Preliminary Examination and Legacy/Sustainable Exit: Reviewing Policies and Practices

Background

1. On 29 September 2015, the *Grotius Centre for International Legal Studies* and the *Centre for International Law Research and Policy*, held an international expert seminar on the 'The Peripheries of Justice Intervention'.[1] The meeting was designed to take stock of policies and practices regarding preliminary examinations ('PEs') and exit/legacy strategies. It focused on four key areas: goals and functions of PEs, the legal framework governing PEs, the practice and methodology of the Office of the Prosecutor ('OTP') and strategies for 'legacy'-building and sustainable exit for the ICC. The meeting was held as part of the project of 'Post-Conflict Justice and Local Ownership', funded by the Netherlands Organization for Scientific Research.[2]

Context, Nature and Functions of PEs

2. The first session was devoted to the goals and functions of PEs. PEs have gained increased importance over past years in ICC practice. They involve some of 'hardest' questions and choices facing the ICC. Their length differs considerably across situations.

(i) Notion

3. The notion of 'preliminary' examination' was discussed. Some concerns were expressed that the notion was unclear in its scope and a misnomer given the length of proceedings. It was made clear that the term 'preliminary' should be understood as referring to the nature of analysis, rather than its temporal scope.

(ii) Objectives and effects

4. The objectives and effects of PEs remain understudied. According to the OTP Strategic Plan 2016-2018,. sub-goals for the 2016-2018 time period include: '(1) further developing cooperation activities and networks related to preliminary examinations, (2) further enhancing complementarity at the preliminary examination stage, and (3) continuing to increase the transparency of and public information on preliminary examinations'[3]. One of the key questions is whether PEs are mainly a gateway to investigations, or whether they have objectives and functions of their own, irrespective of ICC investigations.

5. Several participants argued that PEs have a certain intrinsic value that goes beyond investigations. The point was made that the OTP may have more leverage over States during PEs than during investigation, due the scope of choice/discretion involved and the unpredictability of the outcome. OTP action might have most effects on actors on the ground at this stage, since unlike in the context of arrest warrants, the Office was not

[1] The meeting was held under the 'Chatham House' rule. This document has been prepared under the sole responsibility of the *Grotius Centre for International Legal Studies* on the basis of the diversity of views expressed, and does not intend to reflect agreements of any kind.
[2] More information at http://postconflictjustice.com/.
[3] OTP, Strategic Plan, 2016-2018, para. 54, at http://www.icc-cpi.int/iccdocs/otp/070715-OTP_Strategic_Plan_2016-2018.pdf

yet 'locked in'. It was argued that in situations where the context is right, PEs could be used to facilitate choices in relation to peace and justice. PEs could be used to facilitate a number of goals: prevention of atrocity crimes, shape the agenda of peace negotiations, or serve as catalyst for complementarity and/or transitional justice. PEs could also have a certain deterrent effect due to their element of surprise, their 'watchdog function' (i.e. the fact of 'being watched'), and the structural relationship between the OTP and the state concerned (i.e. monitoring, putting pressure, providing reward for behaviour). These factors make PEs a powerful instrument, even in the absence of binding cooperation obligations under Part 9.[4]

6. Participants identified certain internal and external factors that can influence the impact of PEs. Internal factors mentioned include: OTP strategy regarding timing and negotiations, communication with the state and sensitivity to events on the ground. External factors include sensitivity of the government to international accountability, the prospects of a negotiated peace and/or the degree of popular support.

7. Some suggestions were made as to how the OTP could increase its impact. Factors include: monitoring and reporting on the state of the judicial system; clearer communication of expectations; and sending the message that any state could be targeted, including the powerful ones or the referring state, as a matter of institutional policy ('madman theory').

(iii) Limitations

8. It was at the same time acknowledged that an expansive approach to PEs has limitations. Attention was drawn to the fact that, according to OTP policy, prevention and 'positive complementarity' are policy considerations that are secondary. The main purpose of the PE is to inform the OTP whether to initiate an investigation. The OTP would not open a PE merely with the purpose of prevention or 'positive complementarity'.

9. It was noted that the use of PEs as leverage carries certain risks. It can conflate the judicial function of the Court with wider ambitions of restorative justice. Concerns were expressed that the ICC does not have the institutional capacity to exercise both functions, and that such engagement might entail a strain on the Court's resources. It was also argued the ICC intervention can cause certain critical side effects: a risk of derailing peace negotiations, rising victim expectations, or 'mimicking' of ICC processes at the national level.

(iv) Regulation

10. Different views were expressed as to whether PEs would require further regulation. It was noted that the existing statutory framework (Statute and Rules of Procedure and Evidence) is rudimentary and that approaches had been mainly developed through ICC practice. A suggestion was made to clarify the existing regime through amendment, in order to provide greater certainty, transparency and consistency. Others participants cautioned against regulation, arguing that the process should not be overly codified and that there was a virtue in prosecutorial discretion that should be preserved. Otherwise, PEs would lose some of their leverage.

[4] Part 9 of the Statute applies to investigations and prosecutions.

Legal Framework of PEs

11. The second panel addressed the legal framework of PEs. The panel focused on three main aspects: prosecutorial discretion; the duration of PEs; and judicial review.

(i) Prosecutorial policy

12. Part of the discussion was devoted to OTP policy documents. The point was made that there might be certain discrepancies between the Regulations of the Office of the Prosecutor and the Policy Paper on Preliminary Examinations regarding the extent to which the Prosecutor enjoys discretion in opening PEs. While the Regulations seem to confer such discretion in all situations,[5] the Policy Paper suggests that opening a PE is mandatory upon receipt of a referral or an Article 12(3) declaration.[6]

13. Reference made to the fact that the opening of PE might incentivize domestic investigations or prosecutions under certain conditions. It was argued that PEs might cause a certain 'embarrassment' effect, but that this type of pressure might be 'positive' rather than 'negative' from a compliance perspective. It was noted that the capacity of PEs to spur national investigations might depend on a number of factors: (i) consistency across situations; (ii) publicity and (iii) a realistic prospect of ICC action. [7]

(ii) Duration of PEs and time limits

14. Particular attention was devoted to the duration of PEs, and in particular, the feasibility of timelines. Different views expressed in this regard.

15. Some participants argued that PEs by the OTP should be subject to timelines, or at least certain ideal timeframes. This view is based on the argument that the OTP has a duty to decide within a reasonable time whether or not to proceed to investigation. Several proposals were made as to how the timeframe of PEs could be regulated or better managed:

16. Some support was expressed in favour of fixed timelines and greater judicial review of prosecutorial action. It was argued that the OTP should be required to make a decision whether or not to investigate or prosecute. Scrutiny over decision-making could be enhanced in different ways:

(i) By prescribing a time limit:
PEs should be concluded within one year, with the possibility for the Prosecutor to request the Pre-Trial Chamber to extend the time limit, if necessary;
(ii) By requesting the Prosecutor to make a decision after expiry of the time limit:

[5] See Regulation 25(1) of the Regulations of the Office of the Prosecutor, ICC-BD/05-01-09: 'The preliminary examination […] *may* be initiated […]' (emphasis added).
[6] Office of the Prosecutor, Policy Paper on Preliminary Examinations, November 2013, para. 76: 'Upon receipt of a referral or a declaration pursuant to article 12(3), the Office *will* open a preliminary examination […]' (emphasis added).
[7] For a critical account of early practice, see Human Rights Watch, ICC: Course Correction Recommendations to the Prosecutor for a More Effective Approach to "Situations under Analysis", 16 June 2011, at https://www.hrw.org/news/2011/06/16/icc-course-correction.

The state that enjoys territorial or personal jurisdiction should be given the possibility to ask the Pre-Trial Chamber to request the Prosecutor to make a decision on whether to initiate an investigation; the same right could be given to victims;

(iii) By allowing the OTP to requesting a ruling on jurisdiction and admissibility:
The Prosecutor could seek a ruling on jurisdiction and admissibility from the Pre-Trial Chamber at any time during the PE. The point was made that Article 19(3) and Regulation 46(3) of the Regulation of the Court might already provide for such an avenue. But this reading remains contested since Article 19 refers to a 'case', rather than 'situation', and Regulation 46 (3) was not meant to create substantive rights.

17. An alternative suggestion was made to identify ideal timelines for action. It was argued that a reasonable timeframe should be formulated for specific phases of the assessment of PEs Reference was made to the fact that such timelines were deployed internally at the Court. The point was made that such guidelines would enhance the prospects of speedy action.

18. Other participants remained sceptical towards the idea of specifying time limits for prosecutorial action. Questions were raised about the feasibility of time limits in 'hard' cases. Would the Prosecutor have to proceed with an investigation even if she does not have enough information or should the PE be closed? How should the OTP and Chambers address situations where it is not clear whether an investigation should be initiated? Concerns were expressed that the complexity and fluidity of the situations make it difficult to impose timelines. Difficulties would arise in particular in situations of continuing or recurring violence (e.g. Nigeria and Honduras), or when peace negotiations are ongoing or agreements have been reach and the OTP has to give the state time to proceed with its own investigations and prosecutions. It was argued PEs tend to last longer when national proceedings are being conducted (e.g. Colombia, Georgia). A proposal was made that timelines should be formulated and applied in relation to the assessment of State action (e.g. Kenya).

(iv) Judicial review

19. A third part of the discussion related to the options of judicial review. Many of the statutory contours are still unclear or contested. Judicial review may arise at three different stages: (i) prior to preliminary examination, (ii) during preliminary examination, and (iii) after preliminary examination.

20. Judges can examine legal issues prior opening of a preliminary examination, by virtue of Regulation 46 (3) of the Regulations of the Court.[8] In the context of Egypt, Pre-Trial Chamber II rejected the request by President Mohamed Morsi and the Freedom and Justice Party of Egypt to review of the Prosecutor's decision 'not to open a Preliminary Examination'.[9] The Chamber claimed that 'the decisions of the Prosecutor pursuant to Article 15(6) or 53(1) of the Statute may be subject to judicial review'.[10] But it limited any

[8] Regulation 46 (3) regulates the assignment of a 'request or information not arising out of a situation assigned to a Pre-Trial Chamber'.
[9] Pre-Trial Chamber II, Decision on the 'Request for review of the Prosecutor's decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar's Decision of 25 April 2014, ICC-RoC46(3)-01/14, 12 September 2014.
[10] Ibid., para. 7.

potential review powers to Article 53 (3) (b), which applies 'only if the Prosecutor has taken her decision on the basis of the criterion of Article 53(l)(c) of the Statute i.e. if an investigation 'would not serve the interests of justice".'[11]

21. Similar problems arise during the preliminary examination. It remains contested to what extent Article 53 review powers apply to *proprio motu* action under Article 15[12], what qualifies as a 'decision' of the Prosecutor 'not to proceed', triggering powers of judicial review under Article 53 (1) and (2), and to what extent such a decision must be formalized. Differences also exist between how Pre-Trial Chambers have interpreted the scope of judicial review in relation to Article 15 at the end of the PE, i.e. regarding authorization to investigate ongoing and continuing crimes, or only crimes committed until the date of the filing of the request for authorization[13].

22. Some concerns were expressed in relation to the consequences of the *Comoros* decision.[14] It was argued that the decision might have negative side effects on PEs, since it curtails prosecutorial discretion and might indirectly force the OTP to open investigations in many situations. This might deprive the space for analysis under PEs, and might ultimately make the OTP more reluctant to open PEs, since it would inevitably be expected to follow up by an investigation.

Methodology

23. The third panel focused on the methodology guiding PEs. It addressed issues of transparency and confidentiality, monitoring, and the relationship with other fact-finders.

24. Some general aspects of OTP methodology were discussed. It was that argued that PEs should be approached with the use of potential cases as hypothesis. The statement in early OTP policy that the absence of cases before the Court is a sign of its success might be counterproductive.[15] Longer periods on the ground during PEs, and deeper engagement with situations and their context, might improve the quality of assessment and allow better case hypotheses.

(i) Transparency

25. Participants noted that the practice of the OTP has improved in terms of transparency. The OTP makes all PEs public, except for those that are in Phase 1 (when an initial assessment of all information on alleged crimes received under article 15 is conducted). A situation in Phase 1 may still be made public when there is considerable

[11] Ibid., para. 8.
[12] Rule 48 of the Rules states that, the Prosecutor shall consider the criteria set out in Article 53(l)(a)-(c) of the Statute.
[13] Pre-Trial Chamber II, 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 206-207; Pre-Trial Chamber III, 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, 15 November 2011, paras 177-179.
[14] Pre-Trial Chamber I, Decision on the request of the Union of the Comoros to review the Prosecutor's decision not to initiate an investigation, ICC-01/13, 16 July 2015.
[15] Ceremony for the solemn undertaking of the Chief Prosecutor of the International Criminal Court, 16 June 2003, p. 2 ([T]he absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success'), at https://www.iccnow.org/documents/MorenoOcampo16June03.pdf.

interest, or if the Office receives many inquiries. Participants highlighted that transparency still needs to be balanced against the Prosecutor's obligation to protect confidentiality under Rule 46 of the Rules of Procedure of Evidence.[16]

26. The pros and cons of publicity were further discussed. It was advanced, *inter alia*, that making PEs public may facilitate accountability and have a deterrent effect. On the other hand, transparency curtails the flexibility of the OTP, triggers additional inquiry, and may raise the expectations of affected communities. Further, making the names of possible suspects public raises due process concerns. The practice of the OTP so far has been to make public only the names of the states or armed groups involved, and not individuals.

(ii) Monitoring

27. Questions were raised regarding the role of the ICC in terms of monitoring: whether it should monitor domestic trial proceedings until a final judgment is rendered or simply make sure that proceedings are genuine at a given time, with the possibility of reopening the situation if circumstances change. Several participants shared reservations about the idea of long-term monitoring. They highlighted that the scope of PEs is quite different then trial monitoring and raised concerns with regard to resource limitations and the potential prolongation of PEs. It was suggested that closure, with potential re-opening might be a more suitable methodology. This power, however, has thus far not been exercised or tested.

(iii) Relationship to other fact-finders

28. Further attention was given to the relationship between the ICC and other fact-finders. Participants identified points of convergence between PEs and the work of fact-finding bodies (e.g. in terms of material jurisdiction, applicable standard – 'reasonable basis'/'reasonable grounds'). Participants stated that the work of fact-finding bodies can inform the OTP analysis and can be complementary to PEs. For example, Commissions of Inquiry (COIs) may have better access on the ground, while PEs remain remote, and their reports can inform the OTP about patterns of crimes. It was further pointed out that COIs have an important role in preserving evidence. These synergies should be used to 'break silos' between institutions and avoid that each institution needs to 're-invent the wheel'. At the same time, the sequencing of COIs and PEs might require attention.

'Legacy' and Sustainable 'Exit' after Intervention

29. The last panel focused on the importance of sustainable exit strategies and 'legacy'-building.

(i) Semantics

30. It was pointed that some of the existing semantics[17] are open to question. Experience across institutions suggests that disengagement/'exit' is not simply a moment in time, but a complex process in itself. In line of this, it might be more appropriate to speak of

[16] It reads: 'Where information is submitted under article 15, paragraph 1, or where oral or written testimony is received pursuant to article 15, paragraph 2, at the seat of the Court, the Prosecutor shall protect the confidentiality of such information and testimony …'

[17] See Report of the Court on complementarity: Completion of ICC activities in a situation country, ICC-ASP/12/32, 15 October 2013.

'completion', rather than 'exit'. Similar concerns were expressed in relation to 'legacy'.[18] The point was made that international criminal courts and tribunals are 'legacy' leavers, rather than 'legacy' creators. 'Legacy' should be understood in the sense of a plurality of 'legacies', and might at best a site of contestation. The question was raised whether the notion of 'heritage' might be better suited to capture the work of international criminal courts and tribunals.

(ii) Review of strategies

31. Participants stressed the necessity of planning 'exit' strategies once a PE is made public in order to manage the expectations of the different actors involved: states, victims and affected communities, media. The ICC needs strategies for each of the following situations: (i) a PE is opened, but the Prosecutor decides not to initiate an investigation; (ii) an investigation has been initiated, but cases do not proceed to trial; and (iii) cases have reached the trial stage.

32. Drawing on the experience of the *ad hoc* tribunals, participants made a series of recommendations for each of the three situations:

(i) The OTP should carefully explain its decisions not to proceed with an investigation, bearing in mind that this will also constitute the basis for future challenges;
(ii) If PEs are prolonged, it should explain the reasons behind this. The longer a PE lasts, the higher the negative impact of a decision not to investigate, and the more devastating for the OTP's credibility (except only if the national jurisdiction proceeds with the investigation);
(iii) The Prosecutor should not open investigations that are not feasible and unlikely to result in trials;
(iv) The OTP should plan 'exit' strategies at the same time that it plans intervention. It should decide in advance how many cases it is going to investigate, who, and for how long;
(v) Even when cases proceed to trial and are completed, it will be impossible for the ICC to close the impunity gap. Thus, the ICC should explain to stakeholders the goals of prosecutions, the impact of justice on peace, should communicate its limitations clearly, as well as its reasons for exiting and implications.

33. Participants stressed that disengagement/'exit' is not merely a budgetary issue, but closely tied to complementarity strategy. They emphasized the importance of strengthening national capacity and establishing durable justice. It was argued that a lot could be done by the ICC, without transforming the Court into a 'development' actor. Questions were raised what benchmarks should be used to assess complementarity as part of closure of situations. Doubts were expressed whether international criminal courts and tribunals should focus strictly on 'big fish', while leaving 'small fish' to domestic courts. Strengthening national capacity might in some circumstances require delegating important cases, or allowing the exercise of certain forms of universal jurisdiction.

[18] Stahn, Carsten, Re-Constructing History Through Courts? Legacy in International Criminal Justice (June 9, 2015). Available at SSRN: http://ssrn.com/abstract=2616491 or http://dx.doi.org/10.2139/ssrn.2616491.