A catalyst for justice? The International Criminal Court in Uganda, Kenya, and the Democratic Republic of Congo

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CHAPTER FOUR
Complementarity and the Office of the Prosecutor

While the previous chapter focused on complementarity within the ICC's juridical framework, this chapter addresses its policy dimensions as engaged by another crucial Court actor: the Office of the Prosecutor. As the organ responsible for investigating the situations and prosecuting the cases brought before the Court, the OTP is a critical participant in the complementarity landscape. Situated at once between the ICC's institutional center in The Hague and the various country contexts in which it operates, the Office—through the exercise of prosecutorial discretion and its access to local actors working on the ground—shapes not only the overall work of the Court, but can also have a significant influence on the contours of domestic accountability efforts. Indeed, as a material site for engagement and cooperation with national-level actors, the OTP is uniquely positioned to undertake a variety of activities that could further its stated interest in "encouraging States to carry out their primary responsibility to investigate and prosecute international crimes."[341]

This chapter focuses on two key aspects of the OTP's work relevant to the ICC's potential for catalyzing domestic proceedings: preliminary examinations and investigations. Returning to the dual approach to complementarity outlined in chapter two, it first examines the Office's increasing reliance on preliminary examinations as a primary example of complementarity's coercive power, wherein the threat of prosecutorial action might stimulate domestic efforts at accountability. As the only country of the three examined herein to have been subject to a preliminary examination, a case study of Kenya is offered in order to understand how the Office sought to use the potential leveraging power of this period to push for the establishment of a domestic criminal tribunal. While ultimately unsuccessful, the Kenyan experience highlights both the context-specific nature of the preliminary examination phase but also the diverse political dynamics in which ICC interventions unfold.

The second half of the chapter addresses the Office's investigatory practices, which, I argue, are a material site where a more positive, cooperative approach to complementarity could be enacted. To date, however, the OTP has largely done the opposite, choosing not to base any of its investigators in situation-countries or to develop a more sustained field-based presence. Furthermore, while the Office has relied on its relationships with local information providers, known as "intermediaries," it has too often employed a unilateral approach to evidence gathering, failing to integrate their concerns and priorities into the investigative process. Particular attention in this regard is paid to Uganda and the DRC, where even in the midst of "invited" referrals, the Office's in-country field presence has been minimal.

` A focus on investigations is also important as it has become increasingly clear that the ICC has an evidence problem, one that imperils the Court's ability to serve as a credible threat should a state fail to pursue proceedings at the national level. The withdrawal of charges against Kenyan President Uhuru Kenyatta is only the most recent, though undoubtedly the most damaging, in a series of setbacks for the OTP.[342] Indeed,

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[341] OTP, "Policy Paper on Preliminary Examinations" (November 2013), para. 100.

[342] In May 2014, the Prosecutor withdrew charges against President Uhuru Kenyatta on the basis of insufficient evidence; in so doing, she noted the Kenyan government's lack of cooperation and non-compliance with the OTP's investigation, as well as the deaths of several important potential witnesses and the recanting of earlier testimony by other key witnesses. Furthermore, in March 2013, the Prosecutor was

to date, more than one-third of those individuals who have undergone the confirmation of charges process before the Court have had the charges against them dismissed or withdrawn in their entirety.[343] One report notes that this is "a substantially higher rate of dismissal than the acquittal rate seen at other international criminal bodies following a full trial, even though the standard at trial—beyond a reasonable doubt—is higher than the burden at the confirmation stage."[344] Furthermore, in acquitting the ICC's second defendant, Mathieu Ngudjolo Chui, Trial Chamber II dedicated a portion of its judgment to criticizing the OTP's investigatory methods and the credibility of its witnesses.[345] Similar criticisms were raised in the *Lubanga* judgment and earlier in the Kenya cases as well, when Judge Christine Van den Wyngaert chastised the OTP for its "failure to investigate properly" prior to bringing charges against Kenyatta, revealing, in her words, "grave problems in the Prosecution's system of evidence review, as well as a serious lack of proper oversight by senior Prosecution staff."[346] If the Court is to safeguard its potential as a threat-based catalyst, ensuring effective investigations and prosecutions are thus essential.

This chapter first offers a brief overview of how preliminary examinations and investigations have been structured within the overall architecture of the OTP. The second part turns to the OTP's use of preliminary examinations as a key tool in its efforts to prod national jurisdictions into action. An overview of the emergent policy

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also granted permission to withdraw charges against Francis Muthaura, on the basis that "serious investigative challenges, including a limited pool of potential witnesses" led her to the conclusion that there was no longer a reasonable prospect of conviction. See *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta*, Prosecution Notification of Withdrawal of the Charges against Francis Kirimi Muthaura, ICC-01/09-02/11, TC V, 11 March 2013, para. 11.

[343] *The Prosecutor v. Bahr Idriss Abu Garda*, Decision on the Confirmation of Charges, ICC-02/05-02/09-243Red, PTC I, 8 February 2010 ("Abu Garda Decision"); *The Prosecutor v. Callixte Mbarushimana*, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red, PTC I, 16 December 2011; *The Prosecutor v. William Samoei Ruto, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-01/11-373, PTC II, 23 January 2012 (confirming charges against William Ruto and Joshua Sang, but declining to confirm charges against Henry Kosgey); *The Prosecutor v. Francis Kirimi Muthaura, et al.*, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, ICC-01/09-02/11-382-Red, PTC II, 23 January 2012 (confirming charges against Francis Muthaura and Uhuru Kenyatta, but declining to confirm charges against Mohammed Hussein Ali). Note that this number does not include those charges levied (and confirmed) against those individuals charged with offenses against the administration of justice. More recently, the confirmation decision against former Côte D'Ivoire president Laurent Gbagbo was also "postponed" by Pre-Trial Chamber I due to insufficient evidence. Though later confirmed, the proceedings raised similar questions about the strength of the Prosecutor's case. See *The Prosecutor v. Laurent Gbabgo*, Decision Adjourning the Hearing on the Confirmation of Charges Pursuant to Article 61(7)(c)(i) of the Rome Statute, ICC-02/11-01/11, PTC I, 3 June 2013.

[344] War Crimes Research Office, *Investigative Management, Strategies, and Techniques of the International Criminal Court's Office of the Prosecutor* (2012), 9 ("WCRO Report"). The burden of proof during the ICC confirmation of charges stage is "substantial grounds to believe," Rome Statute, Art. 61(7).

[345] *The Prosecutor v. Mathieu Ngudjolo*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-02/12, TC II, 18 December 2012, para. 516 ("Ngudjolo Judgment").

[346] *The Prosecutor v. Thomas Lubanga Dyilo*, Judgment Pursuant to Article 74 of the Statute, ICC-01/04-01/06-2842, TC I, 14 March 2012, paras. 482-83; *The Prosecutor v. Uhuru Muigai Kenyatta*, Decision on Defence Application Pursuant to Article 64(4) and Related Requests, ICC-01/09-02/11, TC V, 26 April 2013, Concurring Opinion of Judge Christine Van den Wyngaert, paras. 1, 4-5. Similar concerns have been raised over sexual and gender based crimes, which the OTP, particularly under Bensouda's tenure, has identified as a priority but remain those most vulnerable to failing judicial scrutiny. The Women's Initiatives for Gender Justice has noted that gender-based crimes are the "most vulnerable category" of crime at the ICC, with more than 50 percent of such charges being dismissed before trial, attributable, in part, to "the Prosecution's use of open-source information and failure to investigate thoroughly." See "Legal Eye on the ICC" (March 2012).

framework on examinations is provided, as well as its link to the Office's policy on complementarity. The chapter then offers a case study of the Kenyan experience in order to closely explore the political dynamics at play in that period, and what presumptions guided the OTP as it sought to support efforts for a national accountability process. Focusing on Uganda and the DRC, the chapter finally considers how the OTP's evidence-gathering practices, particularly under Moreno-Ocampo's tenure, were in fact designed to minimize the time investigators spent in affected communities and their degree of engagement with local actors, thereby diminishing the investigatory phase's potential to enact a more "positive," cooperative posture with national jurisdictions.

1. Structure of the Office of the Prosecutor

The OTP is made up of three divisions: Jurisdiction, Complementarity, and Cooperation (JCCD); Investigations; and Prosecutions.[347] Led by Phakiso Mochochoko since February 2011, the JCCD is, as Stegmiller notes, the "division that heavily influences policy decisions and the Prosecutor's selective choices originate there."[348] Its Situation Analysis Section is primarily responsible for conducting preliminary examinations, which includes evaluating information the Office receives and making recommendations as to whether an investigation has a sufficient basis to process. Meanwhile, its International Cooperation Section is regarded as the Office's "diplomatic" arm: it carries out external relations activities, including negotiating cooperation agreements, providing legal advice on complementarity and cooperation, and "liais[ing] with external actors to implement the complementarity policy."[349]

Notably, the Division's role has not been without controversy, with sceptics suggesting that, as a unit "defined by diplomatic (external relations and complementarity) expertise," it negotiates with states, unduly politicizing what should remain (or appear to remain) the OTP's strict independence.[350] While the number of staff engaged in preliminary examination analysis has recently increased within the Office, Paul Seils, the JCCD's former Head of Situation Analysis, noted in 2011 that the section "is small, with five members of staff at the time."[351] Communication amongst JCCD and Investigations analysts is also important. As Seils notes, the former are "usually assisted in the analysis

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[347] See Regulations of the Office of the Prosecutor, ICC-BD/05-01-09 (23 April 2009) ("OTP Regulations"), Regulations 7-9. The OTP also has an Executive Committee, which is responsible for strategic, policy and budgetary decisions. Ibid., Regulation 4(1).

[348] Ignaz Stegmiller, *The Pre-Investigation Stage of the ICC* (Berlin: Duncker and Humblot, 2011), 457.

[349] Gregory Townsend, "Structure and Management," in Luc Reydams, Jan Wouters, and Cedric Ryngaert (eds.), *International Prosecutors* (Oxford: Oxford University Press, 2012), 289 (citing ICC OTP Operations Manual (February 2011)). In full, the JCCD is responsible for the following: "(a) the preliminary examination and evaluation of information pursuant to articles 15 and 53, paragraph 1 [of the Rome Statute] and rules 48 and 104 and the preparation of reports and recommendations to assist the Prosecutor in determining whether there is a reasonable basis to proceed with an investigation; (b) the provision of analysis and legal advice to [the Executive Committee] on issues of jurisdiction and admissibility at all stages of investigations and proceedings; (c) the provision of legal advice to [the Executive Committee] on cooperation, the coordination and transmission of requests for cooperation made by the Office under Part 9 of the Statute, the negotiation of agreements and arrangements pursuant to article 54, paragraph 3 [of the Rome Statute]; and (d) the coordination of cooperation and information- sharing networks." Regulation 7, OTP Regulations.

[350] Schiff, 114.

[351] Paul F. Seils, "Making complementarity work: maximizing the limited role of the Prosecutor," in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 999.

of the data on crimes by one or two colleagues from the Analysis Section of the Investigations Division, although this will depend on available resources."[352]

The current head of the Investigations Division, Michel De Smedt, has served in this position since January 2006.[353] The Division's responsibility, in part, is for "the provision of factual crime analysis and the analysis of information and evidence, in support of preliminary examinations and evaluations, investigations and prosecutions."[354] Thus, following a decision to proceed with an investigation, a "joint team" consisting of staff from the OTP's three divisions is formed; one former investigator has referred to these teams as the "core operational units" of the Office.[355] With respect to the composition of the investigative teams, it appears that the ICC has sought to employ investigators from various backgrounds, a decision that some commentators have criticized because of their lack of law enforcement training, but others have welcomed for the multi-disciplinary approach that it offers.[356]

Regulation 32 provides that each team "shall regularly report its progress and activities" to an Executive Committee composed of the Prosecutor, Deputy Prosecutor, and the heads of the ID and JCCD.[357] One former ICC investigator who led investigations against Germain Katanga and Ngudjolo Chui described the concept of the joint team approach as one in which "investigators, prosecutors and cooperation staff … all work together from the very beginning of an investigation… Decisions in the joint team are taken jointly."[358] This tripartite approach distinguishes the ICC from its ad hoc predecessors, both of which followed a more "linear" model in which "an entire investigation team … reports directly to the Chief Prosecutor or to his executive office."[359] While this model aims at "adopting a more holistic and balanced investigative approach,"[360] several OTP staff members have likened the interdivisional concept to a

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[352] Ibid.

[353] Serge Brammertz initially served as the OTP's Deputy Prosecutor for Investigations; however, that position remained vacant after Brammertz's departure in 2007. Under Prosecutor Bensouda's tenure, the Office has since been reorganized, with three individuals each directing the three divisions and the Deputy Prosecutor in charge of them all. In November 2011, the ASP elected James Stewart as the Court's second Deputy Prosecutor, and Fabricio Guariglia has led the OTP's Prosecution Division since October 2014.

[354] The Division is additionally responsible for "the preparation of the necessary security plans and protection policies for each case to ensure the safety and well-being of victims, witnesses, Office staff, and persons at risk on account of their interaction with the Court," in "cooperation and coordination" with the Registrar; providing investigative expertise and support; and preparing and coordinating the field deployment of Office staff. See Regulation 8, OTP Regulations.

[355] Diane Lupig, "Investigation and Prosecution of Sexual and Gender-Based Crimes before the International Criminal Court," *American University Journal of Gender Social Policy and the Law* 17(2) (2009), 438, n.7.

[356] For instance, Bernard Lavigne, who oversaw the ICC's early investigations in the DRC, testified during the Lubanga proceedings that his team included former members of [NGOs] who could provide better open-mindedness to enable the other team members not to limit themselves to their police backgrounds." In his view, this "may have had a negative impact on the quality of their work." *The Prosecutor v. Thomas Lubanga Dyilo*, Deposition of Witness DRC-OTP-**W**WWW-0582, ICC-01/04-01/06- Rule68Deposition-Red2-ENG, TC I, 16 November 2010, at 16-17; see also "Paper on Some Policy Issues before the Office of the Prosecutor," 8. At the same time, tribunals like the ICTY have also championed a multi-disciplinary approach with considerable success. See, e.g., *ICTY Manual on Developed Practices* (2009), 12; see also WCRO Report, 33-34.

[357] OTP Regulations, Regulation 32.

[358] *The Prosecutor v. Germain Katanga and Mathieu Ngudjulo Chui*, Transcript, ICC-01/04-01/07-T-81-Red-ENG, 25 November 2009, at 7:4-9; see also 29:17-19.

[359] Hiroto Fujiwara and Stephan Parmentier, "Investigations," in Luc Reydams, Jan Wouteres, and Cedric Ryngaert (eds.), *International Prosecutors* (Oxford: Oxford University Press, 2012), 590.

[360] Ibid., 593.

"three-headed dragon," insofar as it "divides authority, requires consensus throughout, and can subject all decisions to a difficult interpersonal dynamic."[361]

2. Preliminary Examinations

2.1 Legal Framework

The preliminary examination is a unique pre-investigative stage within the statutory framework of the ICC. While the scope and length of the examination falls within the discretion of the OTP, Article 15 of the Rome Statute mandates the Prosecutor to first determine, regardless of the manner in which a situation comes before the Court, whether there is a "reasonable basis to proceed" with an investigation.[362] As noted by the Court, "reasonable basis" is the lowest evidentiary standard in the Statute; as compared to evidence gathered during the investigation stage, the standard is neither "comprehensive" nor "conclusive."[363] At a minimum, however, the preliminary examination involves assessing whether the jurisdictional and admissibility requirements are met in order to open a formal investigation, and whether, "taking into account the gravity of the crime and the interests of victims, there are nevertheless substantial reasons to believe than an investigation would not serve the interests of justice."[364]

Once a situation is identified, Article 53(1)(a)-(c) establishes the legal framework for a preliminary examination.[365] Seeking, in part, to provide clarity on its approach to the process, the OTP first published a policy paper on the subject in October 2010 (revised as of November 2013).[366] The Office identified three general principles—independence, impartiality, and objectivity—that guide preliminary examination practice and set forth a four-phase procedure:

> Phase 1: During this phase, the Office conducts an "initial assessment" of all information and communications on alleged crimes received under Article 15. As an initial filtering exercise, the initial purpose is to both exclude information that is outside the ICC's jurisdiction and to analyze the seriousness/gravity of information that "appears to fall within the jurisdiction of the Court."

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[361] Townsend, 292 (citing statements of anonymous OTP staff members).
[362] Rome Statute, Article 15 ("Prosecutor").
[363] *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, PTC II, 31 March 2010, para. 27 ("Kenya Article 15 Decision"); *Situation in the Republic of Cote d'Ivoire*, 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, PTC III, 3 October 2011. In both decisions, the Chamber further noted that this standard reflected the Prosecutor's more limited powers during the examination stage as compared to the investigation stage under Article 54.
[364] These criteria are enumerated in Article 53(1)(a)-(c) of the Rome Statute ("Initiation of an Investigation"). Notably, the term "interest of justice" is not defined. See "Policy Paper on the Interests of Justice" (September 2007) for the Office's interpretation and approach to applying these criteria, at http://icc-cpi.int/iccdocs/asp_docs/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf. For criticism of this approach, see Michael Newton, "A Synthesis of Community Based Justice and Complementarity," in Christian De Vos, Sara Kendall, and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015).
[365] Rule 104 of the Rules of Procedure and Evidence and Regulation 27 of the OTP's Regulations also govern preliminary examinations. Regulation 27 requires the Office to make a "preliminary distinction" amongst information that pertains to matters that are either manifestly outside the Court's jurisdiction, related to an ongoing examination, or unrelated to an existing situation.
[366] OTP, "Policy Paper on Preliminary Examinations."

> Phase 2: The second phase represents the "formal commencement" of an examination: it includes all communications not rejected in Phase 1, as well as referrals by states parties or the Security Council. The purpose at this stage is to ascertain whether the pre-conditions for the exercise of jurisdiction under Article 12 are satisfied and "whether there is a reasonable basis to believe" that the crimes fall within the ICC's subject matter jurisdiction. This phase thus entails not only a "thorough factual and legal assessment" of the crimes allegedly committed to ascertain potential cases falling within the Court's jurisdiction, but it also includes "gather[ing] information on relevant national proceedings if such information is available at this stage."
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> Phase 3: The third phase focuses on the admissibility of potential cases in terms of complementarity and gravity ("the scale, nature, manner of commission of the crimes, and their impact.")
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> Phase 4: The final phase involves examining whether any "interests of justice"—a "countervailing consideration"—should apply before making a final recommendation to the Prosecutor on whether there is a reasonable basis to initiate an investigation. Once the Prosecutor is satisfied that there is a reasonable basis to open an investigation into a situation, the authorization of the Pre-Trial Chamber must be sought.

In following this procedure, the Prosecutor has broad discretion as to the means by which to assess the "seriousness" of the information the Office receives. In particular, "he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organization, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court."[367]

As noted, the discretion afforded the OTP during the preliminary examination stage is significant. Unlike investigations, where the Prosecutor must obtain the authorization of the Pre-Trial Chamber to proceed, judicial oversight of preliminary examinations is limited, nor are Article 17's admissibility requirements applicable at this stage.[368] Furthermore, there is no time limit for conducting preliminary examinations, nor any guidance as to what constitutes a "reasonable time" to conclude one. Notably, in the first situation in the Central African Republic, Pre-Trial Chamber III noted that preliminary examinations were to be conducted "within a reasonable time regardless of its complexity" and, to that end, requested the Prosecutor to provide it with a report containing information on the current status of the preliminary examination, as well as an estimate of when it would be concluded.[369] In reply, however, the OTP stated its view

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[367] Rome Statute, Article 15(2). The Office "does not enjoy investigative powers" at the preliminary examination stage, however, "other than for the purpose of receiving testimony at the seat of the Court."
[368] Pre-Trial Chamber I's decision under Article 53(3)(a), ordering the OTP to reconsider the decision not to investigate the situation referred to it by the Union of Comoros (on the grounds that the Prosecutor committed material errors in her determination of the gravity of the potential cases) is the first time that a decision by the OTP not to investigate has been successfully challenged. See *Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, Decision on the request of the Union of Comoros to review the Prosecutor's decision not to initiate an investigation," ICC-01/13, PTC I, 16 July 2015.
[369] See *Situation in the Central African Republic*, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, ICC-01/05, PTC III, 30 November 2006.

that, "there is no obligation under the Statute or the Rules to provide such an estimate or to give such a date."[370] In the Office's view, this was intentional on the part of the drafters, to accommodate such factors as the degree of state cooperation, the availability of information, and the scale of the alleged crimes.[371]

The temporal dimension of preliminary examinations—for instance, the setting of deadlines for the establishment of domestic proceedings or other, similar benchmarks to demonstrate "willingness"— also allows the Office to engage in potentially wide-ranging dialogue with a state. The Colombian experience, which has remained within the examination phase for more than ten years, is instructive in this regard as it has not only influenced the government's approach to accountability, but also helped shaped the contours of its protracted peace negotiations.[372] As the Kenyan case illustrates, domestic political developments can also have a significant influence on the timing or duration of preliminary examinations. Importantly, however, while the OTP has stated that its examination activities are conducted in the same manner regardless of how a situation comes before the Court—in its words, "no automaticity is assumed"[373]—it would appear that, in practice, different standards may well apply. For instance, while several *proprio motu* examinations have lasted for one year or more (Colombia, Kenya), Security Council referred situations (as in Libya) have remained in examination status for a matter of days.

While the outcome of a preliminary examination depends on the circumstances of each situation, three options are ultimately available to the OTP. It may first decline to initiate an investigation or it may alternatively choose to proceed.[374] According to Seils, "By the time the process of preliminary examination reaches its conclusion there should almost always be substantial clarity on the type of the alleged criminal conduct, the numbers of incidents and victims of that conduct and related matters concerning aggravation or impact."[375] A third approach is to keep a situation under preliminary examination, in order to "collect information in order to establish a sufficient factual and legal basis" for a final determination. Seils has, in fact, argued for a more open-ended

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[370] See "Prosecution's Report Pursuant to Pre-Trial Chamber Ill's 30November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic," 15 December 2006. The Office nevertheless stated that it was "committed to completing its analysis of the CAR situation as expeditiously as possible and informing the relevant parties in a timely fashion in accordance with the Rules and Regulations of the Court." Ibid.

[371] By contrast, Olasolo has argued that the Office is required to close preliminary examinations within a reasonable period of time, and is obliged to inform information providers if it decides not to initiate an investigation. Hector Olasolo, *The Triggering Procedure of the International Criminal Court* (Leiden: Martinus Nijhoff, 2005), 62.

[372] See, e.g., Alejandro Chehtman, "The ICC and its Normative Impact on Colombia's Legal System" (DOMAC/16, October 2011); Kai Ambos, "The Colombian peace process (Law 975 of 2005) and the ICC's principle of complementarity," in Carsten Stahn and Mohamed M. El Zeidy (eds.), *The International Criminal Court and Complementarity* (Cambridge: Cambridge University Press, 2011), 1071-1096.

[373] "Policy Paper on Preliminary Examinations," para. 28; see also "Report on Preliminary Examination Activities 2013" (November 2013), para. 10.

[374] Closed examinations where the OTP made public its decision not to proceed to investigation include the situations in Palestine, Comoros (now under review), the Republic of Korea, Honduras, and Venezuela. An examination of Iraq, which concerns allegations of abuses committed by British soldiers, was reopened following an earlier decision to close the examination. Notably, while the Office has not closed an investigation to date, Prosecutor Bensouda announced her decision in December 2014 to "hibernate" the Office's investigations in Sudan, in order to "shift resources to other urgent cases, especially those in which trial is approaching." See "Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)," 12 December 2014, at http://www.icc-cpi.int/iccdocs/otp/stmt-20threport-darfur.pdf.

[375] Seils, "Making complementarity work," 993.

approach to examinations as an exercise in "creative ambiguity."[376] According to the OTP's 2014 report, eight situations remain under such review.[377]

2.2 Relationship to Complementarity

There has been little empirical examination to date of the effects of preliminary examinations, and whether they have indeed catalyzed national accountability efforts. Anecdotal accounts support the contention that the preliminary examination procedure has had a deterrent effect. Juan Mendez, for instance, argues that the Court's examination of Cote d'Ivoire (which later became an investigation) played an important role in deterring a further escalation of violence, following a rise in ethnic hate propaganda that was being broadcast on national radio and television in the wake of a failed attempt to overthrow then President Laurent Gbabgo.[378] Similarly, as noted, Colombia is frequently cited as an example of the OTP's "positive" complementarity approach, insofar as the 2005 passage of the so-called Justice and Peace Law—meant to establish a criminal accountability process for violence committed during the country's long-running armed conflict—was an outcome, in part, of the OTP's public scrutiny of the situation there.[379]

These examples also illustrate the OTP's adoption of a progressively more public approach to preliminary examinations. While earlier examinations were largely confidential, their potential virtue as a tool to prompt states into action has, like complementarity itself, been discovered over time. As Human Rights Watch notes, "This increased publicity is closely tied to the OTP's policy of using preliminary examination to promote two aims at the heart of the Rome Statute: spurring national justice officials to pursue their own rigorous investigations (complementarity) and signaling to would-be rights violators that the international community is watching (deterrence)."[380] Compliance with these norms is thus reinforced in the approach to preliminary examinations as well.

To that end, the Office now often publicizes, where confidentiality and security considerations permit, when it initiates an examination and provides periodic updates of its activities.[381] These measures include publishing, as of 2011, an annual summary of activities performed during the course of the year, as well as including information in the

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376 Paul Seils, "Putting Complementarity in its Place," in Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court* (Oxford: Oxford University Press, 2015), 326.

377 Those situations that remain in Phase 2 include Honduras, Iraq, Ukraine, and Afghanistan; Colombia, Georgia, Guinea, and Nigeria remain in Phase 3. See "Report on Preliminary Examination Activities 2014" (2 December 2014) ("Annual Report 2014").

378 See Juan E. Mendez and Jeremy Kelley, "Peace Making, Justice, and the ICC," in in Christian De Vos, Sara Kendall, and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015).

379 See Chehtman, "The ICC and its Normative Impact on Colombia's Legal System"; Ambos, "The Colombian peace process (Law 975 of 2005) and the ICC's principle of complementarity."

380 Human Rights Watch, "ICC: Course Correction – Recommendations to the Prosecutor for a More Effective Approach to 'Situations under Analysis'" (16 June 2011).

381 Regulation 28 governs the publicity of activities taken under Article 15. While the Office is required to "send an acknowledgement in respect of all information received on crimes to those who provided the information," it is within the Prosecutor's discretion to "make public such acknowledgement," and "to make public the Office's activities in relation to the preliminary examination of information on crimes under article 15," or a determination that there is no reasonable basis to proceed with an investigation. See Regulation 28, OTP Regulations.

Office's weekly bulletin, which it began distributing in 2009.[382] OTP policy documents also provide that it may "disseminate statistics on information on alleged crimes under Article 15; make public the commencement of a preliminary examination through press releases and public statements; publicize events, such as OTP high-level visits to the concerned countries, so that information can be factored in by relevant departments within States and [international organizations]; and issue periodic reports on the status of its preliminary examination."[383] Collectively, these measures seek to bring greater transparency to the examination process but also greater scrutiny to those states under review.

It would also appear that the OTP's investment in the preliminary examinations stage has expanded under Bensouda's leadership. As noted in her assessment of the Office's current strategic plan:

> As one of the three core activities of the Office, stronger emphasis is now placed on the Office's preliminary examinations activities. Through its preliminary examinations work, the Office is committed to contributing to two overarching goals: the ending of impunity, by encouraging genuine national proceedings through its positive approach to complementarity, and the prevention of crimes.[384]

The Prosecutor has likewise drawn a direct link between preliminary examinations and the catalytic potential of complementarity. Writing in 2012, she noted that the phase "gives the States concerned the possibility of intervening to put an end to crimes before the Office of the Prosecutor initiates an investigation," enabling the latter "to act as a catalyst for national proceedings."[385]

Despite the threat that opening a formal investigation carries, there are potentially important "positive" complementarity components to the preliminary examination stage as well. Indeed, according to the OTP, "at all phases of its preliminary examination activities, consistent with its policy of positive complementarity, the Office will seek to encourage where feasible genuine national investigations and prosecutions by the State(s) concerned and to cooperate with and provide assistance to such State(s) pursuant to Article 93(10) of the Statute."[386] As chapter three noted, however, the extent to which the OTP has affirmatively provided information to national authorities through use of the Article 93(10) regime is uncertain: there is no mention, for instance, of such assistance in any of the Office's preliminary examination reports. Moreover, the provision of such information appears to itself be at odds with the OTP's declaration that, at the preliminary examination stage, it "does not enjoy investigative powers" and "cannot invoke the forms of cooperation specified in Part 9 of the Statute from States."[387]

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[382] Reports on Preliminary Examination Activities from 2011-2014 are available online at the OTP's website. It would appear, however, that the Office has since discontinued its practice of weekly briefings as the last posted briefing is from November 2013.
[383] ICC-OTP, "Prosecutorial Strategy 2009-2012" (1 February, 2010), paras. 38-39; see also "Policy Paper on Preliminary Examinations," paras. 89-90 and Annual Report 2014, para. 95.
[384] Fatou Bensouda, "Foreword," Carsten Stahn (ed.), *The Law and Practice of the International Criminal Court*; see also "Interview with Fatou Bensouda, ICC Chief Prosecutor," VRWG Bulletin, Issue 21 (Fall 2012), 4.
[385] Fatou Bensuoda, "Reflections from the International Criminal Court Prosecutor," *Case Western Reserve Journal of International Law* 45(1-2) (Fall 2012), 505-511, 508.
[386] "Policy Paper on Preliminary Examinations," para. 94.
[387] Ibid., para. 85; see also Annual Report 2014, para. 11.

2.3 Preliminary Examinations in Practice: A Case Study of Kenya

As a regional actor, the African Union engaged with the Kenyan state in the immediate aftermath of the 2007-08 election violence.[388] Beginning in late January 2008, an AU Panel of Eminent African Personalities, overseen by former UN Secretary-General Kofi Annan, mediated a political settlement through the Kenyan National Dialogue and Reconciliation process; this led to the National Accord and Reconciliation Agreement ("National Accord"), signed between then President Mwai Kibaki (of the Party of National Unity) and Prime Minister Raila Odinga (of the Orange Democratic Movement) in February 2008. The National Accord set forth a four-part agenda to address the consequences of the violence, including the establishment of a power-sharing, coalition government between Kibaki and Odinga; the creation of a Commission of Inquiry on Post-Election Violence (CIPEV), also known as the Waki Commission; and a Truth, Justice and Reconciliation Commission (TJRC).[389]

The CIPEV's remit "was to investigate the facts and circumstances surrounding the [post-election] violence, the conduct of state security agencies in their handling of it, and to make recommendations concerning these and other matters."[390] The Commission's mandate expired in October 2008, at which point it published its final report. Chief amongst its many recommendations was that a Special Tribunal for Kenya (STK)—established by an act of Parliament and operating outside of the existing judicial system—be established to "seek accountability against persons bearing the greatest responsibility for crimes, particularly crimes against humanity, relating to the 2007 General Elections in Kenya."[391] It further provided:

> 2. The Special Tribunal shall apply Kenyan law and also the International Crimes Bill, once this is enacted, and shall have Kenyan and international judges, as well as Kenyan and international staff to be appointed as provided hereunder.
>
> 3. In order to fully give effect to the establishment of the Special Tribunal, an agreement for its establishment shall be signed by representatives of the parties to the Agreement on National Accord and Reconciliation within 60 days of the presentation of the Report of the Commission of Inquiry into the Post-Election

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[388] For a more detailed history of the election violence in Kenya and its historical antecedents, see, e.g., Makau Mutua, *Kenya's Quest for Democracy: Taming Leviathan* (Kampala: Fountain Publishers, 2009); Michela Wrong, *It's Our Turn to Eat: The Story of a Kenyan Whistleblower* (London: Fourth Estate, 2009); Gabrielle Lynch, *I Say to You: Ethnic Politics and the Kalenjin in Kenya* (Chicago: The University of Chicago Press, 2011). Daniel Branch's *Kenya: Between Hope and Despair, 1963-2011* was also published in 2011; like Lynch, he traces an escalation of government corruption over time that evolved in conjunction with an increasingly ethnicized political landscape, leading to the explosive violence of late 2007. For an account of the violence that consumed the 2007 election, see Human Rights Watch, "Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance" (March 2008).

[389] The National Accord and Reconciliation Act, 2008; Kenya National Dialogue and Reconciliation: Commission of Inquiry on Post-Election Violence, 4 March 2008; Kenya National Dialogue and Reconciliation: Truth, Justice and Reconciliation Commission, 4 March 2008. The TJRC Act provided that the Commission's broad objective would be to "seek and promote justice, national unity, reconciliation and peace, among the people of Kenya by inquiring in to the human rights violations in Kenya and recommending appropriate redress" (Preamble). Its temporal jurisdiction was enormous: December 12, 1963 to February 28, 2008 (see General Parameters).

[390] Commission of Inquiry into Post-Election Violence (15 October, 2008) ("CIPEV Report"), vii, at http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf

[391] Ibid., 472.

> Violence to the Panel of Eminent African Personalities, or the Panel's representative. A statute (to be known as "the Statute for the Special Tribunal") shall be enacted into law and come into force within a further 45 days after the signing of the agreement.[392]

Crucially, in an effort to ensure these terms were implemented, the Commission recommended referral of the post-election violence to the ICC—including a sealed envelope with "a list containing names of … those suspected to bear the greatest responsibility"—in the event that the STK failed to materialize, or if "having commenced operating, its purposes [were later] subverted."[393] In short, it sought to leverage domestic criminal prosecutions through The Hague.

Complementarity's coercive dimension was thus the dominant logic behind the CIPEV's recommendation. If the STK was not established within the Commission's specified time frame, and if the government proved unwilling or unable to investigate and prosecute, the report and its confidential findings would be turned over to the Office of the Prosecutor. In this regard, the Commission's conditioned approach was itself a novelty. As Muthoni Wanyeki notes, "This [approach] was … in contrast with the recommendations of previous commissions of inquiry [in Kenya], which had been only partially implemented, if at all, often preferring to focus on more straightforward legal, policy or institutional reforms rather than on more contentious and pressing matters of legal and political accountability."[394]

2.3.1 Special Tribunal for Kenya: January 2008-February 2009

Unlike Uganda or the DRC, the ICC's intervention in Kenya was not by state choice. According to the Prosecutor's submissions, the situation in Kenya formally came under preliminary examination "[once] the violence erupted in the context of national elections held on 27 December 2007," and remained in this posture for approximately two years. In the interim, the OTP undertook many of the same measures to cajole Kenyan authorities into action as those identified in its policy paper. Following the formal declaration that President Kibaki had been re-elected and the attacks that followed, Prosecutor Moreno-Ocampo issued a public statement on 5 February 2008, recalling that Kenya was both a state party to the Statute and that the Office would "carefully consider all information" related to alleged crimes within the Court's jurisdiction.[395] From this time onward, communications channels existed between state-level actors in Kenya and the OTP. The Prosecutor actively sought additional information, including a copy of the 2008 report on the post-election violence undertaken by the Kenya National Human Rights Commission (a state human rights body).[396] OTP submissions also indicate that letters dated March 2008 sought additional

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[392] Ibid., 472-473.
[393] Ibid., 473 (paragraph 5).
[394] L. Muthoni Wanyeki, "The International Criminal Court's cases in Kenya: origin and impact," Institute for Security Studies, Paper No 237 (August 2012), 8, at http://www.issafrica.org/uploads/Paper237.pdf.
[395] "OTP Statement in Relation to Events in Kenya," 5 February 2008.
[396] The KNHRC report, "On the Brink of the Precipice: A Human Rights Account of Kenya's Post-2007 Election Violence" (August 2008) was referenced in the OTP's Article 15 request and controversially, was relied on significantly by the Office in bringing its charges against the six officials initially accused. See *Situation in the Republic of Kenya*, Request for authorization of an investigation pursuant to Article 15, ICC-01/09, PTC II, 26 November 2009, paras. 29-31 ("Kenya Article 15 Request"); see further the discussion on OTP investigations below.

information from the government, the Kenya Human Rights Commission (a prominent NGO), and the Waki Commission.[397]

The coercive dimension to the ICC's involvement in Kenya lent political urgency to the establishment of the STK. Indeed, while the proposed tribunal raised unique constitutional challenges, work on preparing a draft statute began promptly after the government (unanimously, and without amendment) adopted the Waki Commission's report on 16 December 2008. Martha Karua, Kenya's then Minister for Justice, National Cohesion and Constitutional Affairs took the lead in its drafting, with the support of the Attorney Genera's office and the Law Reform Commission, the body responsible for amendments to Kenyan legislation.

Known as the "Iron Lady" of Kenyan politics, Karua enjoyed significant influence but her style—criticized by many in civil society as imperial and insufficiently consultative—led to criticisms of the bill for its perceived concessions to the executive, including, the power of presidential pardon.[398] Nevertheless, notable features of the proposed tribunal included its primacy over local courts for the crimes under its jurisdiction (not only crimes against humanity, but also genocide, gross human rights violations, and other crimes committed in relation to the 2007 elections); a significant effort to internationalize the court's judicial composition; and, borrowing heavily from the ICC Statute, attempts to incorporate the participation of victims within domestic proceedings.[399]

Significant pressure was placed on parliamentarians to approve a constitutional amendment that would establish the STK. Both Kibaki and Odinga lobbied for the legislation's passage, while opponents of the bill included then Eldoret North MP Minister William Ruto. The latter formed a bloc of MPs who favored the ICC in part because it was seen to be less of a threat: it would prosecute fewer suspects and the proceedings, it was believed, would undoubtedly last longer than the next Kenyan election cycle.[400] Thus, the failure of Karua's bill was largely the product of an "unholy alliance" between those MPs who opposed it because they feared being implicated and those who favoured accountability in principle, but lacked faith in the idea of a domestic process, particularly one that would displace the ICC.[401] While the phrase "Don't be vague, go to The Hague" emerged as part of Kenya's political lexicon to ostensibly indicate a preference for the ICC's involvement, it also signalled that many saw the Court as a more limited threat.

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[397] Kenya Article 15 Request, para. 7.

[398] See Godfrey M. Musila, "Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions," *International Journal of Transitional Justice* 3 (2009). Musila notes, "The few members of civil society who were contacted by the author suggested that it was too late for them to make any input, having been given less than two days to respond before the bill was presented to parliament," 452.

[399] See The Special Tribunal for Kenya Bill, 2009, at http://www.kenyalaw.org/Downloads/Bills/2009/The_Special_Tribunal_for_Kenya_Statute_2009.pdf. The provisions on victim participation in the proposed Bill are found in Article 50 ("Rights of Victims") and are nearly identical to Article 68(3) of the Rome Statute. Notably, victim participation is not a feature otherwise available in Kenya's judicial system.

[400] This view was expressed by several interlocutors in Kenya. For a similar analysis, see Lydia Kemunto Bosire, "Misconceptions II – Domestic Prosecutions and the International Criminal Court" (18 September 2009), at http://africanarguments.org/2009/09/18/misconceptions-ii-—-domestic-prosecutions-and-the-international-criminal-court/.

[401] See Wanyeki, "The International Criminal Court's cases in Kenya," 9-10; Stephen Brown and Chandra Lekha Sriram, "The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya," *African Affairs* 111 (2012), 244-260.

Against this backdrop the February 2009 debate in the National Assembly on the STK was contentious, particularly as compared to the welcoming debate on domestication of the Rome Statute (discussed further in chapter six), which had taken place only several months before.[402] At the outset, MP Gitobu Imanyara, a noted advocate for accountability but one who had favored "The Hague option," argued that the CIPEV's confidential findings should already be turned over to the ICC, because the "45 days period within which the Government had to comply with [its] recommendations" had lapsed.[403] While he was joined by several MPs in this view, other STK advocates, notably Mutula Kilonzo (later Karua's successor as justice minister), insisted on greater time for Parliament to act, noting that the Commission's timeline should not "tie the hands of this august House."[404]

As Kilonzo's comments suggest, the protection of Kenyan sovereignty loomed large in the discussions: supporters and opponents of a domestic tribunal alike summoned it. As the Bill's sponsor, Karua presented the amendment as recognition that Kenya had "not been able, up to now, to deal with the issues arising from the post election violence," but also as an opportunity for domestic ownership and agency.[405] In her words:

> Mr. Deputy Speaker, Sir, this Bill is coming about because we, as a nation, are accepting that there are inherent weaknesses in our national institutions … [It] is time to take responsibility. We are the Assembly as national leaders of this country, and that is why this is a National Assembly. It is our duty to take responsibility to ensure that we put an end to impunity, to ensure that election violence ends once and for all, and that we hold each other to account whenever such things arise.[406]

MP James Orengo, who seconded the Bill, likewise cast the STK as an affirmation of Kenya's sovereign powers. He stated:

> I am happy that in Kenya, we have not allowed a foreign institution, or power, to either establish a court through some instrument, for example through the UN Security Council, or through some arrangement, regional or otherwise; we are doing it through this sovereign Parliament, which has the authority to establish the tribunal. To that effect, we were saying in the beginning that we cannot allow

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[402] The National Assembly is the lower house of the Parliament of Kenya, while the Senate is the upper house. Prior to the structural reforms laid out in the 2010 Constitution, the Assembly served as the country's unicameral legislature; hence, the debate on the STK only took place there.

[403] Hansard records of this debate now appear to be unavailable on-line, though can be accessed through the website "Mzalendo," which describes itself as a non-partisan project whose mission is to "keep an eye on the Kenyan parliament," at http://info.mzalendo.com. Reference herein, however, is to Kenya National Assembly Official Record (Hansard), The Constitution of Kenya (Amendment) Bill, Second Reading, 3 February 2009 ("STK Amendment Bill"), 27 (MP Gitobu Imanyara).

[404] Ibid., 30. Other MPs similarly saw the amendment as a matter of parliamentary supremacy. For instance, MP Peter Mwathi stated that he would vote against the amendment, "so that the final decision to take those people to the Hague, or wherever it will be, will arise from the recommendations of the Waki Commission, not here!," 49. On whether a debate on the constitutional amendment could proceed, Imanyara's procedural concerns over the lapsing of the Waki Report's 45-day deadline were overruled. The Deputy Speaker issued a "considered ruling" that, " An external body [CIPEV] cannot dictate how Parliament conducts business." Ibid., 35.

[405] Ibid., 36.

[406] Ibid.

> ourselves to be guided, or managed by other institutions of government which are not part of the instruments of power in Kenya as a whole.[407]

Other parliamentarians, by contrast, argued that the tribunal was itself a concession to foreign interference, characterizing it as a "house we want to build with foreign materials."[408]

Notably, even with the promise of international involvement, concerns about a domestic tribunal's ability to penetrate the higher ranks of the Kenyan political class motivated opposition to the STK amongst those (like Imanyara) who favored an accountability process in principle. One parliamentarian, for instance, noted that, while he "strongly believed[ed] that the Waki Report [was] correct," he nevertheless objected to the recommendation that "we should have the tribunal in our country." In his view:

> Our interest is not in the proposals of the magistrates courts and the other issues. Our interest is in the leaders. Who are these people who caused pain to this country? Suppose the investigations point, God forbid, at His Excellency the President, do you want to tell me that this country has the capacity to try him? Suppose the investigation points at the Prime Minister, do you want to convince the Republic of Kenya that we have the capacity to try him?[409]

He concluded, "[This] tribunal is being set up for the small people. This country has a history of punishing the small people when the big ones have committed the crimes!"[410]

Despite the criticisms of the bill, the legislation that Karua proposed was the only one that would ever come close to receiving parliamentary assent.[411] In continued exercise of the ICC's oversight function, the Prosecutor publicly reaffirmed on the eve of Parliament's vote that the OTP was monitoring the situation in Kenya, but that proved insufficient to alter the votes. Ultimately, the STK amendment failed to command a constitutional majority: on February 12, 2009, it was defeated in a vote of 101(in favor) to 93 (opposed).[412]

2.3.2 Subsequent Efforts: March-November 2009

Following the government's failure to establish the STK, more direct and frequent contact between the OTP and national-level actors took shape; however, as Lionel Nichols notes, the Office's engagement was still largely conducted "through press statements and media interviews, rather than through face-to-face meetings."[413] The

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[407] Ibid., 38. MP Kilonzo invoked a similar call to sovereignty, noting, "I want as a country, to respect our sovereignty by acknowledging that we are signatories to the International Criminal Court Charter. … Let the citizens of other failed states go to the Hague," 46.
[408] Ibid., 43 (MP Danson Mungatana).
[409] Ibid., 48 (MP Cyrus Khwa Shakhalaga Jirongo).
[410] Ibid.
[411] Musila, "Options for Transitional Justice in Kenya," 452.
[412] While a majority of parliamentarians in fact voted in favour of the tribunal (101 to 93), passage of the Bill required a 2/3 majority given that it required a constitutional amendment. See Francis Mureithi, "How MPs rejected the Proposed Special Tribunal for Kenya Bill," *The Star*, 12 March 2011. A full breakdown of the votes is recorded at Kenya National Assembly Official Record (Hansard), The Constitution of Kenya (Amendment) Bill, Second Reading, 12 February 2009, 30-34.
[413] Lionel Nichols, *The International Criminal Court and The End of Impunity in Kenya* (Switzerland: Springer International Publishing, 2015), 80-81. See, e.g., 9 July 2009, OTP Press Release; 16 July 2009, OTP Press

Kenyan government subsequently promised to reintroduce improved legislation but a second attempt to do so was rejected in June 2009.[414] After two successive extensions lapsed, Annan forwarded the Waki envelope and evidence to the OTP in July 2009. Thereafter, the Prosecutor met with a formal delegation form Kenya (including then Minister of Justice and Constitutional Affairs, Mutula Kilonzo), which resulted in an agreement stating that the government would provide him, by the end of September, with a report on the current status of investigations and prosecutions. Furthermore, if no "modalities for conducting national investigations and prosecutions" were put in place within a year's time, it was agreed that the government would refer the matter to the ICC in accordance with Article 14.[415]

Following Annan's hand over of the envelope and more frequent interactions with the OTP, the government made renewed efforts at establishing domestic accountability process, but to no avail. Kilonzo, for instance, reintroduced an STK bill that sought to ameliorate some of the criticisms of the first draft; however, the Cabinet was unable to come to a political agreement and eventually opted to abandon the idea of a hybrid tribunal. Ultimately, after a series of meetings, Kibaki announced at a press conference (attended by the entire Cabinet) that all suspects would be dealt with through regular national courts as well as the TJRC (even though the latter had no prosecutorial authority),[416] and that the government would first focus its efforts on reforming the judiciary and the police.[417]

During this time, the OTP ensured that the examination maintained a public profile. It held a roundtable discussion in The Hague with Kenyan civil society representatives in September 2009 and, in October, Moreno-Ocampo requested another meeting with national authorities. A letter was also sent to the Kenyan authorities later that month, informing them that the Office's preliminary examination was complete and reiterating that two options were available: either for an Article 14 referral by the government, or an independent decision of the Prosecutor to request judicial authorization to start an investigation. On 5 November 2009, the Prosecutor met with Kibaki and Odinga in Nairobi, and announced in a joint press conference his intention to request such authorization. Six months later, in a divided opinion of Pre-Trial Chamber II, it was granted.[418]

2.3.3 Catalytic Effect? The Kenyan Examination Reconsidered

The Waki Commission's report and its unique use of the ICC as a self-enforcement mechanism "brought Kenya closer than it had ever been before to

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Release; 18 September 2009, OTP Press Release. See also Kenya Article 15 Request, paras. 13-14, 16, 18-20.

414 This bill was introduced by Karua's successor, Justice Minister Mutula Kilonzo. It never reached Parliament as it was rejected at the cabinet level.

415 Agreed Minutes of Meeting of 3 July 2009 between the ICC Prosecutor and Delegation of the Kenyan Government (3 July 2009, The Hague).

416 Notably, the TJRC commissioners also rejected this proposal, as it would have significantly involved amending its mandate.

417 In November 2009, MP Gitobu Imanyara also sought to introduce a private members' bill, but it did not advance on formal grounds as parliamentary quorum was not met. Brown and Sriram note that "a boycott by MPs, allegedly with support their party leaders, prevented the Assembly from reaching quorum whenever the bill was due to be discussed." Brown and Sriram, 254. See further Kenya National Assembly Official Report, The Constitution of Kenya (Amendment) Bill, Second Reading (2 December 2009).

418 Kenya Article 15 Decision; see, however, dissenting opinion of Judge Hans-Peter Kaul.

achieving any judicial accountability for the abhorrent election-related violent crimes."[419] It also created great interest in and demand for accountability across Kenya, pushing the government closer than it had ever before come to setting up a domestic judicial process. Two commentators have also suggested that the preliminary examination "raised international concern about sexual violence during the post-election violence, giving unprecedented exposure to these issues and, for the first time, allowing Kenyans to talk about being victims of sexual violence."[420] Yet the history of the ICC's preliminary examination in Kenya underscores several points that merit closer reflection.

First, the examination procedure did not succeed in producing its desired outcome, which was the establishment of a domestic tribunal (later referred to more obliquely as "modalities") for the prosecution of election-related violence. The difficulty of such a task should not be overlooked: such a tribunal would have effectively functioned outside of the Kenyan "regular" criminal justice system and would have, by design, been insulated from a judiciary that had long been criticized for its susceptibility to executive influence.[421] The defeat of the STK Bill thus largely owed to a political calculus on the part of many parliamentarians who saw the prospect of such a tribunal, at the time, as a greater threat than the ICC itself.[422] Whereas the ICC, by its own admission, could only pursue a handful of perpetrators at the highest level, an STK could likely have pursued a significantly greater number of individuals; therefore, MPs "who were implicated but who were not among the 'big fish' had little to fear from the ICC."[423] Indeed, they may have had much to gain if the Court proved successful in removing senior political rivals from the domestic electoral arena. In short, although key factions of the Kenyan political elite feared the ICC, it was not feared enough.[424]

The two-year period of the Kenyan examination also underscores the importance of timing, both in terms of duration but also the domestic political environment in which the OTP acts. In Kenya, the power of the examination procedure was arguably at its peak during the January 2008-February 2009 period, buttressed as it was by the ongoing CIPEV investigation and the active role of Annan, who had yet to hand the Commission's envelope over to The Hague. Yet the OTP became the most publicly active and engaged in the examination procedure following the STK Bill's defeat, by which point the Court's coercive power (having already failed to ensure the setting up of a domestic mechanism) had diminished considerably. This dynamic continued and deepened ever the course of 2009 such that, by the time Annan handed the Commission's envelope to the OTP in July, it was clear that a domestic tribunal was a political impossibility. Retrospectively, then, the wisdom of continuing to engage with the government (whose proposals had become increasingly incoherent) should be questioned. As Muthoni Wanyeki, writing in late 2009, noted, "The state has done just enough, the bare minimum, to maintain the masquerade that it intends to pursue criminal justice for the organised violence on both sides of the political divide as well as

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[419] Brown and Sriram, 257.
[420] Christine Bjork and Juanita Goebertus, "Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya," *Yale Human Rights and Development Journal* 14 (2011), 218.
[421] See, e.g., Makau Mutua, "Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya," *Human Rights Quarterly* 23 (2001), 96-118.
[422] For a more detailed discussion of these dynamics, see Wankeyi, "The International Criminal Court's Cases in Kenya: Origin and Impact," Institute for Security Studies Paper (No. 237, August 2012), 8-9.
[423] Brown and Sriram, 253.
[424] See, e.g., Dayo Olopade, "Who's Afraid of the International Criminal Court? In Kenya, the answer is no one at all," *New Republic* (9 March 2013).

the state violence last year."[425] The length of the ICC's preliminary examination may well have prolonged this masquerade.

Finally, a paradox lay at the heart of the Kenyan experiment. Whereas the Waki Commission sought to use the threat of the ICC's intervention as leverage for the establishment of a domestic process, many victims and advocates in Kenya, in fact, saw the Court's involvement as a necessary condition of such a process. Kenyan civil society, in particular, while not a monolith, took an exceedingly dim view of the government's willingness to pursue accountability absent the assurance of external proceedings, one that political leaders could not control. It is precisely because of this distrust in a judicial system that was "heavily compromised and 'beholden to the executive'"[426] that the core features of the proposed tribunal— located outside of the domestic justice system, with international judicial participation—were seen as non-negotiable, and why the perceived compromises in Karua's legislation (for instance, with respect to presidential immunity) were viewed with suspicion.

In short, trust in the Kenyan government and faith in its institutions was so low that most within the civil society sector were reluctant to support any domestic legal reform efforts until *after* the ICC intervened. In the words of two prominent Kenyan advocates:

> In tandem with the ICC's intervention, civil society groups have been at the forefront of advocating for [a judicial mechanism], *though such advocacy had to take place after the commencement of the Kenyan cases*. Given the pervasive climate of impunity, many organisations feared that any domestic accountability processes might be hijacked to justify an admissibility challenge before the ICC.[427]

Similarly, in their study of the advocacy strategies of Kenyan NGOs during the ICC's preliminary examination, Christine Bjork and Juanita Goebertus conclude that, "in most cases, even the NGOs that actually had the power to impact national criminal justice system reform were inclined, instead, to encourage ICC intervention at the time that the preliminary examination was being conducted."[428] This was because they "feared that improvements of the criminal justice system or installment of transitional justice mechanisms would avert ICC intervention and create impunity for the main perpetrators."[429]

The presumptions thus driving Kenya's preliminary examination—that Kenyan politicians would necessarily prefer a domestic mechanism to international judicial intervention; that the latter would be a sufficient threat to create such a mechanism; and that accountability advocates would support a domestic process in lieu of (rather than in addition to) the ICC—demonstrate again how legalism informs the complementarity-as-

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[425] L. Muthoni Wanyeki, "Kenya: We Remember, and Have Evidence," *The East African*, 9 November 2009. Brown and Sriram likewise conclude that, "While performing sham compliance, the government dragged its feet and delayed and undermined the process as much as it could, without repudiating it," 258.
[426] Musila, "Options for Transitional Justice in Kenya," 456.
[427] Njonjo Mue and Judy Gitau, "The Justice Vanguard: Kenyan Civil Society and the Pursuit of Accountability," in Christian De Vos, Sara Kendall, and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015) (emphasis added).
[428] Christine Bjork and Juanita Goebertus, "Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya," *Yale Human Rights and Development Journal* 14(1) (2011), 218.
[429] Ibid., 223.

catalyst vision. They reflect, in McEvoy's words, "a capacity to disconnect from the real political and social world of transition through a process of 'magical legalism."[430] In actuality, legal formations in Kenya were subordinated to a dynamic politics of transition, one that saw MPs on both sides of the accountability divide effectively uniting to defeat the STK amendment (if for very different reasons.) Moreover, given the pervasive distrust in Kenya's institutions, most supporters of accountability were unwilling to accept complementarity's catalytic potential without the engagement of the very institution the preliminary examination sought to avoid: the ICC itself.

3. Investigations

3.1 OTP Framework

While the Rome Statute is silent as to how evidence collection is to be carried out, the OTP adopted early on a policy of "focused investigations."[431] As articulated by the former head of the JCCD, "The ICC prosecutor's policy is to carry out investigations in a few months, involving as few witnesses and incidents as possible."[432] Related to this policy is the Office's use of small teams of rotating investigators to carry out its investigations.[433] Bernard Lavigne, who oversaw the ICC's early investigations in the DRC, testified that his investigation teams never consisted of more than twelve people for the entire country, which he considered to be "insufficient."[434] Similarly, in the case against former Ivory Coast President Laurent Gbagbo eight investigators reportedly worked on the ground "in rotating teams of two."[435] According to the OTP's proposed 2012 budget, only 44 professional staff were requested for the "Investigations Teams" section of the ID, to be dispersed among its (then) active eight situation countries.[436]

The pursuit of this early strategy meant that ICC investigators spent relatively little time in the field. Although Moreno-Ocampo indicated in 2004 remarks that some investigators would "be based in headquarters and others will be deployed in the field,"[437] in practice all ICC investigators have been Hague-based and travel "on mission." Moreover, they have only been deployed in the field for limited periods of time,

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[430] McEvoy, "Letting Go of Legalism," 25-26. For a similar conclusion, see Thomas Obel Hansen and Chandra Lekha Sriram, "Fighting for Justice (and Survival): Kenyan Civil Society Accountability Strategies and Their Enemies," *International Journal of Transitional Justice* (2015). Hansen and Sriram quote several Kenyan activists as having "now learned that approaches dominated by legal language and influenced by international norms may be flawed in facing a government that … can draw upon a range of political, historical and ethnic language in a divided society to build counter-narratives," 20-21.

[431] See ICC-OTP, "Report on Prosecutorial Strategy," 14 September 2006, 5, para. 2(b); "Prosecutorial Strategy 2009-2012," para. 20. The Office has also developed an Operational Manual as a framework for its investigations; however, it is not available to the public.

[432] Katy Glassborow, "ICC Investigative Strategy on Sexual Violence Crimes Under Fire," *Institute for War & Peace Reporting*, 27 October 2008. Glassborow quotes Beatrice Le Fraper du Hellen, who headed the JCCD from 2006-2010.

[433] An early OTP policy paper noted that its "operations are informed by three basic principles', one being that 'it functions with a variable number of investigation teams." See ICC Paper on Policy Issues, 8.

[434] Lavigne Deposition, 16:11-16.

[435] John James, "Ivory Coast – Who's Next After Laurent Gbagbo?," *International Justice Tribune* No. 146, 29 February 2012.

[436] Ibid. The report further notes that the number of professional staff employed in the investigations division "has *decreased* since 2007, despite the increase in the number of situations in which the Court is active." Ibid., 30-31 (emphasis in original); see also "Proposed Programme Budget for 2012 of the International Criminal Court," ICC-ASP/10/10, 21 July 2011, at 47.

[437] "Statement of the Prosecutor Luis Moreno-Ocampo to Diplomatic Corps" (12 February 2004), 2, at www.iccnow.org/documents/OTPStatementDiploBriefing12Feb04.pdf.

undertaking repeated, short-term trips. In the DRC, the OTP reported that, as of 2006, members had "conducted more than 70 missions inside and outside the DRC, interviewing almost 200 persons."[438] The same report noted that since opening its investigation in July 2004, the Ugandan joint team had conducted "[i]n just ten months … over 50 missions to the field," Darfur investigators have 'conducted more than 50 missions in 15 countries," although, significantly, not in Darfur itself.[439]

The OTP's approach to investigations is closely linked to limited resources and financing. Indeed, the number of small missions conducted in a relatively short period was extolled in a 2009 document on "efficiency measures" as part of the "Court-wide efficiency drive."[440] The report noted that the Office's strategy "of having a small, flexible office," as well as "lean and flexible" investigation teams had "enabled [it] to perform more investigations and prosecutions simultaneously, with the same number of staff."[441] Yet while the commitment to small investigation teams has been praised for its cost efficiency, the Office's "lean and flexible" approach has been criticized for its effectiveness and the strain it places on Court staff. In a private 2008 letter that Human Rights Watch sent to the OTP Executive Committee (later made public), the organization expressed concern with the high attrition rate of ICC investigators and noted that there were "simply not enough of them to handle the rigorous demands for conducting investigations."[442]

3.2 Investigating from Afar

3.2.1 Limited Field Presence

Perhaps the most notable aspect of investigations has been the OTP's failure to locate any investigators or analysts in country on a permanent (or semi-permanent) basis, or to engage on a more sustained basis with national-level interlocutors. According to testimony, investigators working in the DRC spent only an average of ten days in the field,[443] making it difficult for them to interview witnesses, much less develop the sort of long-term connections that a more sustained field presence would enable. Preliminary examination analysts have faced similar limitations: according to Seils, "analysts are rarely in a country under [ICC] examination for more than one week."[444] Consequently, a 2008 report by Human Rights Watch noted that,

> The opportunities for Hague-based investigators to interact and develop strong contacts with witnesses are limited in number and timeframe… [E]ven when key witnesses agree to a specified time to meet with investigators, circumstances may change, rendering them unavailable by the time that the Hague-based members of the investigative teams travel to the field.[445]

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[438] ICC-OTP, "Report on the Activities Performed During the First Three Years (June 2003-June 2006)" (12 September 2006), 11.
[439] Ibid., at 15, 19.
[440] "Second Status Report on the Court's Investigations in to Efficiency Measures," ICC-ASP/8/30, 4 November 2009, para. 4.
[441] Ibid.
[442] Human Rights Watch, Letter to the Executive Committee of the Prosecutor, 15 September 2008, at www.article42-3.org/Secret%20Human%20Rights%20Watch%20Letter.pdf.
[443] Lubanga Judgment, para 165; Lavigne Deposition, 75:7-8.
[444] Seils, "Making complementarity work," 999.
[445] Human Rights Watch, "Courting History: The Landmark International Criminal Court's First Years" (2008), 55.

This small-team approach makes the possibility of a permanent presence in the field impossible. As summarized by the Lubanga trial chamber in *Lubanga*, "because there were only a few investigators it was not possible to have someone in the field permanently," even though, according to Lavigne, "This would have been the correct approach."[446]

Pascal Kambale, formerly the DRC Country Director for the Open Society Initiative for Southern Africa, followed the ICC's investigations in the DRC closely and has argued that the OTP's failure to bring charges against other, higher-ranking commanders in the DRC situation was "a direct result of the … strategy of conducting quick investigations with the lowest cost possible."[447] In his view, the investigative teams assigned to Ituri "were too undersized and too short-term to generate good analysis of the intricately entangled criminal activities" taking place in the region.[448] Kambale further recalls a meeting in December 2003, at which Moreno-Ocampo reportedly told a group of international NGOs that the investigative teams deployed to the field "would be composed almost entirely of temporary staff."[449] Although this plan was later reconsidered, the "cost-efficient approach" still meant that investigators were "sent to the field for short periods of time." The Prosecutor's minimal field presence in the Kivus region of eastern DRC—which has been even more limited than its presence in Ituri—has led to similar results. In December 2011, a majority of Pre-Trial Chamber I declined to confirm any of the charges against Callixte Mbarushimana (a Rwandan national residing in France) for crimes committed by FDLR troops in the DRC.[450]

In its judgment acquitting Ngudjolo Chui, Trial Chamber II also drew attention to the OTP's lack of field presence in assessing deficiencies in the evidence presented. While acknowledging the difficulty of conducting investigations in a "region still plagued by high levels of insecurity," the chamber emphasized the importance of "mak[ing] as many factual findings as possible, in particular forensic findings … in *loci in quo*."[451] The chamber noted that it would have been "beneficial for the Prosecution to visit the localities where the Accused lived and where the preparations of the attack in Bogoro allegedly took place, prior to the substantive hearings."[452] The chamber had itself travelled to these localities—Bogoro, Aveba, Zumbe, Kambutso—in early January 2012 as part of a judicial site visit, the first (and only) time an ICC chamber has done so.[453]

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[446] Lubanga Judgment, para. 166; Lavigne Deposition, 75:16-18.
[447] Pascal Kambale, "The ICC and Lubanga: Missed Opportunities" (16 March 2012), at http://forums.ssrc.org/african-futures/2012/03/16/african-futures-icc-missed-opportunities/.
[448] Ibid.
[449] Ibid. According to local NGOs and UN staff in Bunia, "Investigators never spent more than a few days," n.21.
[450] Mbarushimana Decision. The chamber, by majority, expressed "concern" over the OTP's apparent attempt to "keep the parameters of its case as broad and general as possible," pleading certain charges with insufficient specificity and "in such vague terms," seemingly "in order to allow it to incorporate new evidence relating to other factual allegations at a later date without following the procedure [governing amendments to the charges]," paras. 82, 110. In the case against FDLR commander Sylvestre Mudacumura, a separate pre-trial chamber denied the OTP's first request for an arrest warrant for a similar "lack of specificity." It later granted the warrant but excluded all of the requested counts of crimes against humanity, while noting that the application bore "some similarities" to the case brought against Mbarushimana. See *The Prosecutor v. Sylvestre Mudacumura*, Decision on the Prosecutor's Application under Article 58, ICC-01/04-01/12, PTC II, 13 July 2012, paras. 20, 22-29.
[451] Ngudjolo Judgment, paras. 115-17.
[452] Ibid., para. 118.
[453] Ibid., paras. 22, 68-69.

Its visit was described as enabling the Chamber to "gain a better understanding of the context of the events," as well as to "conduct the requisite verifications *in situ* of certain specific points and to evaluate the environment and geography of locations."[454] The judgment refers repeatedly to the Chamber's visit, providing examples of how such knowledge would have provided it with a clearer appreciation of the evidence.[455]

Notably, the OTP's approach to investigations (at least its early approach) departs from the practice of predecessor tribunals like the International Criminal Tribunal for Rwanda, which had several investigators based in country.[456] Moreover, while tribunals like the ICTY have also adopted a mission-based approach to investigations, unlike the ICC's small team arrangement, investigation teams at the ICTY "consisted of up to twenty members," with "up to ten separate teams operational at a given time, even though the geographic jurisdiction of the Tribunal was limited to the territories of the former Yugoslavia."[457] OTP leadership also prioritized field investigations. Louise Arbour, the tribunal's former Prosecutor, "made it an organizational priority during the Kosovo period to get as many OTP employees into the field 'on mission' as possible."[458] Another ICTY investigator recalled fieldwork being an "all-consuming" enterprise, where it was "common to work through ten at night, every day, for three, four weeks."[459]

The security question Trial Chamber II raised is also one that has informed the OTP's "light-touch" approach, yet it bears noting that the Office has also been criticized for being too risk-averse in assessing its ability to operate on the territory of situation-countries. For instance, although Moreno-Ocampo defended his decision not to investigate in Darfur on security grounds, he was sharply criticized by Professor Antonio Cassese, chair of the United Nations Commission of Inquiry on Darfur, whose report helped, in part, spur the referral of the situation to the Court. Cassese criticized the "[e]xceedingly prudent attitude of the ICC Prosecutor"[460] and, in an invited *amicus curiae* brief, the failure to pursue even "targeted and brief interviews" in Darfur, noting that the UN Commission had successfully insisted upon such access during the course of its investigations.[461]

Andrew Cayley, the ICC's first senior trial attorney for Darfur, concurs with Cassese's assessment. Reflecting on the Darfur investigation, Cayley notes:

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454 Ibid., para. 70.
455 Ibid.,para. 118.
456 Gideon Boas and Gabriel Oosthuizen, "Suggestions for Future Lessons-Learned Studies: The Experience of Other International and Hybrid Criminal Courts of Relevance to the International Criminal Court" (January 2010), para. 47.
457 WCRO Report, 29-30; see also *ICTY Manual on Developed Practices*, 16.
458 John Hagan, *Justice in the Balkans: Prosecuting War Crimes in The Hague Tribunal* (Chicago: The University of Chicago Press, 2003), 137.
459 Ibid., 154.
460 Antonio Cassese, "Is the ICC Still Having Teething Problems?," *Journal of International Criminal Justice* 4 (2006), 438.
461 *Situation in Darfur*, Observations on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending Before the ICC, ICC-02/05-14, PTC I, 25 August 2006, at 5. Louise Arbour, then the UN's High Commission for Human Rights was also invited to submit a brief to the Court, in which she similarly called for 'an increased visible presence of the ICC in Sudan', insisting that it 'is possible to conduct serious investigations of human rights during an armed conflict in general, and Darfur in particular, without putting victims at unreasonable risk'. See *Situation in Darfur*, Observations of the United Nations High Commissioner for Human Rights Invited in Application of Rule 103 of the Rules of Procedure and Evidence, ICC-02/05, PTC I, 10 October 2006, para. 64.

> It was a mistake that the court did not establish a presence on the ground in Darfur. ... It is not to say that establishing an office in Darfur would have been easy but it should be emphasized that the OTP was extremely risk averse when I worked there. By encouraging some risks I am not proposing recklessness. The reality, as we all know, is that you have to take risks and you have to have courage to do this work. Professor Cassese … personally went to Khoba prison in Khartoum and interviewed very sensitive witnesses. He demanded access with nothing more than a Security Council resolution in his hand. The OTP ICC got no further than the Hilton Hotel in Khartoum.[462]

More recent cases conducted by the Court suggest that little has changed with respect to the OTP's strategy. During the confirmation of charges proceedings against the suspects in Kenya—where security risks were considerably less than in DRC or Darfur—submissions by both defence and victims' counsel raised questions about the OTP's lack of in-country investigations.[463] Similarly, while arrest warrants were issued against the three Libyan suspects in May 2011 (just three months after the Security Council's referral), the Office only began conducting *in loci* investigations in November of that year.[464]

3.2.2 Absence of National Investigators

In addition to a minimal field presence, none of the ICC's investigators have been nationals of countries where cases are under investigation; indeed, only a limited number are African.[465] While other OTP staff members have supported such a proposal—which was, consistent with "positive" complementarity, identified as an early goal of the Office's plan for investigations[466]—it was never implemented during Moreno-Ocampo's tenure. Kambale's notes from a 2004 meeting with OTP staff indicate that the choice not to seek out experienced national investigators was deliberate. Part of the "short and focused" investigative strategy, as articulated by the then Prosecutor, was "the fact that it would minimize the need for having local people in the investigative teams, thus helping avoid situations where impartiality is questionable."[467] Unlike predecessor tribunals the OTP has also hired no country experts as either permanent or temporary

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[462] Andrew Cayley, "Witness Proofing—The Experience of a Prosecutor," *Journal of International Criminal Justice* 6 (2008), 779-80. In 2010, all of the OTP charges against Bahr Idriss Abu Garda—one of only three accused in the Darfur situation to have actually appeared before the ICC—were dismissed. The pre-trial chamber unanimously found that the evidence presented was 'so scant and unreliable' that it could not find substantial grounds to confirm the allegations. See Abu Garda Decision.

[463] See, e.g., *The Prosecutor v. William Samoei Ruto, et al.*, Request by the Victims' Representatives for Authorisation to Make a Further Written Submission on the Views and Concerns of the Victims, ICC-01/09-01/11, PTC II, 9 November 2011, paras. 10-12; *The Prosecutor v. William Samoei Ruto, et al.*, William Samoei Ruto Defence Brief Following the Confirmation of Charges Hearing, ICC-01/09-01/11-355, PTC II, 24 October 2011, paras. 24-29.

[464] See "Third Report of ICC Prosecutor to UN Security Council Pursuant to UNSCR 1970" (16 May 2012), para. 11.

[465] Personal interview with member of ICC Investigations Division, July 2012.

[466] The OTP's 2003 policy paper states that, "Investigation teams will include staff members who are nationals of the countries targeted by the investigations." This "inclusive strategy" would "help the OTP have a better understanding of the society on which its work has the most direct impact, and will allow the team to interpret social behavior and cultural norms as the investigation unfolds," 9.

[467] Kambale, "Missed Opportunities," n.22.

staff.[468] In the DRC, it appears that there was only Congolese national who served for a brief period of time, in a formal capacity, as a country expert and advisor to investigators.[469]

The pursuit of impartiality, or at least its appearance, undoubtedly damaged the quality of OTP investigations. As articulated by one intermediary in Ituri:

> [T]he Court faces difficulties in assessing places and [it] was unfamiliar with the socio-political context [in the DRC.] It did not understand the complicated war-time alliances, and did not grasp the subtleties of "who was close to who" in a toxic environment nor "who could do what," etc.[470]

Similarly, a study conducted by the International Refugee Rights Initiative (IIRI), in consultation with the Congolese NGO Aprodivi, notes that, "[T]he fact that Court staff was … dominated by internationals did little to diminish the sense that the Court could have done more to understand the local context. … Failure to ['verify the information that they got'], and to engage the 'real community leaders,' left the ICC 'looking ridiculous a large percentage of the time.'"[471] The judgment in *Ngudjolo Chui* suggests that the chamber would have similarly appreciated attention to local context: the judges expressed interest, for instance, in questions of "socio-cultural framework," so as to "prompt a more informed debate from the outset."[472]

The OTP's decision not to locate any of its investigators in the field, or to hire nationals of the country being investigated, stands in contrast with others organs of the Court. The Registry, for instance, though performing a different function than the OTP, has hired Congolese and Ugandan nationals to conduct outreach on behalf of the Court in situation countries.[473] The role and participation of victims in ICC proceedings further provides an interesting counter-example to the Prosecutor's approach. During the pre-trial stage of the Kenya cases, the two counsels who were assigned to represent victims each had a staff of three, country-based field assistants. Kenyan nationals all, these individuals had long associations with Kenyan civil society and human rights organizations in the country. Based in Nairobi, they travelled regularly to other conflict-affected regions of the country, while another was based in the Rift Valley Province, a key site of the post-election violence.[474]

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[468] In contrast, both Louise Arbour and Carla del Ponte, former Prosecutors of the ICTY, hired specialists to act as political advisors in dealing with governments and key figures within the former Yugoslavia. See Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge: Cambridge University Press, 2008).
[469] Personal interview with member of ICC Investigations Division, The Hague, July 2012.
[470] Gaelle Carayon, "Increased Use of Intermediaries: Increased Discontent," *ACCESS: Victims' Rights Working Group Bulletin* (Spring 2012), 4, at http://www.vrwg.org/ACCESS/ENG20Rev.pdf.
[471] IRRI and Aprodivi-ASBL, "Steps Towards Justice, Frustrated Hopes: Some Reflections on the Experience of the International Criminal Court in Ituri" (January 2012), 20.
[472] Ngudjolo Judgment, para. 123. The chamber expressed particular interest in testimonies that allowed it "to appreciate the special significance of the local customs and the function of family relationships in Ituri," as "notions of hierarchy and obedience were likely to be interpreted very differently." Ibid., para. 122.
[473] Personal interviews with ICC Field Office Staff in Kampala, Uganda and Kinshasa, DRC, June 2011.
[474] Personal interview with legal assistants to victims' representatives, Nairobi, January 2012.

While the model adopted in Kenya represented a more directed, streamlined approach to the ICC's victim participation regime that some have criticized,[475] the victims' counsels and their assistants played an active role in exposing early gaps in the OTP's case and pushing it (if unsuccessfully) to investigate further. One filing from the victims' representative in the case against William Ruto and Joseph Sang, in particular, sought to make further submissions to the Court about their views and concerns with respect to the Prosecutor's case. The motion stated that the OTP had not conducted a "meaningful investigation into eyewitness experiences" and that the victims—who numbered nearly 300 at the time—had reportedly not been interviewed by the OTP, were not aware of anyone in their locality having been interviewed, nor were they aware of the Prosecutor having ever come to their localities to conduct on-site investigations.[476] The victims' representative further observed that some victims "felt that the failure of the OTP to conduct on-site investigations or to interview victims could explain why the case as presented … did not fully accord with [their] own personal experiences."[477]

3.2.3 Intermediaries: Quasi-Investigators?

While country nationals have not formally been a part of OTP investigations teams, the Office has nevertheless made extensive use of intermediaries. Intermediaries are not ICC employees as such, but may assist the Office (and other organs of the Court) in a volunteer capacity; in certain cases, intermediaries have also been hired on a short-term, contract basis.[478] No definition of "intermediary" is found in the Rome Statute or the Rules of Procedure and Evidence; however, the Court defines an intermediary as "someone who comes between one person and another; who facilitates contact or provides a link between one of the organs or unit of the Court or Counsel on the one hand, and victims, witnesses, beneficiaries of reparations and/or affected communities more broadly on the other."[479] In short, intermediaries are locally based actors who, "[b]ecause of their long-term presence," carry out important functions for the Court.[480] As summarized by the Trial Chamber in *Lubanga*, they "undertake tasks in the field that staff members cannot fulfil without creating suspicion; they know members of the community, and they have access to information and places that are otherwise unavailable to the prosecution."[481]

Although intermediaries were also a feature of the ad hoc tribunals, the ICC's limited resources, combined with the multiple countries in which it must carry out its operations, means that they are a more permanent part of the Court's practice. Indeed,

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[475] See, e.g, Maina Kiai, "Despised and Neglected, PEV Victims are Now Being Abandoned by ICC," *Daily Nation*, 8 June 2012, at http://www.nation.co.ke/oped/Opinion/-/440808/1423430/-/lr0avoz/-/index.html.

[476] Victims' Representatives Request, paras. 10-11.

[477] Ibid., para 10. More recently, the victims' new legal representative, Fergal Gaynor, filed a motion requesting judicial review of the OTP's decision to suspend its investigation into President Kenyatta's role in the post-election violence; the motion accuses the Office of being "ineffective" and of "prosecutorial surrender and inaction." *Situation in the Republic of Kenya*, Victims' request for review of Prosecution's decision to cease active investigation, ICC-01/09, PTC II, 3 August 2015.

[478] Testimony from the Lubanga proceedings indicate that the term intermediary "began to be used in the summer of 2004, but intermediaries only received contracts much later." See Lubanga Judgment, para. 194. Furthermore, while travel expenses for intermediaries were generally reimbursed, "the majority of the intermediaries were not paid and did not request payment," para. 198.

[479] Draft Guidelines Governing the Relations Between the Court and Intermediaries (August 2011), 5.

[480] Lubanga Judgment, para. 167.

[481] *The Prosecutor v. Thomas Lubanga Dyilo*, Redacted Decision on Intermediaries, ICC-01/04-01/06, TC I, 31 May 2010, para. 88.

reliance on intermediaries attracted particular attention in the wake of the Lubanga trial, where the chamber determined early on that their role, together with the manner in which they discharged their functions, had become "an issue of major importance."[482] In its judgment, the chamber ultimately found that the "essentially unsupervised actions of three of the principal [Prosecution] intermediaries [could not] safely be relied upon," a determination that, in turn, led to the exclusion of the testimony of witnesses who claimed to have served as child soldiers in Lubanga's rebel army.[483]

The uncertain relationship of intermediaries to the OTP (and to the Court at large) underscores the crucial, but potentially destabilizing, role that they can play in investigations. On the one hand, as the trial chamber concluded, the OTP inappropriately "delegated" its investigative responsibilities to intermediaries, relying on them, in some cases, to not only contact, but also propose potential witnesses. At the same time, the role of intermediaries was apparently "limited, in the sense that [they] were excluded from the decision-making process."[484] As it was explained to the Court, intermediaries "were not supposed to know the objectives of the investigation team," nor were they "given any substantive information about the case" because it would have been "too complicated to enable discussions with anyone who was not a member of the investigation division."[485]

Despite recognizing that intermediaries are often better placed to gather evidence than many Hague-based investigators, it would appear that, as a matter of policy, they remain at the margins of the OTP's decision-making process.[486] Kambale, for instance, notes that local Congolese NGOs and activists, "had more raw intelligence on the crimes than any other entity, [but] were deliberately sidelined and their invaluable expertise not fully integrated into the investigative process."[487] Similarly, IIRI, which has worked extensively with intermediaries in the DRC, Uganda, and Sudan, notes that, in the context of the DRC, the Prosecution did not know enough about who was giving it information and why. This "lack of expertise … was viewed as reducing the capacity of the office [in The Hague] to navigate the complex local politics." Simply put, ""They trusted anyone who called themselves civil society.""[488] The trial chamber in *Lubanga* drew a similar conclusion, finding that, "There was no formal recruitment procedure for selecting intermediaries. An intermediary was simply someone who could perform this role; there was no process of candidacy or application and instead it was a matter of circumstance."[489]

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[482] Ibid., paras. 135-138; see also Christian De Vos, "'Someone Who Comes Between One Person and Another': Lubanga, Local Cooperation and the Right to a Fair Trial," *Melbourne Journal of International Law* 12 (2011).
[483] Lubanga Judgment, para. 482.
[484] Ibid., para. 181.
[485] Ibid., para. 183.
[486] See, e.g., Elena Baylis, "Outsourcing Investigations," *UCLA Journal of International Law and Foreign Affairs* 14 (2009), 121; Emily Haslam and Rod Edmunds, "Managing a New 'Partnership': 'Professionalization,' Intermediaries and the International Criminal Court," *Criminal Law Forum* 24 (2013), 49.
[487] Kambale, "Missed Opportunities."
[488] IRRI and Aprodivi-ASBL, "Steps Towards Justice, Frustrated Hopes," 20.
[489] Lubanga Judgment, para. 195. The Prosecutor also drew heavily on evidence gathered from confidential agreements with intermediaries in its cases against Katanga and Ngudjulo Chui, leading the pre-trial chamber to similarly lament 'the reckless investigative techniques during the first two years of the investigation into DRC'. *Prosecutor v. Katanga*, Decision on Article 54(3)(e) Documents Identified as Potentially Exculpatory or Otherwise Material to the Defence's Preparation for the Confirmation Hearing, ICC-01/04-01/07, PTC I, 20 June 2008, para. 123.

Some strides have been made in this area. Draft Guidelines—described as an attempt to "provide a framework with common standards and procedures in areas where it is possible to standardize the Court's relationship with intermediaries"[490]—were first circulated in 2010 and later revised. Importantly, the Guidelines address the existing legal and policy framework governing the ICC's relationship with intermediaries and seek to provide greater clarity as to the rights intermediaries may expect from the ICC, including their selection, payment (where appropriate) of their expenses, and their protection when placed at risk. Text for these guidelines was agreed upon in April 2012; however, they were not formally promulgated for two more years. Initially, it was understood that the Guidelines required the consent of the ASP; however, at both the Assembly's 2012 and 2013 sessions, delegates only "took note" of them. As Deirdre Clancy notes, "While a fiscally sensitive ASP was clearly wary of institutionalising the intermediary role, reports by the Court to the ASP at the same time indicated that use of intermediaries was 'ultimately cost effective.'"[491] Eventually, in April 2014, the Guidelines (including a Model Contract and the Code of Conduct) appeared on the ICC's website, preceded, with little fanfare, by the appointment of a facilitator/focal point on intermediaries. Although the Guidelines are now formally in effect, the text accompanying the website notably describes them simply as "standards" to which the organs of the Court will "aspire."[492]

4. Linking Preliminary Examinations and Investigations

Reflecting on investigatory practices underscores the degree to which the ICC's ability to function as a credible threat depends on the quality of its investigations and prosecutions. Indeed, if one part of complementarity is its sword—the Prosecutor's ability to wrest cases away from member states, or to initiate proceedings where there are none—then the ICC's record of convictions must itself be convincing. The OTP's failings in this respect, with only two convictions to date in trials that were both heavily criticized, suggests that it has not sufficiently guarded the Court's own catalytic potential and that, at an institutional level, investigative practices have been marginalized.[493] This lack of prioritization appears to have been premised, at least initially, on a presumption that distancing the Court from local contexts would better preserve its impartiality and efficiency, although, in fact, it appears to have hobbled both.

Furthermore, this approach rests uneasily with the OTP's rhetorical commitment to the guiding ethos of "positive" complementarity: responsible, cooperative engagement

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[490] Notably, while many organizations (for, instance local NGOs) can also serve as intermediaries, the Guidelines only govern the ICC's relationships with individuals. In addition to the Guidelines, a draft "Code of Conduct for Intermediaries" and a "Model Contract for Intermediaries" have also been created. See "ICC adopts Guidelines on Intermediaries," at www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/strategies-and-guidelines/Pages/default.aspx.

[491] Deirdre Clancy, "'They Told Us We Would Be Part of History': Reflections on the Civil Society Intermediary Experience in the Great Lakes Region," in Christian De Vos, Sara Kendall, and Carsten Stahn (eds.), *Contested Justice: The Politics and Practice of International Criminal Court Interventions* (Cambridge: Cambridge University Press, 2015). See "Second Report on the draft Guidelines" (30 October 2013), which states that, "while there are unavoidable costs for the Court in implementing the draft Intermediaries Guidelines … the use of intermediaries is ultimately cost effective for the Court. Intermediaries undertake work that would be extremely costly for the Court to perform," para. 19.

[492] The ICC's webpage notes that, "[W]ith the exception of the model contract, Intermediaries guidelines are not legally binding, but represent standards for the Organs of the Court to aspire to in their interactions with intermediaries." See "ICC adopts Guidelines on Intermediaries."

[493] For similar criticism, see Human Rights Watch, "Unfinished Business: Closing Gaps in the Selection of ICC Cases" (September 2011).

with national-level actors.[494] This dimension of complementarity, extolled by scholars like Burke-White and ratified by the Office itself, underscores the importance of cultivating meaningful relationships between prosecutorial authorities in The Hague and in-country actors. Such an orientation to the field would offer important opportunities to build the sort of beneficent relationship imagined for the Court and national jurisdictions, one in which the judicial intervention becomes a site for knowledge transfer and capacity building. It would also benefit the Court in the long run, providing greater opportunity to understand the political, social, and cultural contexts in which its examinations unfold. As one ICC senior analyst has noted, "Local expertise is indispensable to interpret the relevant information in its authentic social context, including aspects of culture, politics, economy and linguistics."[495]

Like investigations, preliminary examinations are also an area where the potential of "positive" complementarity could be better realized. In particular, examinations are crucial because they provide a potentially greater dialogic space between the Court and national authorities, one that narrows substantially once the OTP moves from "situation" to "case." Whereas investigations might necessarily initiate a more adversarial relationship with the state it does not appear that anything prohibits the OTP (assuming the state in question consents) from locating staff on the territory of countries under preliminary examination. Seils has advocated such an approach, noting that, "A longer presence on the ground should allow analysts to improve their understanding of the institutions that are of interest, both in terms of those providing information and those conducting national proceedings."[496] The Office's Policy Paper likewise notes that, "for the purpose of analysing the seriousness of the information" it receives, it "may also undertake field missions to the territory concerned in order to consult with the competent national authorities, the affected communities and other relevant stakeholders, such as civil society organisations."[497]

The Kenyan experience, where the failed prosecutions have done great damage to the Court's credibility, illustrates the important link between these stages. For instance, it would appear that the OTP did not use the extended preliminary examination period to conduct more thorough independent inquiries in Kenya or, as discussed above, to develop a meaningful presence within the country or amongst affected communities. (The Prosecutor's Article 15 request, for instance, makes no mention of any in-country inquiries that the Office undertook, relying instead entirely on the CIPEV and KNHRC reports, as well as those of other UN and NGO offices.) Nor does this approach appear to be unique to the Kenyan situation.[498] In Seils' words, "most of the preliminary analysis [is] carried out at the OTP's headquarters in The Hague by very small teams." This "prolonged distance from the country," he argues, "may inhibit potential positive

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[494] I was surprised to learn, for instance, that it was not until after the 2010 Rome Statute Review Conference in Kampala that the appropriate members of the Ugandan DPP came to even be aware of the ICC investigators acting in-country, and subsequently initiated contact with the Office. Interview with a senior DPP official, Kampala, December 2011.

[495] Xabier Agirre Aranburu, "Methodology for the Criminal Investigation of International Crimes3," in A. Smeulers (ed.), *Collective Violence and International Criminal Justice* (2010), 359.

[496] Seils, "Making complementarity work," 1000.

[497] OTP Policy Paper, para. 85.

[498] Speaking in 2005, Jane Odwong, a former Ugandan parliamentarian, criticized the ICC's investigations for "operating in a clandestine manner." In her words, "Nobody knows the issues of the ICC even within our communities, and the country." Jane Odwong (Kitgum), 23 March 2005.

impacts that could occur as the result of preliminary examinations."[499] By contrast, developing closer relationships with national-level interlocutors, particularly intermediaries, could better ensure that the Office "knows the lie of the land well enough to identify reliable and credible counterparts to begin the investigation."[500] Indeed, while the OTP's missteps with respect to ill-intentioned intermediaries have dominated discussions about the topic, most intermediaries are committed advocates who have sought to help the ICC, often at great personal risk.

5. Conclusion

If the ICC is to serve as a credible threat to states, greater capital must be invested in preserving the two areas where its catalytic effect on domestic proceedings is greatest: preliminary examinations and investigations. The OTP's record of successful prosecutions to date, and the increasing dissatisfaction amongst affected communities with its performance, belies the desirability of the "light touch" approach to the field that Prosecutor Moreno-Ocampo once championed.[501] While deliberate, this approach has elided with larger constraints, ranging from a limited appetite by member states to appropriately resource the Court, to an institutional reluctance to assume the greater risks that a long-term ground presence might present.[502] Such reluctance is more understandable in the context of coercive interventions (where the prospect of state cooperation is uncertain or unlikely) yet, as has been seen even in states that have invited the ICC in, the OTP's field presence has been minimal; the composition of its staff predominantly, if not exclusively, international; and its relationships with local actors damaged by a unilateral approach to evidence gathering.

There have been promising policy changes under Prosecutor Bensouda's leadership, though it is unclear the extent to which they have taken shape in practice. Notably, the Office's 2012-2015 strategic plan announced a departure from the policy of "focused investigations" in favour of a principle of "in-depth, open-ended investigations," and explicitly committed the Office to ensuring that its "cases at the confirmation hearings … are as trial-ready as possible."[503] In line with this reorientation, Bensouda promisingly noted in her inaugural speech to the ASP that the OTP is "sending longer

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[499] Seils, "Making complementarity work," 999. Phil Clark makes a similar point, arguing based on his extensive ethnographic research in the DRC that, "the Court has generally failed to foster meaningful relations with … ground-level institutions that are vital to its cause. … [T]he ICC has not always sought this collaboration and often perceived itself as the lead organisation to which all others are answerable." Phil Clark, "If Ocampo Indicts Bashir, Nothing May Happen," 13 July 2008, at http://www.csls.ox.ac.uk/documents/Clark_Final.pdf.

[500] Seils, "Making complementarity work," 1000. The War Crimes Research Office similarly concludes that, the "selection of suspects and crimes that will be the focus of an investigation" would benefit from improving the OTP's "understanding of the context in which ...crimes took place and its ability to gain the trust of those who may be in a position to provide useful information." See WCRO Report, 6.

[501] By contrast, for a defense of ICC investigations, see Alex Whiting, "Dynamic Investigative Practice at the International Criminal Court," *Law & Contemporary Problems* 76(3-4), 163-189.

[502] See, e.g., Sara Kendall, "Commodifying Global Justice: Economies of Accountability at the International Criminal Court," *Journal of International Criminal Justice* 13(1) (2015).

[503] 2012-2015 strategy. Perhaps drawing on the lessons of the Kenyan experience and the criticisms of the Lubanga case, the Office also announced a departure form its previously stated policy of prosecuting only those "most responsible" for crimes in favor of a strategy of "gradually building upwards," wherein it "first investigates and prosecutes a limited number of mid-and high-level perpetrators in order to ultimately have a reasonable prospect of conviction for those most responsible."

investigative missions with less frequent travel."[504] The Office's proposed 2016-2018 strategic plan maintains this approach, while also adopting a new strategic goal of developing "with partners a coordinated investigative and prosecutorial strategy to close the impunity gap."[505]

It would therefore seem that the Office acknowledges some of the problems inherent in its earlier approach. To that end, it has actively sought greater budgetary assistance to support its expanding workload (including the hiring of additional situation analysts) and has increasingly endorsed the potential value of more open-ended preliminary examinations and investigations as a form of maintaining leverage on states.[506] If implemented effectively, such an approach could better capitalize on both the cooperative dimension of "positive" complementarity—working with national authorities to provide technical assistance or advice, for instance—as well as its coercive potential. As the Kenyan experience suggests, however, "open-ended" examinations can also harbor risks, particularly where the threat of an ICC investigation is conditioned on the establishment of particular domestic benchmarks.

These changes suggest that, as with the more recent turn in the Court's admissibility jurisprudence, the ICC may yet evolve into an institution that is more responsive to the domestic contexts in which it operates and, as a result, better able to capitalize on complementarity's catalytic properties. At the same time, the unique dynamics of each ICC situation country underscores the fact that the leverage (or support) the prosecutorial function may bring to bear is necessarily limited. Notwithstanding the OTP's evident missteps in Kenya, in retrospect it is unlikely that the threat of the Court alone was sufficiently great for the STK to receive the domestic political support it needed. Nevertheless, the failure of the Kenyan state to comply with this particular desired outcome does not mean that the ICC's intervention there has been without effect. On the contrary, as the 2009 STK debates and those in the following chapters illustrate, the Court remains deeply alive in the Kenyan political landscape.

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[504] Bensouda ASP Address. In the same speech, however, it was made clear that "there shall be no structural changes in the Office, neither shall there be a departure from established policies and methods of operation," paras. 3, 6.

[505] International Criminal Court, Office of the Prosecutor, Strategic Plan, 2016-2018 (6 July 2015).

[506] As Bensouda has noted, "One of the main challenges faced not only by the Office but by the Court as whole is the question of resources. Over the years, the number of preliminary examinations, investigations and prosecutions has increased and yet resources are not matched to respond to this growing demand. There is therefore a real challenge in maintaining and ensuring high quality work without the necessary resources." See "Interview with Fatou Bensouda," *New African Magazine* (28 January 2014), at http://newafricanmagazine.com/interview-with-fatou-bensouda/.