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Rosemary Grey

Sydney Law School & Sydney Southeast Asia Centre, The University of Sydney

Sara Wharton

University of Windsor, Faculty of Law

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Lifting the Curtain

Opening a Preliminary Examination at the International Criminal Court

Rosemary Grey* and Sara Wharton**

Abstract

In the emerging literature on preliminary examinations, most scholars have focussed on issues that arise after a preliminary examination has been opened. Yet there has been little analysis of the International Criminal Court (ICC) Prosecutor's decision to open a preliminary examination in the first place. Taking this gap in the literature as our starting point, and flagging an emerging debate in the ICC as to whether the Rome Statute envisages a 'pre-preliminary examination' stage at all, this article examines the law and policy which governs the opening of an ICC preliminary examination and makes the case for further critical discussion about how actions by the Prosecutor and the Court at this early stage of proceedings might affect perceptions of the legitimacy of the ICC. We argue that the Prosecutor's power to open a preliminary examination can involve complex legal questions, have significant political consequences, and affect how independent the Court is, and is seen to be. As an initial contribution to what we hope will be a broader conversation on this topic, we suggest that greater transparency about the Prosecutor's decision-making at the 'pre-preliminary examination' stage, and greater consistency in the Office of the Prosecutor (OTP)'s treatment of different situations, would enhance the legitimacy of the Court, so long as the OTP continues to protect the safety and security of those who send information on alleged crimes.

1. Introduction

On 8 February 2018, the Prosecutor of the International Criminal Court (ICC) announced that she had started to analyse information on alleged crimes in the Philippines and Venezuela.¹ The very next day, Philippines President Rodrigo Duterte threatened to withdraw from the Rome Statute of the International Criminal Court, claiming: 'There are so many massacres happening in all parts of Asia and you pick on me. You better clear that up because I will withdraw from the ICC.'² True to his word, on 17 March 2018, Duterte sent the United Nations (UN) Secretary-General written

* University of Sydney Postdoctoral Fellow, Sydney Law School & Sydney Southeast Asia Centre (Australia). With thanks to the reviewers for their comments. [rosemary.grey@sydney.edu.au]

** Assistant Professor, Faculty of Law, University of Windsor (Canada). In addition to thanking the reviewers, I would like to thank Clare Hopkins and Amanda Hawkins for their research assistance. [Sara.Wharton@uwindsor.ca]

¹ ICC-OTP, *Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela*, 8 February 2018, available online at <https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat> (visited 3 September 2019).

² *Press Conference of President Rodrigo Roa Duterte*, Republic of the Philippines, Presidential Communications Operations Office, 9 February 2018, available online at https://pcoo.gov.ph/press_briefing/press-conference-president-rodrigo-roa-duterte/ (visited 3 September 2019). Translation: 'Philippines President Rodrigo Duterte says he cannot be tried by war crimes court', *New Indian Express*, 9 February 2018, available online at <http://www.newindianexpress.com/world/2018/feb/09/philippines-president-rodrigo-duterte-says-he-cannot-be-tried-by-war-crimes-court-1770887.html> (visited 3 September 2019).

notice of the Philippines' decision to withdraw from the Rome Statute.³ In accordance with the Statute, this decision will become effective in one year's time.⁴ The Philippines will then become the second state to withdraw from the ICC, following Burundi, whose withdrawal became effective on 27 October 2017 — a development described by the presidential spokesperson as a 'great victory' over a court which had become an 'instrument in the hands of the West to enslave African states'.⁵

These withdrawals were not provoked by the issuance of arrest warrants against government officials, or even the start of an ICC investigation *per se*. Rather, they were provoked by the initiation of a 'preliminary examination'; an exercise of prosecutorial power deemed so insignificant by the Rome Statute's drafters that it rates just a single mention in the Statute.⁶ As a result of the lack of a detailed statutory framework for opening a preliminary examination, several parts of this process take place with little or no legal guidance. Twenty years since the creation of the ICC, the lack of legal guidance on this point is starting to look like significant oversight given the complex legal issues that can arise during or prior to the instigation of a preliminary examination, and because of the significant political consequences that a decision to open a preliminary examination can have.⁷ Even more so now, given the emerging debate as to when a 'preliminary examination' actually *begins* — a question raised by the proceedings regarding the alleged deportation of Rohingya people from Myanmar.⁸

The Office of the Prosecutor's (OTP's) current practice of formally announcing and publicizing the opening of new preliminary examinations, as well as the tide of reports on

³ ICC, *ICC Statement on The Philippines' notice of withdrawal: State participation in Rome Statute system essential to international rule of law*, 20 March 2018, available online at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1371> (visited 3 September 2018).

⁴ Art. 127(1) ICCSt.

⁵ 'Burundi becomes first nation to leave international criminal court', *The Guardian*, 28 October 2017, available online at <https://www.theguardian.com/law/2017/oct/28/burundi-becomes-first-nation-to-leave-international-criminal-court> (visited 3 September 2018); 'UN commission: Burundi commits crimes against humanity', *Al Jazeera*, 5 September 2017, available online at <https://www.aljazeera.com/news/2017/09/commission-burundi-commits-crimes-humanity-170904133352582.html> (visited 3 September 2018).

⁶ Art. 15(6) ICCSt.

⁷ For example, the ICCSt. stipulates that in the absence of a referral from a State Party or the Security Council, the Prosecutor cannot proceed from a preliminary examination to an investigation without obtaining authorization from the Pre-Trial Chamber of the Court. This requirement for judicial authorization was written into the Statute to alleviate the fears of states who were concerned about the prospect of a rogue Prosecutor using his or powers to initiate 'politically motivated' proceedings. See A.M. Danner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court', 97 *American Journal of International Law (AJIL)* (2003) 510-552.

⁸ See ICC, *Decision on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute"* (ICC-RoC46(3)-01/18-37), 6 September 2018, §§ 81-82 ('Myanmar/Bangladesh Decision') & Partially dissenting opinion of Judge Marc Perrin de Brichambaut, § 13 ('Myanmar/Bangladesh Partial Dissent').

preliminary examinations that the OTP now publishes, suggests that the importance of this early stage of proceedings is not lost on Prosecutor Bensouda. Most recently, the caution that the OTP has shown in requesting a ruling on jurisdictional questions raised in the context of alleged crimes against the Rohingya people in Myanmar and Bangladesh suggests that it is acutely aware that a decision to open a preliminary examination, and the interpretation of the ICC's jurisdictional requirements at this early stage of proceedings, can have high stakes.⁹ The importance of preliminary examinations is also increasingly recognized in academic literature, with several scholars and non-government organisations (NGOs) arguing that preliminary examinations can have consequences *beyond* the possible initiation of an investigation by the ICC, such as catalysing domestic proceedings, or engendering domestic law reform.¹⁰ The significance of the preliminary examination process has been clearly articulated by Carsten Stahn who observes:

Although they are at the periphery of the formal judicial process, [preliminary examinations] have a key role to play in relation to the legitimacy and perception of justice. Preliminary examinations are related to certain retributive rationales, such as prevention of violations and reaffirmation of norms. They also have certain distributive effects. They frame choices on resource allocation and distribution of blame, i.e. who should be investigated and prosecuted internationally. They provide incentives to domestic jurisdictions to address accountability dilemmas. Moreover, they have a strong expressivist dimension. They express harm and gravity of alleged violations and set important signals about the type of atrocity situations that international criminal justice cares about.¹¹

Yet in the emerging literature on preliminary examinations, most scholars have focussed on issues that arise *after* a preliminary examination has been opened, such how long the preliminary

⁹ ICC, *Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute* (ICC-RoC46(3)-01/18-1), OTP, 9 April 2018, § 1 ('Myanmar/Bangladesh Request'); Decision assigning the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute" to Pre-Trial Chamber I (ICC-RoC46(3)-01/18-2), President of the Pre-Trial Division, 11 April 2018.

¹⁰ E.g. D. de Vos, *Complementarity's Gender Justice Prospects and Limitations – Examining normative interactions between the Rome Statute and national accountability processes for sexual violence crimes in Colombia and the Democratic Republic of Congo* (PhD Thesis, European University Institute, 2017); A. Kapur, 'The Value of International-National Interactions and Norm Interpretations in Catalysing National Prosecutions of Sexual Violence', 6 *Oñati Socio-Legal Series* (2016); Human Rights Watch, *Pressure Point: The ICC's Impact on National Justice* (2018), available online at https://www.hrw.org/sites/default/files/report_pdf/ij0418_web_0.pdf (visited 3 September 2018).

¹¹ C. Stahn, 'Damned If You Do, Damned If You Don't: Challenges and Critiques of Preliminary Examinations at the ICC', 15 *Journal of International Criminal Justice (JICJ)* (2017) 413-434, at 415-416.

examination should take,¹² and how the statutory criteria for opening an investigation have been interpreted at the preliminary examination stage.¹³ By contrast, there has been little analysis of the political and legal consequences of a decision to *open* a preliminary examination in the first place, and the process that leads up to that exercise of prosecutorial power — a process that has no name in the Rome Statute or ICC Rules of Procedure and Evidence, but which we will call the ‘pre-preliminary examination’ stage.

Taking this gap in the literature as our starting point, this article examines and makes the case for further critical discussion about the law and policy which governs the *opening* of an ICC preliminary examination and the ‘pre-preliminary’ stage. We argue that these early deliberations warrant closer attention from scholars, lawyers, states, and all of those with an interest in the Court, because it can involve complex questions about the ICC’s jurisdictional boundaries, can have significant political consequences including prompting withdrawals, and can affect how independent the Court is, and is seen to be. Motivating this analysis is a curiosity about where a decision to open a preliminary examination fits into the broader debate about the ICC’s legitimacy — both in terms of its ‘right to rule’, as understood from the perspective of legal theorists, and its perceived legitimacy, as understood by the local and global polities watching the Court.¹⁴ We suggest that greater transparency and consistency in the Office’s decision-making at this early stage of proceedings would enhance the perceived legitimacy of the Court by making decision-making more accountable and, potentially, more participatory, so long as the Office continues its practice of protecting the identity of individuals that send it information on alleged Rome Statute crimes.¹⁵

¹² A. Poes, ‘Towards the ‘Golden Hour’? A Critical Exploration of the Length of Preliminary Examinations’, 15 *JICJ* (2017) 435-453.

¹³ M. Longobardo, ‘Everything Is Relative, Even Gravity: Remarks on the Assessment of Gravity in ICC Preliminary Examinations, and the *Mavi Marmara* Affair’, 14 *JICJ* (2016) 1011-1030; D. Bosco, ‘Discretion and State Influence at the International Criminal Court: The Prosecutor’s Preliminary Examinations’, 111 *AJIL* (2017) 395-414; L. Chappell, R. Grey and E. Waller, ‘The Gender Justice Shadow of Complementarity: Lessons from the International Criminal Court’s Preliminary Examinations in Guinea and Colombia’, 7 *International Journal of Transitional Justice* (2013) 455-475.

¹⁴ For a discussion of these two conceptions of legitimacy, often described as ‘normative’ and ‘sociological’ legitimacy, see: A. Buchanan and R.O. Keohane, ‘The legitimacy of global governance institutions’, 20 *Ethics and International Affairs* (2006), 405-437; H.G. Cohen, A Føllesdal, N. Grossman and G. Ulfstein, ‘Legitimacy and International Courts – A Framework’, in N. Grossman, H.G. Cohen, A Føllesdal and G. Ulfstein, *Legitimacy and International Courts* (Cambridge University Press, 2018) 1-40; L. Chappell, *The Politics of Gender Justice at the International Criminal Court: Legacies and Legitimacy* (Oxford University Press, 2016), 19-23.

¹⁵ ICC Rules of Procedure and Evidence, rule 46; OTP, *Policy Paper on Preliminary Examinations*, November 2013 (‘Policy Paper’), § 88, available online at https://www.icc-cpi.int/iccdocs/otp/otp-policy_paper_preliminary_examinations_2013-eng.pdf (visited 13 September 2018).

To frame this argument, Part Two of the article examines the law and policy that governs a decision to open a preliminary examination (as distinct from the host of decisions that follow). This section is quite brief because, as we will show, decision-making at this early stage of proceedings occurs with little guidance from law *or* policy. However, it makes the point that prosecutorial decision-making at the ‘pre-preliminary examination’ stage includes making decisions of a *legal* nature (namely, decisions on jurisdiction), as well decisions of a *discretionary* nature, meaning ‘choos[ing] between two or more permissible courses of action’.¹⁶ In Part Three, we explore the OTP’s practice in this respect, organising our observations into what is *known* about decisions to open a preliminary examination, and what remains ambiguous or unknown. This review spans fifteen years of practice, starting with the opening of a preliminary examination into the situations in Uganda, the Democratic Republic of Congo, and Côte d’Ivoire in 2003. Part Four offers some ideas for making this area of the OTP’s practice more consistent and transparent, and considers how the Court (i.e., the Chambers) might support the OTP in this respect. Bringing the article to a close, Part Five identifies some questions for further research and debate.

2. Law and Policy

The process for *opening* a preliminary examination occurs with little guidance from law or policy. To begin with the law, the starting point is Article 13 of the ICC Statute which provides that the ICC can exercise jurisdiction in any of three scenarios: when a situation is referred to the Prosecutor by a State Party; when a situation is referred to the Prosecutor by the UN Security Council; or if the Prosecutor ‘has initiated an investigation in respect of such a crime in accordance with article 15.’ It is there, in Article 15, that we find the first and only reference to a ‘preliminary examination’ in the ICC Statute.

Read together, Articles 13 and 15 indicate that the Prosecutor must conduct an analysis of available information before an investigation can begin; that this early stage of analysis is called a ‘preliminary examination’; and, if it was initiated by the Prosecutor *proprio motu* (on his or her own motion), then a Pre-Trial Chamber must give permission before the Prosecutor can progress to an ‘investigation’ as such.¹⁷ While this statutory framework offers a general definition of what

¹⁶ See Danner, *supra* note 7, 518.

¹⁷ The only reference to a ‘preliminary examination’ in the ICCSt. appears in Art. 15(6), which regulates the initiation of an investigation by the Prosecutor *proprio motu*. One might therefore argue that there is no need for a preliminary examination when the investigation is instead initiated by a referral from a State Party or the UN Security Council.

a ‘preliminary examination’ is, it leaves unanswered several key questions about the process by which the Prosecutor decides whether or not to open a preliminary examination in the first place. In particular, the Statute does not specify any circumstances in which the Prosecutor is *obligated* to take this step, nor set forth any *criteria* for the Prosecutor to apply when sorting between situations that warrant the initiation of a preliminary examination and those that do not.

By contrast, the decision to open an ‘investigation’ is a highly regulated affair. In order to open an investigation, the Prosecutor must apply the criteria found in Article 53(1) of the Rome Statute, meaning that he or she must determine whether or not there is a reasonable basis to believe that crimes within the jurisdiction of the ICC have been committed, that the potential cases would be admissible (meaning that they would be sufficiently grave to justify further action by the ICC and are not already the subject of genuine national proceedings), and that an investigation would serve the ‘interests of justice’.¹⁸ Article 53(1) further specifies that, if the situation was referred by a State Party or the Security Council, the Prosecutor ‘shall’ (must) initiate an investigation *unless* any of these tests of ‘jurisdiction’, ‘admissibility’, and ‘interests of justice’ is not satisfied.¹⁹ If there was no such referral, then the Prosecutor must convince a Pre-Trial Chamber that these three tests are satisfied before an investigation can commence.²⁰ Additional rules govern a decision to open an investigation into the crime of aggression²¹ for which the ICC’s jurisdiction was activated on 17 July 2018. If the Prosecutor decides that there is *not* a reasonable basis to open an investigation, that decision is subject to a degree of judicial oversight (albeit minimal).²² By

However, Art. 53(1) ICCSt. and Rule 48 RPE specify that the Prosecutor must determine whether the criteria of jurisdiction’, ‘admissibility’, and ‘interests of justice’ are satisfied before initiating an investigation into any situation, regardless of the initiating mechanism. A preliminary examination is therefore necessary in all situations, not just those in which the proceedings are initiated by the Prosecutor *proprio motu*. It has been argued that the ICC Statute is ‘wrong’ to require a preliminary examination in the case of a Security Council referral. However, the Court has not adopted that view: it has allowed the Prosecutor to conduct preliminary examinations (albeit brief ones) into both situations that have been referred by the UN Security Council to date. See J.D. Ohlin, ‘Peace, Security, and Prosecutorial Discretion’, in C. Stahn and G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, 2008), 186-208.

¹⁸ Art. 53(1) ICCSt. Rule 48 RPE.

¹⁹ Art. 53(1) ICCSt.

²⁰ Art. 15(3)-(4) ICCSt.

²¹ Art. 15*bis* ICCSt..

²² Art. 53(3)(a) ICCSt. provides that, if the Prosecutor’s decision not to open an investigation is based on the criteria of ‘jurisdiction’ or ‘admissibility’, and if situation was referred by a State Party or the Security Council, then the Pre-Trial Chamber may review the Prosecutor’s decision at the referring party’s request and, on the basis of that review, may request the Prosecutor to reconsider his or her decision. We note that judicial review under this provision is limited in three ways. First, the Pre-Trial Chamber is not obligated to review the Prosecutor’s decision if the referring party so requests. Second, if the Pre-Trial Chamber elects to review the Prosecutor’s decision and identifies an error therein, it cannot compel the Prosecutor to reconsider; the most it can do is ‘request’ that the Prosecutor takes that

contrast, the Statute is silent about whether the Prosecutor’s decision on whether or not *to open a preliminary examination* is subject to judicial oversight at all.²³

In the absence of clear statutory framework for opening a preliminary examination, the OTP has developed its own *Policy Paper on Preliminary Examinations* (‘the Policy’), which was made public in November 2013. While policy papers are, of course, not binding, it provides the greatest insight into the OTP’s approach to preliminary examinations, in particular in light of the limited statutory guidance on this issue. The Policy outlines four ‘phases’ of analysis that the OTP conducts before any investigation can begin. Phases 2, 3 and 4 are fairly straightforward and focus on the Article 53(1) criteria that the Prosecutor applies during a preliminary examination in order to determine whether or not there is a reasonable basis to open an investigation (namely, the aforementioned tests of ‘jurisdiction’; ‘admissibility’ and ‘interests of justice’).²⁴ However, it is ‘Phase 1’ which is the most relevant for our purposes. According to the Policy:

Phase 1 consists of an initial assessment of all information on alleged crimes received under article 15 (‘communications’). The purpose is to analyse and verify the seriousness of information received, filter out information on crimes that are outside the jurisdiction of the Court and identify those that appear to fall within the jurisdiction of the Court. Specifically, the initial assessment distinguishes between communications relating to: a) matters which are manifestly outside the jurisdiction of the Court; b) a situation already under preliminary examination; c) a situation already under investigation or forming the basis of a prosecution; or d) matters which are neither manifestly outside the jurisdiction of the Court nor related to situations already under preliminary examination or investigation or forming the basis of a prosecution, and therefore warrant further analysis.²⁵

step. Third, if the Prosecutor chooses to review the decision, he or she is not obligated to reach a different outcome. By contrast, Art. 53(3)(b) provides that, if the Prosecutor’s decision not to open an investigation was based solely the ‘interests of justice’ criteria, the Pre-Trial Chamber can overrule that decision, either at the request of the referring party or on its own motion. This is the only true judicial review power that the Chambers have over the OTP’s decision making at the preliminary examination phase.

²³ When faced with this issue, one Pre-Trial Chamber used the judicial review provisions under Art. 53(3) of the Statute to resolve the question. See Decision on the ‘Request for review of the Prosecutor’s decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar’s Decision of 25 April 2014’, *Request under Regulation 46(3) of the Regulations of the Court* (ICC-RoC46(3)-01/14-3), Pre-Trial Chamber II, 12 September 2014.

²⁴ Policy Paper, *supra* note 15, §§ 81-83.

²⁵ *Ibid.*, § 78. See also A. Khojasteh, ‘ICC Statute Article 15’, 13 June 2017, available online at <https://www.cilrap.org/cilrap-film/15-khojasteh/> (visited 3 September 2018).

Communications in the last category, i.e. those that ‘warrant further analysis’, are then examined in a ‘dedicated analytical report which will assess whether the alleged crimes appear to fall within the jurisdiction of the Court and therefore warrant proceeding to the next phase’.²⁶ The preparation of this report is all part of the ‘Phase 1’.

As a foundation for the forthcoming analysis, there are four key points about the ‘Phase 1’ process to be noted here. First, ‘Phase 1’ is not part of the preliminary examination; it is a *pre-preliminary* examination stage.²⁷ Second ‘Phase 1’ does not apply to situations that have been referred by a State Party or the Security Council, or which are the subject of an *ad hoc* declaration by a non-State Party accepting the jurisdiction of the ICC (an ‘Article 12(3) declaration’).²⁸ Rather, those situations jump straight to ‘Phase 2’, meaning that a preliminary examination is formally opened without prior screening by the OTP.²⁹ This disparate treatment of situations that have been referred or identified in Article 12(3) declarations versus other situations that the Prosecutor may be asked to investigate by civil society or other actors is not mandated by the Statute. Rather, it is a choice that the Prosecutor has made — not unlawfully but, as we suggest later, not very fairly — in the exercise of prosecutorial discretion. Third, both ‘Phase 1’ and ‘Phase 2’ deal with the issue of jurisdiction. This raises questions about the distinction between these two stages, which we return to in our discussion of the OTP’s practice, below. Fourth, the entire ‘Phase 1’ process can occur behind closed doors. The Statute does not obligate the Prosecutor to notify the Pre-Trial Chamber, or any third party, of any conclusions reached at the ‘pre-preliminary examination’ stage. Thus, if the Prosecutor finds that a situation is ‘manifestly outside the jurisdiction of the Court’, the reasons for this decision, or even the bare fact that the decision has been made, need not be disclosed or publicised in any form.

3. From Policy to Practice

A. Phase 1: Key Facts and Figures

While the OTP’s Policy lays down a framework for opening a preliminary examination, a thorough understanding of this stage of proceedings requires an analysis of the Office’s practice in reviewing Article 15 communications. The term ‘Article 15 communications’ refers to information on alleged

²⁶ *Ibid.*, § 79.

²⁷ The Policy Paper specifies that a preliminary examination’s ‘formal commencement’ occurs at Phase 2. *Ibid.*, § 80.

²⁸ *Ibid.*, §§ 75-76.

²⁹ *Ibid.*, § 80.

crimes that is sent by individuals or organizations to the ICC Prosecutor in accordance with Article 15 of the Rome Statute. These communications may be sent *before* a preliminary examination has been opened and may, depending on the conclusions reached at ‘Phase 1’, prompt the Prosecutor to open a preliminary examination *proprio motu*. They may also be submitted *after* a preliminary examination has been opened, in which case they could potentially supplement the information that the Prosecutor has already received and/or solicited under Article 15(2).

The OTP receives a vast number of these communications in a single year, all of which are subjected to a ‘Phase 1’ analysis in accordance with the Policy. Data provided by the Office gives a sense of the scale of this task. As of 31 October 2017, the OTP had received 12,590 Article 15 Communications, 568 of which were received in the period between 1 October 2016 and 31 October 2017 alone.³⁰ In general, it receives approximately 400 to 600 communications every year.³¹ However in one anomalous period (1 August 2008 and 30 June 2009), the Office received 4870 communications.³² 3,823 of these pertained the conflict in South Ossetia, Georgia,³³ all but six of those being submitted by the Prosecutor General of Moscow³⁴ — a striking fact, and one that has not garnered much attention in the scholarship on the Court.

In accordance with the Rules of Procedure and Evidence, the OTP does not publicly identify the sender as a general rule.³⁵ However, pursuant to its Policy and its Regulations, the Office may publicly confirm receipt of a communication if the sender has already made public that fact.³⁶ There have been relatively few instances in which the Office has followed this course of action in practice. One example is the aforementioned barrage of communications from the

³⁰ OTP, *Report on Preliminary Examination Activities 2017*, 4 December 2017 (‘2017 Preliminary Examination Report’), § 18, available online at https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf (visited 3 September 2018).

³¹ The number of Art. 15 communications received annually are reported in the OTP’s annual reports on preliminary examinations. Other numbers can be found in the Court’s reports to the Assembly of States Parties (ASP) and to the UN General Assembly.

³² ICC, *Report of the International Criminal Court*, UN General Assembly, Sixty-fourth session, 17 September 2009, Un Doc. A/64/356 (‘2009 UN Report’), § 44.

³³ *Ibid.*

³⁴ The ICC’s 2009 report to the General Assembly notes that: ‘The Prosecutor General of Moscow, whose State is not a party to the Statute, has sent 3,817 communications to the Court’. However, the report does not specify the time period in which these 3,817 communications were received. *Ibid.*, § 48.

³⁵ Rule 46 provides that: ‘Where information is submitted under article 15, paragraph 1, or where oral or written testimony is received pursuant to article 15, paragraph 2, at the seat of the Court, the Prosecutor shall protect the confidentiality of such information and testimony or take any other necessary measures, pursuant to his or her duties under the Statute.’

³⁶ Policy Paper, *supra* note 15, § 88; Regulations of the OTP, reg. 28.

Prosecutor General of Moscow, which the Office acknowledged in a 2009 report.³⁷ Another is the communication from two civil society groups that, in 2014, prompted Prosecutor Bensouda to ‘reopen’ the preliminary examination into allegations of crimes by UK forces in Iraq (see Part 3.D, below). Aside from these and a handful of other examples,³⁸ the OTP does not generally publicise receipt of an ‘Article 15 communication’ or identify the sender. However, as we discuss in more detail below, some senders have chosen to publish their communications of their own accord.³⁹

The number of Article 15 communications varies from one situation to another. Excluding the anomaly of the thousands of communications in the situation in Georgia, reported numbers of communications per preliminary examination vary from only seven or eight in situations like South Korea⁴⁰ and Central African Republic II⁴¹ to 125 communications relating to the situation in Afghanistan,⁴² 131 communications relating to the situation in Nigeria,⁴³ 199 communications relating to the situation in Colombia,⁴⁴ and over 240 communications reportedly received in relation to the Iraq/UK preliminary examination.⁴⁵ In most cases, the OTP continues to receive communications most years even after a preliminary examination has been opened.⁴⁶

³⁷ 2009 UN Report, *supra* note 32.

³⁸ Other examples include the report of the Independent Fact-Finding Committee on Gaza, which the OTP reports having received from the Secretary-General of the League of Arab States in 2009; and a communication submitted by the Palestinian Minister for Foreign Affairs in June 2015, six months after the second preliminary examination in Palestine had been opened. See: *Report of the International Criminal Court to the United Nations for 2007/8*, UN Doc. A/64/356, 17 September 2009, § 51; OTP, *Report on Preliminary Examination Activities 2015* (12 November 2015), § 74, available online at <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf> (visited 3 September 2018).

³⁹ See also M. Fairlie, ‘The Hidden Costs of Strategic Communications for the International Criminal Court’, 51 *Texas International Law Journal* (2016) 281-320; S. Williams, ‘Civil Society Participation in Preliminary Examinations’, *Quality Control in Preliminary Examination*, Torkel Opsahl Academic EPublisher (forthcoming).

⁴⁰ OTP, *Report on Preliminary Examination Activities 2013*, November 2013 (‘2013 Preliminary Examination Report’) § 103, available online at <https://www.icc-cpi.int/itemsDocuments/OTP%20Preliminary%20Examinations/OTP%20-%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF> (visited 3 September 2018).

⁴¹ OTP, *Report on Preliminary Examination Activities 2014*, 2 December 2014, (‘2014 Preliminary Examination Report’), § 194, available online at: <https://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf>.

⁴² 2017 Preliminary Examination Report, *supra* note 30, § 230.

⁴³ *Ibid.*, § 204.

⁴⁴ *Ibid.*, § 121.

⁴⁵ OTP, *Response to communications received concerning Iraq*, 9 February 2006 (‘2006 Iraq Response’), 1, available online at http://www.iccnw.org/documents/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (visited 3 September 2018).

⁴⁶ For example, the OTP had reported receiving a total of 86 communications relating to the situation in Colombia in its first annual report on preliminary examinations published in 2011 (although some were outside of the Court’s jurisdiction), § 61. Since then, the number of article 15 communications in relation to the situation in Colombia has gone up by an average of 19 new communications per year: OTP, *Report on Preliminary Examination Activities 2011*, 13 December 2011 (‘2011 Preliminary Examinations Report’), § 61, available online at <https://www.icc-cpi.int/NR/rdonlyres/63682F4E-49C8-445D-8C13->

As noted above, the OTP sorts incoming Article 15 communications into four groups: communications relating to crimes that are ‘manifestly’ outside the ICC’s jurisdiction; communications relating to existing preliminary examinations; communications relating to existing investigations or prosecutions; and communication which ‘warrant further analysis’. The majority of ‘Article 15 Communications’ (70-85% in most years) relate to allegations that are found to be ‘manifestly’ outside the jurisdiction of the Court at Phase 1.⁴⁷ Some relevant article 15 communications contain information on *new* situations and, thus, require evaluation for the purposes of determining whether or not to open a new preliminary examination. However, many communications in more recent years relate to ongoing preliminary examinations or investigations.

In the OTP’s most recent report on its preliminary examination activities, it recorded a slightly higher rate of potentially relevant article 15 communications than average (39%).⁴⁸ Numbers published in recent OTP reports show that generally, in the past few years, only a few dozen potentially relevant⁴⁹ article 15 communications require analysis relating to potentially new preliminary examinations for the Office, namely: 21 out of 597 (3.5%) in 2013;⁵⁰ 44 out of 579 (7.6%) in 2014;⁵¹ 42 out of 502 in 2015 (8.4%);⁵² and 28 out of 477 (5.9%) in 2016.⁵³ Again, the OTP’s 2017 Preliminary Examination Report recorded a higher rate of communications warranting further analysis than previous years, namely 62 out of 568 (10.9%).⁵⁴

[F310A4F3AEC2/284116/OTPReportonPreliminaryExaminations13December2011.pdf](https://www.icc-cpi.int/NR/ronlyres/C433C462-7C4E-4358-8A72-8D99FD00E8CD/285209/OTP2012ReportonPreliminaryExaminations22Nov2012.pdf) (visited 3 September 2018); OTP, *Report on Preliminary Examination Activities 2012*, November 2012 (‘2012 Preliminary Examination Report’), § 97, available online at <https://www.icc-cpi.int/NR/ronlyres/C433C462-7C4E-4358-8A72-8D99FD00E8CD/285209/OTP2012ReportonPreliminaryExaminations22Nov2012.pdf> (visited 3 September 2018); 2013 Preliminary Examination Report, *supra* note 40, § 118; 2014 Preliminary Examination Report, *supra* note 41, § 103; OTP, *Report on Preliminary Examination Activities 2015*, 12 November 2015 (‘2015 Preliminary Examination Report’), § 136, available online at <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf> (visited 3 September 2018); OTP, *Report on Preliminary Examination Activities 2016*, 14 November 2016 (‘2016 Preliminary Examination Report’), § 231, available online at https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf (visited 3 September 2018); 2017 Preliminary Examination Report, *supra* note 30, § 121.

⁴⁷ For example, in its first report to the ASP, the OTP noted that, from July 2002 to 8 July 2003, it received 499 communications, over 70 per cent of which ‘manifestly fell outside of the current subject-matter jurisdiction of the Court’ ICC, *Report of the International Criminal Court*, 6 August 2003, ICC-ASP/2/5, (‘2003 Report to ASP’), § 32. Similar numbers can be seen in the most recent annual preliminary examination reports, e.g. 2013 Preliminary Examination Report, *supra* note 40, § 16; 2015 Preliminary Examination Report, *supra* note 46, § 18; 2017 Preliminary Examination Report, *supra* note 30, § 18.

⁴⁸ 2017 Preliminary Examination Report, *supra* note 30, § 18.

⁴⁹ ‘Potentially relevant’ meaning those not filtered out as ‘manifestly outside the Court’s jurisdiction’. See, e.g., 2014 Preliminary Examination Report, *supra* note 41, § 18.

⁵⁰ 2013 Preliminary Examination Report, *supra* note 40, § 16.

⁵¹ 2014 Preliminary Examination Report, *supra* note 41, § 18.

⁵² 2015 Preliminary Examination Report, *supra* note 46, § 18.

⁵³ 2016 Preliminary Examination Report, *supra* note 46, § 18.

⁵⁴ 2017 Preliminary Examination Report, *supra* note 30, § 18.

B. Preliminary Examinations that have been opened

Consistent with the Policy, the OTP has opened a preliminary examination into every situation that has been referred by a State Party or the Security Council (see Table 1, below). It has also opened an *investigation* in all but one of these situations: a striking correlation, but one which we will not examine here.⁵⁵ It is also the OTP's policy to open a preliminary examination into every situation that is the subject of an Article 12(3) declaration, as noted above. However, the OTP's practice in this regard has not been entirely consistent. The first declaration was made by Côte d'Ivoire and was received on 1 October 2003, at which time current ICC accused Laurent Gbagbo was President.⁵⁶ The preliminary examination was opened at that point.⁵⁷ The next declaration was the 22 January 2009 declaration by the Palestinian National Authority, which purported to accept the ICC's jurisdiction since 1 July 2002.⁵⁸ Prosecutor Moreno Ocampo opened a preliminary examination upon receipt of that declaration in January 2009, but subsequently closed the preliminary examination on 3 April 2012 because Palestine was not yet recognised as a 'state' by the UN General Assembly and, therefore, its Article 12(3) declaration was invalid.⁵⁹ Prosecutor Bensouda has since opened two further preliminary examinations on receipt of Article 12(3) declarations: the declaration by Ukraine on 7 April 2014 which accepted the ICC's jurisdiction from 21 November 2013 to 22 February 2014;⁶⁰ and the declaration made by Palestine on 1 January

⁵⁵ For a discussion of this pattern, see Bosco, *supra* note 13. The exception to this pattern is the situation regarding the registered vessels of Comoros, Greece and Cambodia, which was referred to the Prosecutor by the Union of Comoros on 14 May 2013. See Notice of Prosecutor's Final Decision under Rule 108(3), *Situation on the registered vessels of the Union of Comoros, the Hellenic Republic and the Kingdom of Cambodia* (ICC-01/13-57), Pre-Trial Chamber I, 29 November 2017.

⁵⁶, *Situation in the Republic of Côte d'Ivoire*, "Request for authorisation of an investigation pursuant to article 15", OTP, 23 June 2011, ICC-02/11-3, § 15.

⁵⁷ *Ibid.* The 2003 declaration was 'reconfirmed' in December 2010, following Alassane Ouattara's victory in the November 2010 presidential election. In May 2011, Ouattara sent Prosecutor Moreno Ocampo a letter emphasising the 'obstacles' to prosecuting the crimes committed in the ensuing post-election crisis in domestic courts. The OTP 'thus continued' to analyse the situation in Côte d'Ivoire, particularly the violence following the [2010] presidential runoff, and subsequently sought authorization to open an investigation in June 2011. See 2011 Preliminary Examination Report, *supra* note 46, §§ 120-121 (emphasis added).

⁵⁸ 2012 Preliminary Examination Report, *supra* note 46, § 196; *Report of the International Criminal Court to the United Nations for 2008/9*, UN Doc. A/64/356, 17 September 2009, § 51.

⁵⁹ 2012 Preliminary Examination Report, *supra* note 46, § 201-202.

⁶⁰ 2015 Preliminary Examination Report, *supra* note 46, § 77-79. *Note:* On 8 September 2015, Ukraine made a second Article 12(3) declaration which accepted the Court's jurisdiction from 20 February 2014 onwards.

2015 (which by then attained ‘non-member observer State’ status in the General Assembly) which accepted the Court’s jurisdiction from 13 June 2014.⁶¹

A contrasting example can be seen in the OTP’s response to the Article 12(3) declaration submitted on 13 December 2013 by the Freedom and Justice Party of Egypt, *i.e.* the party of former Egyptian President Mohamed Morsi, who was toppled by a *coup d’état* in July 2013. The declaration was received by the ICC Registrar, but the OTP declined to open a preliminary examination because the Freedom and Justice Party lacked the requisite authority to make declarations on behalf of Egypt and, as a result, the declaration was invalid.⁶² Morsi and his party sought a review of that decision, but the Pre-Trial Chamber found that the decision was not subject to judicial review.⁶³ The Egypt example is similar to the first Palestine example: in both instances the OTP found that the ICC’s preconditions to jurisdiction were lacking because there was no consent, in the form of a valid Article 12(3) declaration, from a relevant state.⁶⁴ Yet in relation to Palestine, this decision was made three years after a preliminary examination was opened, whereas in relation to Egypt, it was made before a preliminary examination even begun.

Collectively, Prosecutor Moreno Ocampo and Prosecutor Bensouda have opened fifteen preliminary examinations *proprio motu* without an Article 12(3) declaration. For some of these preliminary examinations the OTP has explicitly stated that they were opened on the basis of Article 15 communications. For others, this information is not available.⁶⁵ The list includes the preliminary examination in the Democratic Republic of Congo⁶⁶ and the second preliminary

⁶¹ Palestine made an Article 12(3) declaration on 1 January 2015, and became a State Party to the ICCSt the following day. Palestine subsequently referred the situation to the Prosecutor for investigation on 22 May 2018. The OTP has confirmed that the Prosecutor opened the preliminary examination 16 January 2015 on the basis of the Article 12(3) declaration. See OTP, *The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine*, 16 January 2015, available online at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1083> (visited 3 September 2018).

⁶² ICC, *The determination of the Office of the Prosecutor on the communication received in relation to Egypt*, 8 May 2014, available online at <https://www.icc-cpi.int/Pages/item.aspx?name=pr1003> (visited 3 September 2018).

⁶³ Decision on the ‘Request for review of the Prosecutor’s decision of 23 April 2014 not to open a Preliminary Examination concerning alleged crimes committed in the Arab Republic of Egypt, and the Registrar’s Decision of 25 April 2014’, *Request under Regulation 46(3) of the Regulations of the Court*, (ICC-RoC46(3)-01/14-3), Pre-Trial Chamber II, 12 September 2014.

⁶⁴ In the absence of a Security Council referral, the ICC can only exercise jurisdiction where the conduct is committed on the territory of an ICC State Party or a state that has made an Article 12(3) declaration, or if the alleged crimes were committed by a national of such states. See ICCSt, Article 12(2) and (3).

⁶⁵ Theoretically, the OTP could open a preliminary examination *proprio motu* on the basis of open source information but it is not clear whether or not the OTP has ever done so.

⁶⁶ On 19 April 2004, the DRC referred the situation in its territory to the ICC Prosecutor: ICC, *Report of the International Criminal Court*, UN Doc A/62/314, 31 August 2007, §10. On 23 June 2004, the OTP issued a statement announcing Prosecutor Moreno Ocampo’s decision to open an investigation into the situation in the DRC. The

examination in the Central African Republic (CAR),⁶⁷ which were opened by the Prosecutor *proprio motu* in 2003 and 2012 respectively, prior to the ‘*post hoc* referrals’ by those states.⁶⁸ It also includes the preliminary examination in the ‘Iraq/UK situation’ (relating to crimes allegedly committed by UK forces in Iraq), which was first closed in 2006 and then ‘re-opened’ in 2014, the preliminary examination in the ‘situation in Afghanistan’ (relating to crimes allegedly committed in Afghanistan and in CIA-operated facilities in Lithuania, Poland and Romania), and the preliminary examinations into crimes allegedly committed on the territories of Burundi, Colombia, Georgia, Guinea, Honduras, Kenya, Nigeria, the Philippines, the Republic of Korea, and (in two separate situations) Venezuela.⁶⁹ Disaggregated by the regional categories used by the UN,⁷⁰ this list of preliminary examinations is relatively diverse: it includes crimes allegedly committed in six

statement did not identify a starting date for the preliminary examination; but it noted that the Office ‘has been closely analyzing the situation in the DRC since July 2003, initially with a focus on crimes committed in the Ituri region. [Prior to the referral,] [i]n September 2003 the Prosecutor informed the States Parties that he was ready to request authorization from the Pre-Trial Chamber to use his own powers to start an investigation, but that a referral and active support from the DRC would assist his work’. It can be therefore be surmised that the OTP conducted a preliminary examination in this situation, and made a decision to proceed to an investigation, *prior* to the DRC’s referral. See: ICC, *The Office of the Prosecutor of the International Criminal Court opens its first investigation*, 23 June 2004, available online at <https://www.icc-cpi.int/Pages/item.aspx?name=the+office+of+the+prosecutor+of+the+international+criminal+court+opens+its+first+investigation> (visited 3 September 2018).

⁶⁷ On 7 February 2014, the OTP announced its decision to open a preliminary examination in a ‘new’ situation in the CAR. Subsequently, on 30 May 2014, the transitional government of CAR referred the situation in the CAR since 1 August 2012 to the OTP. See: OTP, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a new Preliminary Examination in Central African Republic*, 7 February 2014, available online at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-07-02-2014> (visited 3 September 2018); 2014 Preliminary Examination Report, *supra* note 41, § 191.

⁶⁸ The ICCSt. does not provide a term for a scenario in which, *after* the Prosecutor has initiated a preliminary examination *proprio motu* pursuant to Art. 15(1), a State Party then refers that same situation to the ICC pursuant to Art. 14 (thereby removing the need for the Prosecutor to seek authorization from the Pre-Trial Chamber before an investigation can commence). We refer to such referrals as ‘*post hoc* referrals’.

⁶⁹ The first ‘Venezuela’ preliminary examination, which has been closed, related to crimes allegedly committed by the Venezuelan government and associated forces, and by opposition groups, prior to 9 February 2006. The second ‘Venezuela’ preliminary examination, which is ongoing, concerns crimes allegedly committed in this state ‘since at least April 2017, in the context of demonstrations and related political unrest.’ See: OTP, *OTP response to communications received concerning Venezuela*, 9 February 2006, available online at <https://www.legal-tools.org/doc/c90d25/pdf/> (visited 3 September 2018); ICC, *Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela*, 8 February 2018, available online at <https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat> (visited 3 September 2018).

⁷⁰ UN Department for General Assembly and Conference Management, *United Nations Regional Groups of Member States*, (undated), available online at <http://www.un.org/depts/DGACM/RegionalGroups.shtml> (visited 3 September 2018).

African states,⁷¹ four Asia-Pacific states,⁷² four Eastern European states,⁷³ three Latin American states,⁷⁴ and encompasses several crimes allegedly perpetrated by nationals from the ‘Western European and Others’ bloc, namely, nationals of the USA and UK.⁷⁵

⁷¹ These six states are Burundi, the CAR, the DRC, Guinea, Kenya, and Nigeria.

⁷² These four states are Afghanistan, Iraq, the Philippines, and the Republic of Korea.

⁷³ This includes the preliminary examination into the situation in Georgia, and the preliminary examination into the situation in Afghanistan, which includes crimes allegedly committed in Lithuania, Poland, and Romania. See: Public redacted version of “Request for authorisation of an investigation pursuant to article 15”, 20 November 2017, ICC-02/17-7-Conf-Exp, *Situation in the Islamic Republic of Afghanistan* (ICC-02/17-7-Red 20-11-2017), Pre-Trial Chamber III, 20 November 2017, §§ 49, 51, 189, 249.

⁷⁴ These three states are Colombia, Honduras, and Venezuela.

⁷⁵ The ‘Afghanistan’ preliminary examination includes crimes allegedly committed by members of the US armed forces and the CIA; the ‘Iraq/UK’ preliminary examination includes crimes allegedly committed by members of the British harmed forces; and the second Palestine situation (‘Palestine II’), as well as the situation on the registered vessels of Comoros, Cambodia, and Greece (the ‘Comoros situation’), both include crimes allegedly committed by Israeli nationals. See: Public redacted version of “Request for authorisation of an investigation pursuant to article 15”, 20 November 2017, ICC-02/17-7-Conf-Exp, *Situation in the Islamic Republic of Afghanistan* (ICC-02/17-7-Red 20-11-2017), Pre-Trial Chamber III, 20 November 2017, § 4; 2014 Preliminary Examination Report, *supra* note 41, §§ 246-269; 2015 Preliminary Examination Report, *supra* note 46, §§ 23-76.

Table 1: Preliminary examinations opened by the OTP

	Situation	Trigger for PE	Year PE opened	Prosecutor's decision
1	Uganda ⁷⁶	State Party referral	2003	Proceed to investigation
2	CAR I		2004	Proceed to investigation
3	Mali		2012	Proceed to investigation
4	Comoros		2013	<i>Not</i> to proceed to investigation
5	Gabon		2016	Decision pending
6	Sudan	UNSC referral	2005	Proceed to investigation
7	Libya		2011	Proceed to investigation
8	Côte d'Ivoire	Prosecutor <i>proprio motu</i> following Art. 12(3) declaration	2003	Proceed to investigation
9	Palestine I		2009	<i>Not</i> to proceed to investigation
10	Ukraine		2014	Decision pending
11	Palestine II ⁷⁷		2015	Decision pending
12	DRC ⁷⁸	Prosecutor <i>proprio motu</i> following Art. 15 communications	2003	Proceed to investigation
13	Colombia		2004	Decision pending
14	Iraq/UK		2006 or prior; 're-opened' 2014	Decision pending
15	Venezuela		2006 or prior	<i>Not</i> to proceed to investigation
16	Kenya		2007	Proceed to investigation
17	Afghanistan et al.		2007 or prior	Proceed to investigation ⁷⁹
18	Georgia		2008	Proceed to investigation
19	Guinea		2009	Decision pending
20	Republic of Korea		2010	<i>Not</i> to proceed to investigation
21	Nigeria		2010	Decision pending
22	Honduras		2010	<i>Not</i> to proceed to investigation
23	CAR II ⁸⁰		2014	Proceed to investigation
24	Burundi		2016	Proceed to investigation
25	Venezuela II		2018	Decision pending
26	Philippines	2018	Decision pending	

⁷⁶ The ICC website says that the situation in Uganda was referred to the ICC in 'January 2004', available online at <https://www.icc-cpi.int/uganda> (visited 3 September 2018). However, court records cite the referral date as 16 December 2003. See, e.g. ICC, Decision on the confirmation of charges, *Ongwen* (ICC-02/04-01/15-422-Red), Pre-Trial Chamber II, 23 March 2016, § 4.

⁷⁷ This preliminary examination was initiated by the Prosecutor *proprio motu* in response to Palestine's Article 12(3) declaration of 1 January 2015. Palestine subsequently made a *post hoc* referral on 22 May 2018 (see note 60).

⁷⁸ This preliminary examination was initiated by the Prosecutor *proprio motu* in approximately June 2003. The DRC subsequently made a *post hoc* referral on 19 April 2004 (see note 65).

⁷⁹ As of 31 July 2018, the Pre-Trial Chamber's decision on whether or not to authorize this investigation is pending.

⁸⁰ This preliminary examination was initiated by the Prosecutor *proprio motu* on 7 February 2014. The CAR subsequently made a *post hoc* referral on 30 May 2014 (see note 66).

C. Blurring of Phase 1 and Phase 2

If the Prosecutor decides *not* to open a preliminary examination in response to an Article 15 communication, there is no legal duty to notify the Court, the public, or the sender of that fact. Yet, information that senders post online, as well as information obtained directly from senders, indicates that the OTP has chosen to notify senders of a decision not to proceed.⁸¹ The responses that we analysed in researching this article, albeit a small sample, suggest that the line between a preliminary examination and a ‘pre-preliminary examination’ has not always been clear in practice.

For example, on 13 September 2011, the US-based Center for Constitutional Rights sent Prosecutor Moreno Ocampo an 84-page submission, plus 20,000 pages of supporting material, on alleged ‘pervasive and serious sexual violence against children and vulnerable adults by priests and others associated with the Catholic church’.⁸² The Center argued that the alleged sexual abuse met the Rome Statute’s definition of crimes against humanity, and that it was attributable to high-level Vatican officials under Articles 25(3)(c), (d) and 28(b) of the Rome Statute.⁸³ In a brief letter dated 31 May 2013, the OTP summarised the criteria for opening an investigation (*i.e.* the criteria found in Article 53(1) of the Statute), and advised the Center that, based on the information that the Center provided and other readily available information, ‘the matters described in your communication do not appear to fall within the jurisdiction of the Court’. More specifically:

Some of the allegations described in your communication do not appear to fall within the Court’s temporal jurisdiction, and other allegations do not appear to fall within the Court’s subject-matter jurisdiction. The Prosecutor has therefore determined that there is not a basis at this time to proceed with further analysis.

⁸¹ Pursuant to Regulation 28(1) of the Regulations of the Office of the Prosecutor, ‘The Office shall send an acknowledgement in respect of all information received on crimes to those who provided the information.’ The regulations impose no such requirement about informing senders of any subsequent decision not to open a preliminary examination into the relevant matter. 23 April 2009, ICC-BD/05-01-09.

⁸² Centre for Constitutional Rights, *Victims’ Communication Pursuant to Article 15 of the Rome Statute Requesting Investigation and Prosecution of High-level Vatican Officials for Rape and Other Forms of Sexual Violence as Crimes Against Humanity and Torture as a Crime Against Humanity*, 13 September 2011, § 1, available online at <http://nationbuilder.s3.amazonaws.com/snap/pages/795/attachments/original/FINALSNAPWORD.pdf?1315913668> (visited 3 September 2018).

⁸³ *Ibid.*, §§ 193-196.

However, the information you have submitted will be maintained in our archives, and the decision not to proceed may be considered in light of new facts or information.⁸⁴

This could be interpreted to mean that a preliminary examination was opened, and was then discontinued because the first criteria for opening an investigation (namely, that there is a ‘reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed’) is not satisfied.⁸⁵ Yet the Office does not classify the situation described in the Center’s communication as a preliminary examination that has been ‘closed’, indicating that the analysis described in the above letter took place *before* any preliminary examination began.⁸⁶ For us, this example illustrates the difficulty of distinguishing the initial jurisdictional analysis that the OTP conducts prior to a preliminary examination (i.e. ‘Phase 1’) from the jurisdictional analysis it conducts once a preliminary examination is underway (i.e. ‘Phase 2’). It appears that both phases deal with fairly complex jurisdictional questions, and both involve an analysis of information contained in the Article 15 communication in conjunction with other sources. The distinction seems to be the standard of proof: at ‘Phase 1’, the Office is asking whether or not the crimes are ‘manifestly’ outside the Court’s jurisdiction, whereas at ‘Phase 2’, it is applying a ‘reasonable basis’ test. The line here is fine and, in practice, it is not clear that the situations deemed to fall short of the Phase 1 standard necessarily fell ‘manifestly’ outside the jurisdiction of the Court.

The ambiguity between ‘Phase 1’ and ‘Phase 2’ is further illustrated in the responses to two communications regarding the Australian government’s widely-criticised treatment of asylum seekers who enter Australian waters by boat,⁸⁷ the first of which was sent in October 2014 by an

⁸⁴ OTP, Letter from the Office of the Prosecutor (ICC Ref, OTP-CR-159/11), 31 May 2013, available online at http://d3n8a8pro7vnm.cloudfront.net/snap/pages/795/attachments/original/1372188351/ICC_letter_from_Prosecutor.pdf?1372188351 (visited 3 September 2018).

⁸⁵ ICCSt, Art. 53(1)(a).

⁸⁶ The Office has identified four preliminary examination which were opened and subsequently closed without an investigation, namely, the preliminary examinations in Honduras, on the Registered Vessels of Comoros, Greece and Cambodia, the Republic of Korea, and the first preliminary examination in Venezuela. See: ICC, ‘Preliminary Examinations’, available online at: <https://www.icc-cpi.int/pages/pe.aspx#Default=%7B%22k%22%3A%22%22%7D#eb04684c-1c88-48c8-9ed5-aeba105c7014=%7B%22k%22%3A%22%22%7D> (visited 3 September 2018).

⁸⁷ E.g. Committee on Economic, Social and Cultural Rights, *Concluding observations on the fifth periodic report of Australia*, UN Doc. E/C.12/AUS/CO/5, 11 July 2017, §§ 17-18; Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014).

Australian member of parliament,⁸⁸ and the second of which was sent by a coalition of legal experts assembled by the International Human Rights and Conflict Resolution Clinic of Stanford Law School in February 2017.⁸⁹ The OTP's response to both communications was the same. It stated:

The Office is analyzing the situation identified in your communication, with the assistance of other related communications and other available information. Under Article 53 of the Rome Statute, the Prosecutor must consider whether there is a reasonable basis to believe that crimes within the jurisdiction of the Court have been committed, the gravity of the crimes, whether national systems are investigating and prosecuting the relevant crimes, and the interests of justice As soon as a decision is taken on whether there is a reasonable basis to proceed with an investigation, we will advise you promptly and we will provide reasons for the decision.⁹⁰

This response seems to suggest that the situation is the subject of an ongoing preliminary examination, and that the Office is in the process of determining whether or not to proceed to the next stage (an investigation). However, the OTP's most recent preliminary examination report makes no reference to the situation regarding Australia's treatment of asylum seekers, which indicates that the matter has not progressed to Phase 2, 'which represents the formal commencement of a preliminary examination',⁹¹ but is still at Phase 1 – a position that the OTP confirmed in June 2017.⁹² Given these ambiguities, it is positive that the Office has indicated that future correspondence with article 15 senders will be more comprehensive and detailed.⁹³

The ambiguity between Phase 1 and Phase 2 is perhaps best illustrated by the ongoing proceedings regarding events in Myanmar and Bangladesh. The proceedings arise from a request made by the Prosecutor in April 2018, which seeks a judicial opinion on whether or not the ICC could theoretically exercise jurisdiction in relation to the 'alleged deportation of the Rohingya

⁸⁸ A. Wilkie, *Letter to the ICC Prosecutor*, 22 October 2014, available online at <http://andrewwilkie.org/wp-content/uploads/2015/10/First-Letter-to-the-ICC.pdf> (visited 3 September 2018).

⁸⁹ J. Cavallaro, D. Shamas, B. Van Schaack, et al., *Communiqué to the Office of the Prosecutor of the International Criminal Court Under Article 15 of the Rome Statute: The Situation in Nauru and Manus Island: Liability for Crimes Against Humanity*, sent on 14 February 2017, available online at <https://law.stanford.edu/publications/communique-to-the-office-of-the-prosecutor-of-the-international-criminal-court-under-article-15-of-the-rome-statute-the-situation-in-nauru-and-manus-island-liability-for-crimes-against-humanity/> (visited 3 September 2018).

⁹⁰ Letter dated 25 November 2014 and 11 April 2017 (on file). Cited with the permission of the addressees.

⁹¹ Policy Paper, *supra* note 15, § 80.

⁹² See Khojasteh, *supra* note 25.

⁹³ *Ibid.*

people from Myanmar into Bangladesh'.⁹⁴ Some may suggest that the alleged deportation would not to fall within the ICC's jurisdiction because the situation Myanmar has not ratified the Rome Statute or made a declaration under Article 12(3), nor has the Security Council referred the situation to the Court. However, the OTP argues that the situation *does* fall within the Court's jurisdiction because part of the relevant conduct occurred in Bangladesh, which *is* a State Party to the Rome Statute.⁹⁵

On 6 September 2018, the majority of the Pre-Trial Chamber accepted that argument regarding the ICC's territorial jurisdiction.⁹⁶ However, the Chamber rejected the OTP's claim that the current proceedings *precede* the opening of a preliminary examination into the situation in Myanmar and Bangladesh: in its view, the ICC's legal texts 'do not envisage a pre-preliminary examination stage', and the Prosecutor's actions of receiving information and assessing whether jurisdiction exists 'do not precede a preliminary examination, but are *part of it*, whether formally announced or not'.⁹⁷ In a partially dissenting opinion, Judge Perrin de Brichambaut declined to answer the jurisdictional question on the basis that the Court has no power to decide such questions at this 'embryonic stage' of proceedings,⁹⁸ that a judicial decision at this early stage would amount to 'a *de facto* advisory opinion',⁹⁹ and that rendering such decisions 'might allow the Prosecutor to circumvent the procedures otherwise applicable, delay her decision-making, or even shift the burden of assembling a case onto the Pre-Trial Chamber.'¹⁰⁰

The fact that the OTP has come to the view that the ICC *could* prosecute the alleged deportation of Rohingya people from Myanmar to Bangladesh, and asked the Chamber to 'verify' that position,¹⁰¹ indicates that it has completed the jurisdictional analysis that it describes as 'Phase 1' Moreover, the Pre-trial Chamber has ruled, by a majority, that this preliminary examination is

⁹⁴ See Myanmar/Bangladesh Request, *supra* note 9, § 1.

⁹⁵ In the OTP's words: 'The coercive acts relevant to the deportations occurred on the territory of a State which is not a party to the Rome Statute (Myanmar). However, the Prosecution considers that the Court may nonetheless exercise jurisdiction under article 12(2)(a) of the Statute because an essential legal element of the crime - crossing an international border - occurred on the territory of a State which *is* a party to the Rome Statute (Bangladesh).' *Ibid*, § 2 (emphasis original).

⁹⁶ Myanmar/Bangladesh Decision, *supra* note 8.

⁹⁷ *Ibid*, § 82 (emphasis added).

⁹⁸ Myanmar/Bangladesh Partial Dissent, *supra* note 8, § 5

⁹⁹ *Ibid*, § 4,

¹⁰⁰ *Ibid*, § 13.

¹⁰¹ *Ibid*, § 4.

already underway. Yet in the OTP's view, no preliminary examination has begun. For us, this scenario exemplifies the difficulty in distinguishing between Phase 1 and Phase 2.

D. Decision-making Behind Closed Doors

As a result of the OTP's decision to publish its *2013 Policy Paper on Preliminary Examinations* and to issue regular reports and public statements on its preliminary examination activities, information about this once-mysterious stage of ICC proceedings is increasingly available to interested individuals, organisations, and states. However, some significant information gaps remain. We will highlight three illustrate examples here.

First, the date of the Prosecutor's decision to open certain preliminary examinations is unknown. These days, when the Prosecutor opens a preliminary examination, it is the OTP's practice to make a public announcement to that effect.¹⁰² However, in its earlier practice, the Office did not always announce the start of the preliminary examination or specify that date in subsequent public documents. As a result, the starting date for some early preliminary examinations, including the initial preliminary examinations in Venezuela¹⁰³ and Iraq,¹⁰⁴ is unknown.

Second, for most of the preliminary examinations that the OTP has initiated *proprio motu*, the source(s) of information on which the Office's decision was based remain unknown. The Office has only once specified which sources it relied on when deciding to open a preliminary examination. That was in May 2014, when Prosecutor Bensouda announced her decision to 're-

¹⁰² E.g. ICC-OTP, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on opening a Preliminary Examination into the situation in Burundi*, 25 April 2016, available online at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-25-04-2016> (visited 3 September 2018); ICC, *Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela*, 8 February 2018, available online at <https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat> (visited 3 September 2018).

¹⁰³ On 9 February 2006, the OTP made public its decision not to request authorization for an investigation in Venezuela. The statement issued by the ICC did not identify the starting date of the preliminary examination (indeed, it did not use that term at all). However, it noted that the Office had received twelve communications regarding this situation and that, based on the information available, the Office could not find a reasonable basis to believe that crimes within the jurisdiction of the ICC were committed. Specifically, there were no allegations of war crimes or genocide and, in relation to crimes against humanity, '[e]ven on a generous evaluation of the information provided, the available information did not provide a reasonable basis to believe that the requirement of a widespread or systematic attack against any civilian population had been satisfied.' See OTP, *OTP response to communications received concerning Venezuela*, 9 February 2006, available online at <https://www.legal-tools.org/doc/c90d25/pdf/> (visited 3 September 2018).

¹⁰⁴ On 9 February 2006, the OTP made public its decision not to request authorization for an investigation in Iraq because the alleged crimes were not of sufficient gravity to justify further action by the ICC. As with the first Venezuela situation, the ICC did not identify the starting date of the preliminary examination, or use the term 'preliminary examination' at all. See 2006 Iraq Response, *supra* note 45.

open' the preliminary examination into crimes allegedly committed by UK nationals in Iraq on the basis of a January 2014 communication from the European Center for Constitutional and Human Rights and Public Interest Lawyers as the catalyst for re-opening this preliminary examination.¹⁰⁵ In the other fourteen examples, the information that prompted the Prosecutor to open a preliminary examination is unknown. Even at a general level, it is unknown in some cases whether the decision was based on Article 15 communications, or on open access information, or a combination of the two.¹⁰⁶

Third, there is very little data on Article 15 communications that did *not* result in a preliminary examination. Although the OTP has published some general statistics about communications that were filtered out at Phase 1 (see above), there is almost no information on the subject matter of those communications, or the reasons that they were filtered out. The explanation provided in the OTP's reports, namely that the information is manifestly ill-founded or that the alleged crimes fell 'manifestly outside the jurisdiction of the Court', covers a vast range of possibilities: it could mean that the ICC's preconditions to jurisdiction are not satisfied;¹⁰⁷ that the alleged crimes fall outside the Court's temporal jurisdiction;¹⁰⁸ that the Court is lacking subject matter jurisdiction for any reason, including that the contextual elements for war crimes, crimes against humanity or genocide are not established;¹⁰⁹ that the Office does not regard the underlying

¹⁰⁵ ICC, *Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq*, 13 May 2014, available online at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-iraq-13-05-2014> (visited 3 September 2018).

¹⁰⁶ Article 15(1) of the ICCSt states that: 'The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.' It does not limit this to information that has been sent to the Prosecutor; thus, the Prosecutor could presumably act solely on the basis of open source evidence such as NGO or media reports.

¹⁰⁷ See note 63.

¹⁰⁸ The ICC has jurisdiction only with respect to crimes committed after the ICCSt's entry into force (1 July 2002). If a state ratifies the ICCSt after that date, the ICC may exercise its jurisdiction only with respect to crimes committed after the date that the Statute enters into force for that particular state. For the crime of aggression, the ICC's jurisdiction began on 17 July 2018. See ICCSt, Art. 11; *Draft resolution proposed by the Vice-Presidents of the Assembly Activation of the jurisdiction of the Court over the crime of aggression* (ICC-ASP/16/L.10), 14 December 2017, § 1.

¹⁰⁹ To prove crimes against humanity under the ICCSt, the Prosecution must show that the relevant criminal acts were committed 'as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack', and that this attack was carried out 'pursuant to or in furtherance of a State or organizational policy': ICCSt, Art. 7(1); 7(2)(a). For war crimes, the Prosecution must prove that the conduct took place in the context of an international or non-international armed conflict. In addition, the Statute stipulates that the ICC has jurisdiction over war crimes 'in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes': ICCSt, Art. 8(1). The Statute does not impose a contextual element for the crime of genocide. However, the ICC Elements of Crimes requires that the relevant conduct took place 'in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.' Elements of Crimes, Art. 6(a)-(e).

acts as crimes within the jurisdiction of the ICC;¹¹⁰ that certain ‘special intent’ requirements are not established;¹¹¹ or simply that the information is manifestly ill-founded and has no air of reality to the allegations. Thus, beyond stating that there was a problem of jurisdiction (as opposed to admissibility, or the ‘interests of justice’), the OTP’s reports shed little light on why the vast majority of Article 15 communications are filtered out at the ‘pre-preliminary examination’ stage.

Against this backdrop, it is significant to note some recent developments in which the OTP has been more forthcoming about its reasoning and legal analysis at the ‘pre-preliminary examination’ stage. For example, in April 2015, the Prosecutor made a public statement explaining why, despite receiving numerous communications about crimes allegedly committed by the so-called Islamic State of Iraq and Syria (ISIS), she had concluded that ‘the jurisdictional basis for opening a preliminary examination into this situation is too narrow at this stage.’¹¹² Moreover, on 9 April 2018, the Prosecutor took the unprecedented step of seeking a judicial ruling on a complex jurisdictional question regarding alleged deportation into a State Party *before* a preliminary examination has been opened. This request, which offers a rare glimpse into the OTP’s decision-making at the ‘pre-preliminary examination’ stage, is discussed in more detail below.

4. Enhancing Legitimacy

Having outlined the OTP’s practice in opening preliminary examinations in detail above, there are three points that stand out as requiring further research and discussion in and around the Court with a view to enhancing the legitimacy of the Court by increased consistency, transparency, and communication in the OTP’s ‘pre-preliminary examination’ activities.

A. Consistency

¹¹⁰ Many acts are expressly criminalised in the ICCSt. However, some crimes are not exhaustively defined. Examples include the crimes against humanity of ‘other forms of sexual violence’ and ‘other inhumane acts’: ICCSt, Art. 7(1)(g)-6; 7(1)(k). The question of whether a particular act is criminalised under these provisions can be controversial, as illustrated by the recent litigation about whether ‘forced marriage’ can be prosecuted as an ‘other inhumane act’. See Decision on the confirmation of charges against Dominic Ongwen, *Ongwen* (ICC-02/04-01/15-422-Red), Pre-Trial Chamber II, 23 March 2016, §§ 87-95.

¹¹¹ The *mens rea* for certain crimes goes beyond the general ‘intent and knowledge’ requirements found in Art. 30 of the ICCSt. For example, for the crime of genocide, the Prosecution must show that the relevant acts were committed ‘with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such’: ICCSt, Art. 6.

¹¹² ICC-OTP, *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the alleged crimes committed by ISIS* (8 April 2015), available online at <https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-08-04-2015-1> (visited 3 September 2018).

The first point relates to the OTP's policy of putting some situations, but not others, through a 'pre-preliminary examination' process. From a workload perspective, the fact that the Office has found a way to cull situations before opening a preliminary examination makes sense. As Fairlie has observed, the process of sifting through Article 15 communications is a major undertaking.¹¹³ Taking the next step and actually *opening* a preliminary examination into every situation described in these communications would be untenable, especially in years where the number of communications is unusually high. Thus, the Office is justified in developing a triage system to manage this process. However, we suggest that there should be further discussion about whether the OTP is justified, normatively and politically, in creating a shortcut for situations identified in channels that are *only available to states*, namely, referrals and Article 12(3) declarations, as distinct from situations identified in Article 15 communications.

To explain: as a matter of policy, the first group of situations (those described in referrals or declarations) proceed automatically to 'Phase 2', meaning that they are given the status of a 'preliminary examination' *regardless* of the strength of the jurisdictional arguments in the situation at hand.¹¹⁴ By contrast, the second group of situations (those described in Article 15 communications) go through a 'Phase 1' analysis, and the vast majority are filtered out at that stage. As the OTP recognises, this differential treatment of Article 15 communications as compared to referrals and declarations is a policy decision, rather than something expressly required by the Rome Statute.¹¹⁵ We do not suggest that this policy decision is unlawful. However, from a normative perspective, it is open to critique. This is because Article 15 communications can be sent by anyone, but referrals and declarations can only be made by states, either independently or as members of the UN Security Council. Thus, as a consequence of the OTP's policy, states (or, more specifically, incumbent governments, including permanent members of the Security Council who have chosen not to ratify the Rome Statute) have a greater say in where the ICC operates — insofar as preliminary examinations are concerned — than organizations or

¹¹³ Fairlie, *supra* note 39, at 291-292.

¹¹⁴ For a possible exception, see the above discussion of the attempted Article 12(3) declaration by Egypt's Freedom and Justice Party.

¹¹⁵ We acknowledge that states and the Security Council are privileged by Article 53(2) of the ICCSt, insofar as they can seek limited judicial review of the Prosecutor's decision not to open an investigation. For some people, this fact suggests that, as a general matter, more deference is owed to states and the Security Council than other actors who may provide information to the ICC Prosecutor. We take the position that although states and Security Council may seek limited judicial review of a decision not to open an *investigation*, it does not follow that they must likewise be privileged before a preliminary examination has begun.

individuals who may wish to hold those governments to account. This has negative implications for how independent the Court is seen to be, and how independent it actually is, from the interests of states.

Some may argue that states and the Security Council are given a privileged provision in the Statute over civil society members or other non-state actors by virtue of the fact that an investigation may be opened on the basis of a state party or Security Council referral without any judicial oversight. However, it is important to recall that the reason that a role was given to the Pre-Trial Chamber in overseeing investigations opened *proprio motu* was to provide a measure of oversight over the Prosecutor (due to the fear of a ‘rogue’ or ‘politically-motivated’ Prosecutor), and not a comment on the role that civil society and other non-state actors could play in providing information to the Prosecutor for the purposes of initiating an investigation.¹¹⁶

Of course, the OTP’s policy has practical benefits, if certain conditions are met – namely, if the referral or declaration comes from a state with jurisdiction over the alleged crimes. Where such a state ‘invites’ the OTP in, this increases the likelihood that the state will cooperate with the ICC, may enable smoother investigations (particularly if it is the state with *territorial* jurisdiction over the alleged crimes), and decreases the risk of states withdrawing if a preliminary examination is opened, as Burundi and the Philippines have done. However, any such benefits, even if they may arise, should not be determinative of the Prosecutor’s decision on whether or not a preliminary examination is opened. The Prosecutor is required to be independent and impartial. Their role is not to make decisions that are convenient but to ensure that the most serious crimes of concern to the international community are investigated and prosecuted in accordance with the law.¹¹⁷ That conception of prosecutorial independence sits uncomfortably with a policy which differentiates between requests from states versus civil society at the ‘pre-preliminary examination’ stage. As the late Christopher Hall has written, ‘[t]he Court was not to be simply a passive institution, simply waiting for the Security Council, States parties and Article 12(3) States or others to seize the Court.’¹¹⁸

¹¹⁶ See Danner, *supra* note 7, at 513-15.

¹¹⁷ ICCSt, Art. 42; Policy Paper, *supra* note 15, § 26.

¹¹⁸ C.K. Hall, ‘Developing and implementing an effective positive complementarity prosecution strategy’, in C. Stahn & G. Sluiter (eds), *The Emerging Practice of the International Criminal Court* (Martinus Nijhoff Publishers, 2009), 219, at 220.

For these reasons, we suggest that it would seem more legitimate for the OTP's 'Phase 1' filtering process to apply to *all* situations, including referrals and Article 12(3) declarations, rather than only to Article 15 communications as the current policy states. This is unlikely to overburden the Office, given that the number of referrals and declarations is demonstrably lower than the number of communications under Article 15. However, it would make the Court more impervious to attacks on the Prosecutor's independence, which is particularly necessary in a climate where threats of withdrawals are no longer just 'talk'.

B. Transparency

As detailed above, 'Phase 1' and 'Phase 2' of the preliminary examination process both address questions of jurisdiction, but are (at least theoretically) distinguishable by the applicable standard of proof. But there is another distinction between these two phases: whereas decisions at Phase 1 generally take place out of the public eye, decisions at Phase 2 are explained in the annual preliminary examination reports and other interim reports published by the OTP. The Prosecutor's request for a ruling on jurisdictional questions in relation to Myanmar/Bangladesh, a situation which is currently at Phase 1, represents a step forward in this respect. The question raised by the OTP has implications beyond the situation in Myanmar/Bangladesh.¹¹⁹ From a transparency perspective, it is positive that the request has been made, and is publicly accessible. Theoretically, the OTP could have made the request immediately upon opening a preliminary examination, at the start of Phase 2. However, according to the Prosecutor, it was important to take this step prior to opening a preliminary examination in order to avoid creating expectations of an ICC intervention or allocating resources to further analysis *before* the OTP would be confident that the ICC would agree that the situation falls within the jurisdiction of the Court.¹²⁰

The OTP's decision to refer this question to the Court at the 'pre-preliminary examination' stage is a departure from its previous practice. As noted in the OTP's request,¹²¹ a similar legal question arose in the (now closed) preliminary examination into alleged war crimes committed on

¹¹⁹ For example, applying the argument made in the OTP's Myanmar request, the Global Legal Action Network has argued that if Israel executes its reported plan to forcibly deport Eritrean and Sudanese asylum seekers to Uganda, this could potentially amount to a crime against humanity within the jurisdiction of the ICC because Uganda is a State Party to the ICCSt. See K.J. Heller, 'A Letter to Israel About Its Plans to Forcibly Deport Africans', *Opinio Juris*, 15 April 2018, available online at <http://opiniojuris.org/2018/04/15/a-letter-to-israel-about-its-plans-to-forcibly-repatriate-africans/> (visited 3 September 2018).

¹²⁰ ICC, *Transcript of Ex Parte Status Conference* (ICC-RoC46(3)-01-18-T-1-Red-ENG), 20 June 2018, pages 13-15.

¹²¹ Myanmar/Bangladesh Request, *supra* note § 9.

South Korean islands and vessels. However, in that instance, the Office did not request a jurisdictional ruling by the Pre-Trial Chamber. Instead, it took the view that, although the alleged crimes commenced on the territory of a non-State Party (North Korea), they were completed in a State Party (South Korea) and, therefore, satisfied the pre-conditions to jurisdiction found in Article 12(2)(a) of the Rome Statute.¹²² The Office's new approach is more transparent than the previous practice of making potentially far-reaching conclusions about contentious jurisdictional questions without external input or judicial oversight. This shift to transparency is laudable, even if as a result of the Pre-Trial Chamber's decision of 6 September 2018, the OTP must acknowledge that a preliminary examination is 'open' before further requests of this nature can be made.

By contrast, the Pre-Trial Chamber's handling of the matter has been quite opaque.¹²³ It has given Bangladesh and Myanmar the opportunity to submit public *or confidential* observations on what is ostensibly a pure question of law,¹²⁴ an offer that Bangladesh took up by filing confidential observations on 11 June 2018 (and which Myanmar declined),¹²⁵ scheduled a closed, Prosecutor-only status conference to discuss the request, and declined to invite *amicus curiae* submissions on the matter in line with the example set by the ICC Appeals Chamber in the *Al Bashir* case.¹²⁶ Most concerning, it did not put in place any mechanism to guarantee that the

¹²² OTP, *Situation in the Republic of Korea Article 5 Report*, June 2014, § 39 (see note 17 therein), available online at: <https://www.icc-cpi.int/iccdocs/otp/sas-kor-article-5-public-report-eng-05jun2014.pdf> (visited 3 September 2018).

¹²³ For other commentaries on the closed nature of these proceedings, see J. O'Donohue, 'Transparency is essential if the ICC is to convincingly resolve the question of its jurisdiction over forced deportations from Myanmar', *Human Rights in International Justice*, 20 June 2018, available online at <https://hrij.amnesty.nl/transparency-essential-icc-jurisdiction-forced-deportations-myanmar/> (visited 3 September 2018); K.J. Heller, 'PTC I's Problematic Closed, Ex Parte Hearing on the Myanmar Situation', *Opinio Juris*, 14 May 2018, available online at <http://opiniojuris.org/2018/05/14/33572/> (visited 3 September 2018); A. Whiting, 'Process as well as Substance is Important in ICC's Rohingya Decision', *Just Security*, 15 May 2018, available online at <https://www.justsecurity.org/56288/process-substance-important-iccs-rohingya-decision/> (visited 3 September 2018).

¹²⁴ Decision Inviting the Competent Authorities of the People's Republic of Bangladesh to Submit Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", *Request under Regulation 46(3) of the Regulations of the Court* (ICC-RoC46(3)-01/18-3), Pre-Trial Chamber I, 7 May 2018, § 7; Decision Inviting the Competent Authorities of the Republic of the Union of Myanmar to Submit Observations pursuant to Rule 103(1) of the Rules of Procedure and Evidence on the "Prosecution's Request for a Ruling on Jurisdiction under Article 19(3) of the Statute", *Request under Regulation 46(3) of the Regulations of the Court* (ICC-RoC46(3)-01/18-28), Pre-Trial Chamber I, 21 June 2018, § 6.

¹²⁵ See: ICC, Transcript of Ex Parte Status Conference (ICC-RoC46(3)-01-18-T-1-Red-ENG), page 14, line 7; Observations on behalf of victims from Tula Toli, *Request under Regulation 46(3) of the Regulations of the Court* (ICC-RoC46(3)-01/18-26), Legal Representative of Victims, 18 June 2018, § 6; Government of the Republic of the Union of Myanmar, Ministry of the Office of the State Counsellor, *Press Release* (9 August 2018), available online at

<https://reliefweb.int/sites/reliefweb.int/files/resources/PRESS%20RELEASE%20%20Myanmar%20President%20Office.pdf> (visited 6 September 2018).

¹²⁶ Order inviting expressions of interest as *amici curiae* in judicial proceedings (pursuant to rule 103 of the Rules of Procedure and Evidence), *Al Bashir* (ICC-02/05-01/09-330), Appeals Chamber, 29 March 2018. We note that this

putative victims would be represented in the proceedings (the vast majority of Rohingya people are stateless, and therefore, not represented by either of the two governments whose opinion the Chamber sought). In short, the Chamber has kept much of the process in the dark. It has ultimately taken proactive submissions from lawyers representing two groups of putative victims¹²⁷ and similar initiatives by civil society groups, five of whom have been granted leave to submit *amicus curiae* observations,¹²⁸ to ensure that a broader range of voices are heard. Nonetheless, this approach to judicial proceedings, we suggest, is not a model for transparent, accountable, and inclusive decision-making at the ‘pre-preliminary examination’ stage.

C. Public Communication of Results

As explained above, while the Office now publishes statistics about how many communications it receives in a given year and how many are filtered out at ‘Phase 1’, this information is of a very general nature. For researchers, the lack of information about the subject matter of Article 15 communications, the identity of the senders, and the reasons that the majority of communications are deemed ‘manifestly outside the jurisdiction of the Court’ impedes clear and accurate commentary on the OTP’s preliminary examination and ‘pre-preliminary examination’ activities.¹²⁹ Moreover, from the perspective of individuals and organisations who are seeking to catalyse an ICC investigation, the inability to review and compare previous successful and

invitation was not a model for inclusive justice either: it was extended only to the UN, African Union, European Union, League of Arab States, Organization of American States, ICC States Parties, and ‘Professors of International Law.’

¹²⁷ Submissions on Behalf of the Victims Pursuant to Article 19(3) of the Statute, *Request under Regulation 46(3) of the Regulations of the Court* (ICC-RoC46(3)-01/18-9), Global Rights Compliance & Shanti Mohila (Peace Women), 30 May 2018; Observations on behalf of victims from Tula Toli, *Request under Regulation 46(3) of the Regulations of the Court* (ICC-RoC46(3)-01/18-26), Legal Representative of Victims, 18 June 2018.

¹²⁸ Amicus Curiae Observations on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, *Request under Regulation 46(3) of the Regulations of the Court* (ICC-RoC46(3)-01/18-25 Canadian Partnership for International Justice, 18 June 2018; Joint Observations Pursuant to Rule 103 of the Rules, *Request under Regulation 46(3) of the Regulations of the Court* (ICC-RoC46(3)-01/18-22), Women’s Initiatives for Gender Justice et al, 18 June 2018; Amicus Curiae Observations by the International Commission of Jurists (pursuant to Rule 103 of the Rules), *Request under Regulation 46(3) of the Regulations of the Court* (ICC-RoC46(3)-01/18-20), International Commission of Jurists, 18 June 2018; Amicus Curiae Observations by Guernica 37 International Justice Chambers (pursuant to Rule 103 of the Rules), *Request under Regulation 46(3) of the Regulations of the Court* (ICC-RoC46(3)-01/18-24), Guernica 37, 18 June 2018; Amicus Curiae Observations by the Bangladeshi Non-Governmental Representatives (pursuant to Rule 103 of the Rules) on the “Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute”, *Request under Regulation 46(3) of the Regulations of the Court* (ICC-RoC46(3)-01/18-21), Bangladeshi Non-Governmental Representatives, 18 June 2018.

¹²⁹ For a similar observation about the difficulties to conducting research on preliminary examinations, see S. Williams, ‘Civil Society Participation in Preliminary Examinations’, in *Quality Control in Preliminary Examination*, Torkel Opsahl Academic EPublisher (forthcoming 2018).

unsuccessful Article 15 communications poses a challenge. For these reasons, it seems that there is a public benefit in more detailed, specific information from the OTP in this regard.

Of course, this public benefit must be balanced against the need to protect senders of Article 15 communications, or any third parties, from risk. As discussed above, the OTP has a legal duty to protect the confidentiality of information received under Article 15. However, this duty does not preclude the Office from publicizing summarized and *de-identified* data on the senders of Article 15 communications. Indeed, the OTP did precisely that in its early practice to some degree. For example, in 2003, the Office reported that had received 499 communications ‘from 66 different countries, of which 23 per cent originated in non-State Parties.’¹³⁰ However, the OTP no longer includes this level of detail in its public reports. We suggest that a return to the Office’s past practice of publishing this type of data would be helpful in giving some insight into who seeks to ‘use’ the Court. For example, the OTP could report on the percentage of communications from civil society organisations, individuals, and state officials, including whether it originates in state parties or non-state parties, as well as a breakdown by continent.

Similarly, the Office’s duty to protect the confidentiality of information received under Article 15 would not preclude some more specific information on the *reasons* that the bulk of communications are filtered out at Phase 1. In its early practice, the OTP gave more specific details as to why jurisdiction was ‘manifestly’ lacking.¹³¹ By contrast, in its more recent reporting, the OTP has not elaborated on its conclusions in this regard.¹³² Again, this is an area where the Office could resuscitate and build on its past reporting practices. In particular, the reason of ‘falling manifestly outside the jurisdiction of the Court’ would be more meaningful if divided into sub-categories, such as ‘manifestly outside the Court’s temporal jurisdiction’, ‘manifestly outside the Court’s subject matter jurisdiction’, ‘pre-conditions for jurisdiction not met because the alleged crimes were neither committed on the territory of a state that has accepted ICC’s jurisdiction nor

¹³⁰ 2003 Report to ASP, *supra* note 47.

¹³¹ For example, in the 2003 report to the ASP, the OTP noted that of the 499 communications it had received, 38 related to allegations of crimes of aggression (which, at that time, fell outside the jurisdiction of the ICC). In the 2004 report to the ASP, the Office stated that of the 858 communications received in the ICC’s first two years, ‘57 were manifestly outside the temporal jurisdiction of the Court, 132 were manifestly outside the personal and territorial jurisdiction of the Court, 192 were manifestly outside the subject-matter jurisdiction of the Court, and 212 were manifestly ill-founded (information lacking any air of reality or faltering on numerous jurisdictional grounds).’ 2003 Report to ASP, *supra* note 47, § 32; ICC, *Report on the activities of the Court* (ICC-ASP/3/10), 22 July 2004, § 50.

¹³² E.g. ICC, *Report on activities and programme performance of the International Criminal Court for the year 2016* (ICC-ASP/16/2), 6 June 2017, § 45; 2017 Preliminary Examination Report, *supra* note 30, § 18.

by the nationals of such states’, ‘pre-conditions for jurisdiction not met because referring entity was not a ‘state’, *inter alia*.

Additionally, when no security risk is posed to the communication sender or third parties, senders can and *should* make such communications public. If the sender discloses their identity and the information contained in the communication, the Prosecutor no longer needs to maintain the sender’s confidentiality and can release more information publically if, for example, the communication does in fact lead to the opening of a preliminary examination. On the other hand, if the communication does not lead to the opening of a preliminary examination, the Prosecutor’s response and any reasons given therefor can be made public by the sender. All of this will help contribute to greater transparency and a greater *expectation* of transparency from the OTP.¹³³ These would be small but positive steps in the direction of the ICC being what Glasius calls ‘a communicative court’ and, thereby, enhancing its legitimacy.¹³⁴

5. Conclusion

It is increasingly recognized that ‘preliminary examinations are in fact one the most powerful policy instruments of the OTP’.¹³⁵ In this article, we have focussed on one aspect of this ‘powerful policy instrument’ that has received little attention to date, namely the decision to *open* a preliminary examination in the first place. In calling for greater attention to this stage of proceedings, our intention has not been to over-state the significance of the event of opening a preliminary examination; we recognise that is just the first of *many* steps that must be taken before an accused appears in the courtroom. However, we suggest that the decision on whether or not to open a preliminary examination is more legally complex, politically contentious, and more relevant to perceptions of the ICC’s legitimacy than was envisaged by the drafters of the Rome Statute or is appreciated in the literature on the Court. Indeed, speaking for ourselves, our own estimation of the importance of this decision has grown as a result of several developments that occurred during our research process, including the withdrawals by Burundi and the Philippines and the Prosecutor’s unprecedented request for a justification ruling at the ‘pre-preliminary examination’ stage. This discussion also raises a number of issues worthy of further analysis,

¹³³ For a contrasting view, see Fairlie, *supra* note 39.

¹³⁴ M. Glasius, ‘Do International Criminal Courts Require Democratic Legitimacy?’ 23 *European Journal of International Law* (2012) 43-66, at 64-65.

¹³⁵ Stahn, *supra* note 11, at 416.

including: whether the Prosecutor should make a habit of seeking judicial rulings on jurisdictional questions before a preliminary examination has commenced, whether the Court should give such opinions and, if so, how transparent its process should be. With 15 years' worth of practice to draw on, scholars, practitioners and civil society are now well positioned to engage with this largely unexamined aspect of the ICC's work.