduct or forms of responsibility; the lack of adequate resources for effective investigations and prosecutions; as well as violations of fundamental rights of the accused.<sup>40</sup>

58. When assessing unwillingness and inability, the Office considers whether any or a combination of the factors above impact on the proceedings to such an extent as to vitiate their genuineness. The complementarity assessment is made on the basis of

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<sup>40</sup> *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi", [ICC-01/11-01/11-344-Red](#), 31 May 2013, paras.199-215; *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, "Decision on the Admissibility of the Case against Abdullah Al-Senussi", [ICC-01/11-01/11-466-Red](#), 11 October 2013, para. 235.

the underlying facts as they exist at the time of the determination and is subject to revision based on change in circumstances.<sup>41</sup>

(ii) Gravity

59. Although any crime falling within the jurisdiction of the Court is serious,<sup>42</sup> article 17(1)(d) requires the Court to assess, as an admissibility threshold, whether a case is of sufficient gravity to justify further action by the Court. At the preliminary examination stage, in line with the approach regarding complementarity outlined above, the Office assesses the gravity of each potential case that would likely arise from an investigation of the situation.<sup>43</sup>

60. The Appeals Chamber has dismissed the setting of an overly restrictive legal bar to the interpretation of gravity that would hamper the deterrent role of the Court. It has also observed that the role of persons or groups may vary considerably depending on the circumstances of the case and therefore should not be exclusively assessed or predetermined on excessively formulistic grounds.<sup>44</sup>

61. The Office's assessment of gravity includes both quantitative and qualitative considerations. As stipulated in regulation 29(2) of the Regulations of the Office of the Prosecutor, the factors that guide the Office's assessment include the scale, nature, manner of commission of the crimes, and their impact.<sup>45</sup>

62. 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).

63. 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.

64. 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

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<sup>41</sup> Regulation 29(4), Regulations of the Office of the Prosecutor; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 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, [ICC-01/04-01/07-1497](#), 25 September 2009, para. 56.

<sup>42</sup> See Preamble para. 4, articles 1 and 5, Statute.

<sup>43</sup> [ICC-01/09-19-Corr](#), paras. 50 and 188; [ICC-02/11-14-Corr](#), paras. 202-204.

<sup>44</sup> *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," [ICC-01/04-169](#), under seal 13 July 2006; reclassified public 23 September 2008, paras. 69-79.

<sup>45</sup> See in concurrence *Prosecutor v. Abu Garda*, Decision on the Confirmation of Charges, [ICC-02/05-02/09-243-Red](#), 8 February 2010, paras. 31; [ICC-01/09-19-Corr](#), para. 188; [ICC-02/11-14-Corr](#), paras. 203-204.



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.

65. 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.

66. The gravity assessment is an important consideration in the opening of investigations, bearing in mind the potential cases that are likely to arise from an investigation. The principle of impartiality as described above does not mean an 'equivalence of blame' between different persons and groups within a situation, or that the Office must necessarily prosecute all sides, in order to balance-off perceptions of bias; instead, it requires the Office to focus its efforts objectively on those most responsible for the most serious crimes within the situation in a consistent manner, irrespective of the States or parties involved or the person(s) or group(s) concerned.

*(c) Interests of Justice*

67. The interests of justice are only considered where the requirements of jurisdiction and admissibility are met. While jurisdiction and admissibility are positive requirements, the interests of justice under article 53(1)(c) provide a potentially countervailing consideration that may give a reason not to proceed. As such, the Prosecutor is not required to establish that an investigation serves the interests of justice. Rather, the Office 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. The subject is treated in detail in a separate policy paper of the Office.<sup>46</sup>

68. Pursuant to article 53(1)(c), the Office will consider, in particular, the interests of victims, including the views 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.

69. The Statute, namely article 16, recognises a specific role for the Security Council in matters affecting international peace and security. Accordingly, the concept of the interests of justice should not be perceived to embrace all issues related to peace and security. In particular, the interests of justice provision should not be considered a conflict management tool requiring the Prosecutor to assume the role of a mediator

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<sup>46</sup> [Policy Paper on the Interests of Justice](#) (ICC-OTP 2007).

in political negotiations: such an outcome would run contrary to the explicit judicial functions of the Office and the Court as a whole.<sup>47</sup>

70. In terms of whether effective investigations are operationally feasible, the Office notes that feasibility is not a separate factor under the Statute as such when determining whether to open an investigation. Weighing feasibility as a separate self-standing factor, moreover, could prejudice the consistent application of the Statute and might encourage obstructionism to dissuade ICC intervention.

71. In light of the mandate of the Office and the object and purpose of the Statute, there is 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.

## V. Conduct of Preliminary Examination

72. Once a situation has been identified for preliminary examination, the Office will consider in accordance with the factors set out in article 53(1)(a)-(c), whether: (a) the information available provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed; (b) the case is or would be admissible under article 17, and (c) an investigation would serve the interests of justice.<sup>48</sup> This section details how a preliminary examination may be initiated, the phased approach that follows, and the activities that the Office may carry out pursuant to article 15.

### *(a) Initiation of Preliminary Examination*

73. The preliminary examination of a situation may be initiated by the Office taking into account any information on crimes within the jurisdiction of the Court, namely genocide, crimes against humanity or war crimes (and ultimately the crime of aggression).<sup>49</sup> This includes: a) information on crimes provided by individuals or groups, States, intergovernmental or non-governmental organisations or other reliable sources (also referred to as 'communications'); b) referrals from States Parties or the Security Council, or (c) declarations accepting the exercise of jurisdiction by the Court pursuant to article 12(3) lodged by a State which is not a Party to the Statute.<sup>50</sup>

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<sup>47</sup> In the same vein, the UN Secretary General has called for mediators to adjust to the legal process, rather than for the legal process to accommodate political negotiations: "Now that the ICC has been established, mediators should make the international legal position clear to the parties. They should understand that if the jurisdiction of the ICC is established in a particular situation, then, as an independent judicial body, the Court will proceed to deal with it in accordance with the relevant provisions of the Rome Statute and the process of justice will take its course;" *Enhancing Mediation and its Support Activities*, Report of the Secretary General, [S/2009/189](#), 8 April 2009, para. 37.

<sup>48</sup> Article 53(1), Statute; rule 48, RPE.

<sup>49</sup> See *supra* note 26.

<sup>50</sup> Regulation 25, [Regulations of the Office of the Prosecutor](#).

74. It should be recalled that the Prosecutor's *proprio motu* powers under article 15 of the Statute can be exercised only within the statutory parameters of the Court's jurisdiction, meaning with respect to crimes allegedly committed on the territory or by nationals of States Parties or States that have lodged a declaration accepting the exercise of jurisdiction by the Court; article 12(2)-(3), Statute. The Prosecutor cannot act on information concerning crimes allegedly committed outside of these parameters unless the Security Council has referred the situation.<sup>51</sup>

75. Pursuant to article 15, the Office may receive information on crimes from multiple sources. Such communications do not automatically lead to the start of a preliminary examination of a specific situation since the first phase of the approach described below is to filter out those that are manifestly outside the jurisdiction of the Court. The Office will only open a preliminary examination on the basis of article 15 communications when the alleged crimes appear to fall within the jurisdiction of the Court.

76. Upon receipt of a referral or a declaration pursuant to article 12(3), the Office will open a preliminary examination of the situation at hand. However, it should not be assumed that a referral or an article 12(3) declaration will automatically lead to the opening of an investigation. Documents accompanying a referral or declaration as well as any other information will be subject to critical analysis and independent evaluation by the Office.<sup>52</sup> The Office's approach to considering the factors set out in article 53(1)(a)-(c) will be the same irrespective of the way in which the preliminary examination is initiated.

*(b) Procedure: a Statutory-Based Approach*

77. In 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. While each phase focusses on a distinct statutory factor for analytical purposes, the Office applies a holistic approach throughout the preliminary examination process.

78. Phase 1 consists of an initial assessment of all information on alleged crimes received under article 15 ('communications'). The purpose is to analyse and verify the seriousness of 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. Specifically, the initial assessment distinguishes between communications relating to: a) matters which are manifestly outside the jurisdiction of the Court; b) a situation already under preliminary examination; c) a situation already under investigation or forming the basis of a prosecution; or d) matters which are neither manifestly outside the jurisdiction of the Court nor related to

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<sup>51</sup> Article 12(2)-(3), Statute.

<sup>52</sup> Articles 14(2) and 15(2), Statute; Rule 104, RPE. See also below Section III General Principles.

situations already under preliminary examination or investigation or forming the basis of a prosecution, and therefore warrant further analysis.

79. Communications deemed to be manifestly outside the Court's jurisdiction may be revisited in light of new information or circumstances, such as a change in the jurisdictional situation. Communications deemed to require further analysis will be the subject of a dedicated analytical report which will assess whether the alleged crimes appear to fall within the jurisdiction of the Court and therefore warrant proceeding to the next phase. Such communications shall be analysed in combination with open source information such as reports from the United Nations, non-governmental organisations and other reliable sources for corroboration purposes.

80. Phase 2, which represents the formal commencement of a preliminary examination of a given situation, focuses on whether the preconditions to the exercise of jurisdiction under article 12 are satisfied and whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court. Phase 2-analysis is conducted in respect of all article 15 communications that were not rejected in Phase 1, as well as of information arising 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.

81. Phase 2 analysis entails a thorough factual and legal assessment of the crimes allegedly committed in the situation at hand with a view to identifying the potential cases falling within the jurisdiction of the Court. The Office will pay particular consideration to crimes committed on a large scale, as part of a plan or pursuant to a policy. The Office may further gather information on relevant national proceedings if such information is available at this stage. Phase 2 leads to the submission of an 'Article 5 report' to the Prosecutor, in reference to the material jurisdiction of the Court as defined in article 5 of the Statute.

82. Phase 3 focusses on the admissibility of potential cases in terms of complementarity and gravity pursuant to article 17. In this phase, the Office will also continue to collect information on subject-matter jurisdiction, in particular when new or ongoing crimes are alleged to have been committed within the situation. Phase 3 leads to the submission of an 'Article 17 report' to the Prosecutor, in reference to the admissibility issues as defined in article 17 of the Statute.

83. Phase 4 examines the interests of justice. It results in the production of an 'Article 53(1) report,' which provides the basis for the Prosecutor to determine whether to initiate an investigation in accordance with article 53(1).

84. On the basis of the available information, and without prejudice to other possible crimes which may be identified in the course of an investigation, the 'Article 53(1) report' will indicate an initial legal characterisation of the alleged crimes within the jurisdiction of the Court. It will also contain 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.<sup>53</sup> 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.<sup>54</sup>

(c) *Preliminary Examination Activities*

85. At the preliminary examination stage, the Office does not enjoy investigative powers, other than for the purpose of receiving testimony at the seat of the Court, and cannot invoke the forms of cooperation specified in Part 9 of the Statute from States. As article 15 sets out, the Office may receive information on alleged crimes and may seek additional information from States, organs of the United Nations, intergovernmental and non-governmental organisations and other reliable sources that are deemed appropriate.<sup>55</sup> Accordingly, the Office can send requests for information to such sources for the purpose of analysing the seriousness of the information received.<sup>56</sup> 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 organisations.

86. The Office also examines the general context within which the alleged crimes, in particular, sexual and gender based crimes, have occurred and assesses the existence of local institutions, international organisations, non-governmental organisations and other entities available as potential sources of information and/or of support for victims.

87. With respect to information submitted under article 15 and oral or written testimony received at the seat of the Court, the Prosecutor has a duty to protect the confidentiality of such information or testimony or take any other necessary measures.<sup>57</sup> Similarly, when a decision is taken under article 15, any notice thereof shall be provided in a manner that prevents any danger to the safety, well-being and privacy of those who provided the information or the integrity of investigations or proceedings, in accordance with rule 49(1).

88. While all senders of communications are provided an acknowledgment of receipt, the Office refrains from disclosing their identity to the public. The Office may only publicly confirm receipt of a given communication if the sender has already

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<sup>53</sup> Regulation 49, RoC. The same process is applied as a matter of policy to both situations referred by a State Party or the Security Council as well as to those initiated pursuant to article 15.

<sup>54</sup> *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, [ICC-01/09-19-Corr](#), 31 March 2010, para. 50; regulations 33-35, [Regulations of the Office of the Prosecutor](#).

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> Article 15(2), Statute; rule 46, RPE.

made that fact public.<sup>58</sup> When seeking additional information pursuant to article 15, the Office confers with potential information providers regarding the scope and possible use of the information sought and the disclosure obligations that might ultimately arise should an investigation be opened and prosecution ensue.

(d) *Termination of Preliminary Examination*

89. No provision in the Statute or the Rules establishes a specific time period for the completion of a preliminary examination. This deliberate decision by the Statute's drafters ensures that analysis is adjusted to the specific features of each particular situation,<sup>59</sup> which may include, *inter alia*, the availability of information, the nature, scale and frequency of the crimes, and the existence of national responses in respect of alleged crimes.<sup>60</sup>

90. Preliminary examination of available information in respect of a situation must be performed in a comprehensive and thorough manner. The Prosecutor must continue the examination until the information provides clarity on whether or not a reasonable basis for an investigation exists. This may require gathering and analysing information on alleged crimes committed on an ongoing basis when such crimes are committed with high frequency and/or when new eruptions of violence occur. This may also entail 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.

91. If, after a preliminary examination, the Prosecutor concludes that the information available does not provide a reasonable basis for an investigation, the Office will inform those who provided the information, and make its decision public. This does not preclude the Office from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

92. The Pre-Trial Chamber may review a decision by the Prosecutor not to proceed with an investigation in relation to a referral by a State or the Security Council in accordance with article 53(3).<sup>61</sup> This applies with respect to the situation as a whole and not to individual lines of inquiry or case hypotheses within a situation. The Pre-Trial Chamber may also, on its own initiative, review a decision by the Prosecutor not to proceed with a referral if it is based solely on the interests of justice, pursuant to article 53(3).

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<sup>58</sup> See also regulation 28, [Regulations of the Office of the Prosecutor](#).

<sup>59</sup> *Situation in the Central African Republic*, 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, [ICC-01/05-7](#), 15 December 2006, paras. 9-10.

<sup>60</sup> *Ibid*, paras. 7-8.

<sup>61</sup> Such review may be conducted at the request of the State making the referral, or of the Security Council where it has referred the situation.

## VI. Policy Objectives

93. The Office is committed to providing regular public information on its preliminary examination activities. In the course of these activities, the Office will seek to contribute to two overarching goals of the Rome Statute, the ending of impunity, by encouraging genuine national proceedings, and the prevention of crimes.<sup>62</sup>

### *(a) Transparency*

94. In order to promote a better understanding of the process and to increase predictability, the Office will regularly report on its preliminary examination activities. Such information provided to the public will enable the Office to carry out its mandate without raising undue expectations that an investigation will necessarily be opened, while at the same time encouraging genuine national proceedings and contributing towards the prevention of crimes.

95. The Office will make the commencement of preliminary examinations public and will provide regular updates on the activities performed under phases 2 to 4.<sup>63</sup> The Office will seek to publicise its activities in various ways, including through early interaction with stakeholders, dissemination of relevant statistics on article 15 communications, public statements, periodic reports, and information on high level visits to the concerned States.

96. The Office reports on an annual basis on its preliminary examination activities, including by contributing to the Report of the Court to the Assembly of States Parties and the Report of the International Criminal Court to the UN General Assembly, as well as by issuing the OTP yearly report on preliminary examination activities.<sup>64</sup>

97. Additionally, the Office has adopted a policy of issuing situation-specific reports to substantiate the Prosecutor's decision to close a preliminary examination,<sup>65</sup> or to proceed with an investigation in the situation at hand.<sup>66</sup> Subject to rule 46, article 15 applications submitted to a Pre-Trial Chamber for the purpose of seeking authorisation to investigate are also made publicly available.<sup>67</sup> With respect to

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<sup>62</sup> Paras. 5 and 10, Statute ('Preamble').

<sup>63</sup> At the time of writing, the Office has made public its preliminary examinations of 19 situations, including those that have led to the opening of an investigation (Uganda, Democratic Republic of the Congo, Central African Republic, Darfur, Kenya, Libya, Côte d'Ivoire and Mali), those where the "reasonable basis to proceed with an investigation" test (article 53 (1)(a)-(c) of the Statute) was not met (Venezuela, Iraq and Palestine), and those that remain under preliminary examination (Colombia, Afghanistan, Georgia, Guinea, Nigeria, Honduras, the Republic of Korea and Comoros).

<sup>64</sup> [OTP Report on Preliminary Examination Activities 2013](#); [OTP Report on Preliminary Examination Activities 2012](#); and [OTP Report on Preliminary Examinations 2011](#).

<sup>65</sup> [OTP response to communications received concerning Venezuela](#), 9 February 2006; [OTP response to communications received concerning Iraq](#), 9 February 2006.

<sup>66</sup> ICC Office of the Prosecutor, [Situation in Mali, Article 53\(1\) Report](#), 16 January 2013.

<sup>67</sup> Situation in the Republic of Kenya Request for Authorisation of an Investigation Pursuant to Article 15, [ICC-01/09-3](#), 26 November 2009; Situation in the Republic of Côte d'Ivoire, Request for Authorisation of an Investigation Pursuant to Article 15, [ICC-02/11-3](#), 23 June 2011.

ongoing preliminary examinations, the Office will further publish situation-specific reports addressing issues of jurisdiction<sup>68</sup> and/or admissibility<sup>69</sup>, as appropriate.

98. Where the Office has initiated a preliminary examination independently under article 15 and assesses that there is a reasonable basis to proceed with an investigation, before requesting authorisation to the Pre-Trial Chamber, it will inform relevant State(s) with jurisdiction of its determination and inquire whether they wish to refer the situation to the Court.<sup>70</sup> If the State(s) concerned elect not to refer the situation, the Prosecutor will remain prepared to proceed *proprio motu*.

99. The purpose of such consultations is to demonstrate transparency and predictability with the States that would normally exercise jurisdiction over the crimes; to encourage national ownership and engagement with the judicial process; and to promote future cooperation. Pursuant to the principles of independence, impartiality and objectivity, such consultations are without prejudice to the Office's approach to case selection. It can have no predictive effect on the future direction of the Office's investigative and other prosecutorial activities, which remains subject to the evidence gathering process and the conduct of the parties to a conflict in the commission of alleged crimes.

#### (b) Ending Impunity through Positive Complementarity

100. In light of the global nature of the Court and the complementarity principle, 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 crimes. The complementary nature of the Court requires national judicial authorities and the ICC to function together. The preamble of the Statute recalls "the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" and provides that the ICC shall be "complementary to national criminal jurisdictions." Accordingly, States bear the primary responsibility for preventing and punishing crimes, while proceedings before the ICC should remain an exception to the norm. Where national systems remain inactive or are otherwise unwilling or unable to genuinely investigate and prosecute, the ICC must fill the gap left by the failure of States to satisfy their duty.<sup>71</sup> A Court based on the principle of complementarity ensures the international rule of law by creating an interdependent, mutually reinforcing international system of justice.

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<sup>68</sup> See e.g., ICC Office of the Prosecutor, [Situation in Nigeria, Article 5 Report](#), 5 August 2013. See also [Summary of submissions on whether the declaration lodged by the Palestinian National Authority meets statutory requirements](#), 3 May 2010.

<sup>69</sup> See e.g., [Interim Report on the Situation in Colombia](#), November 2012.

<sup>70</sup> [Report on the activities performed during the first three years \(June 2003 - June 2006\)](#), Ref-RP20060906-OTP. It should be noted there is no statutory duty on the Prosecutor to invite concerned States to refer a situation before seeking *proprio motu* authorisation pursuant to article 15.

<sup>71</sup> [Paper on some policy issues before the Office of the Prosecutor](#) (September 2003), p. 5.



101. 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.

102. The nature of the Office's efforts towards encouraging genuine national proceedings will be dependent on the prevailing circumstances. The Office will engage with national jurisdictions provided that it does not risk tainting any possible future admissibility proceedings. Nonetheless, the Office can report on its monitoring activities, send in-country missions, request information on proceedings, hold consultations with national authorities as well as with intergovernmental and non-governmental organisations, participate in awareness-raising activities on the ICC, exchange lessons learned and best practices to support domestic investigative and prosecutorial strategies, and assist relevant stakeholders to identify pending impunity gaps and the scope for possible remedial measures. Any interaction between the Office and the national authorities cannot be construed as a validation of the national proceedings, which will be subject to independent examination by the Office taking into account all of the relevant factors and information.

103. The Office has also adopted a policy of investigating and prosecuting those most responsible for the most serious crimes, based on the evidence collected in the course of an investigation.<sup>72</sup> At the preliminary examination stage, the Office's efforts towards encouraging genuine national proceedings will centre on potential cases that fall within the ambit of this policy, without being limited to those cases. The Office's prosecutorial strategy is without prejudice to States' obligations to investigate and prosecute international crimes, regardless of the level of responsibility of the perpetrators.

*(c) Prevention*

104. The Office will seek to perform an early warning function. For this purpose, it will systematically and proactively collect open source information on alleged crimes that appear to fall within the jurisdiction of the Court.

105. This will allow the Office to react promptly to upsurges of violence by reinforcing early interaction with States, international organisations and non-governmental organisations in order to verify information on alleged crimes, to encourage genuine national proceedings and to prevent reoccurrence of crimes.

106. The Office may also issue public, preventive statements in order to deter the escalation of violence and the further commission of crimes, to put perpetrators on

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<sup>72</sup> In appropriate cases, the OTP will expand its general prosecutorial strategy to encompass mid- or high-level perpetrators, or even particularly notorious low-level perpetrators, with a view to building cases up to reach those most responsible for the most serious crimes. See ICC Office of the Prosecutor, [OTP Strategic Plan \(June 2012-2015\)](#), para. 22.

notice, and to promote national proceedings, as it has done with respect to Georgia, Kenya, Guinea, South Korea, Nigeria, Côte d'Ivoire and Mali.<sup>73</sup>

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<sup>73</sup> See *e.g.* [Prosecutor's statement on Georgia](#) (14 August 2008); [OTP statement in relation to events in Kenya](#) (5 February 2008); [ICC Prosecutor confirms situation in Guinea under examination](#) (14 October 2009); [Statement by ICC Deputy Prosecutor Fatou Bensouda on Guinea](#) (19 November 2010); [ICC Prosecutor: alleged war crimes in the territory of the Republic of Korea under preliminary examination](#) (6 December 2010); [OTP Statement on Electoral Violence in Nigeria](#) (21 April 2011); [Statement by ICC Prosecutor Luis Moreno-Ocampo on the situation in Côte d'Ivoire](#) (21 December 2010); [OTP statement about the situation in Mali](#) (24 April 2012); [Statement of the Prosecutor on Mali](#) (1 July 2012).