

SYMPOSIUM ON THE ROME STATUTE AT TWENTY

PUTTING THE PROSECUTOR ON A CLOCK? RESPONDING TO VARIANCE IN THE LENGTH OF PRELIMINARY EXAMINATIONS

*David Bosco**

One of the unique challenges that the International Criminal Court's (ICC's) Office of the Prosecutor (OTP) faces is deciding when and where to launch investigations. It is a task that other international prosecutors have not confronted. Their investigative "situations" were selected in advance, leaving those prosecutors free to focus on the myriad other challenges any international justice enterprise faces. The ICC prosecutor's ability to define her own investigative situations (within the limits of jurisdiction) is both a boon and a burden. On the one hand, it accords the OTP the freedom to select the situations it deems most serious and worthy of international attention. Yet this discretion can also generate intense strain for the prosecutor of a still novel and fragile institution.

Identifying and choosing investigations is primarily achieved through the preliminary examination phase of the prosecutor's work. The Rome Statute provides very little guidance on this critical process; it merely gives the OTP the responsibility for "receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court."¹ Article 53 of the Statute lays out the requirements for initiating an investigation, but the Statute contains no guidance on how long the preliminary examination process should last or the specific procedures the prosecutor should follow during that phase. Other key court documents, including the Rules of Procedure and Evidence, provide little additional instruction.

The absence of statutory guidance should not obscure the importance of the preliminary examination phase. As Carsten Stahn has noted, "[T]his phase has become one of the most important centers of activity of the Court and a focal point of contemporary critiques."² Important elaborations of the preliminary examination process have taken place during the Court's fifteen years in operation. This essay briefly considers that emerging framework, with a focus on whether it adequately constrains the discretion of the prosecutor. In particular, this essay considers the merits of instituting a timetable for the completion of preliminary examinations and argues that, on balance, the reduced flexibility and other disadvantages associated with a timetable outweigh the advantages.

Evolving Practice

In the Court's first several years, the preliminary examination process was almost totally opaque. In several situations, including Afghanistan, it is not even clear when the OTP initiated a preliminary examination. The OTP

* Associate Professor, Indiana University's School of Global and International Studies; author of [ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS \(2014\)](#).

¹ [Rome Statute of the International Criminal Court](#) art. 42(1), July 17, 1998, 2187 UNTS 3.

² Carsten Stahn, [Damned If You Do, Damned If You Don't: Challenges and Critiques of Preliminary Examinations at the ICC](#), 15 J. INT'L CRIM. JUST. 413, 414 (2017).

provided little regular information on the status of the examinations it had opened and limited explanations when it chose not to open a full investigation. During the Court's first five years, a set of situations—including Afghanistan, Colombia, Côte d'Ivoire, and Georgia—emerged as preliminary examinations that remained open year after year with little information about the prosecutor's activities and no clear path to a final determination.

That situation began to change somewhat in 2011. The prosecutor finally sought a full investigation in Côte d'Ivoire, which had by then been at the preliminary examination stage for nearly eight years. As important, the prosecutor released a report on the status of open preliminary examinations. "In order to promote transparency of the preliminary examination process," it stated, "the Office aims to issue regular reports on its activities and provides reasoned responses for its decisions to either proceed or not proceed with investigations."³ The report listed all publicly announced examinations, described the posture of these examinations, and provided information on the OTP's activities, including insights into contacts between the OTP and relevant states. And in the years that have followed, those reports have allowed governments and the broader public to watch the progress of different situations through the phases of the examination process.

Two years later, the OTP released a policy paper on preliminary examinations that provided additional detail on the office's strategy.⁴ Tracking the requirements of Article 53 for opening an investigation, the paper described four phases of an examination, moving from (i) an initial assessment of whether allegations fall within the jurisdiction of the court to (ii) more detailed consideration of the alleged crimes, (iii) a review of admissibility issues (including gravity and complementarity), and (iv) considerations of whether an investigation would serve the interests of justice. Importantly, the policy paper insisted that the OTP treats all examinations the same, regardless of whether they were initiated by state or Security Council referral, or on the prosecutor's own initiative (*proprio motu*). The report also noted that the Statute provides no deadlines for decisions on preliminary examinations. The OTP characterized the absence of a timeframe as a "deliberate decision by the Statute's drafters [that] ensures that analysis is adjusted to the specific features of each particular situation, which may include, *inter alia*, the availability of information, the nature, scale and frequency of the crimes, and the existence of national responses in respect of alleged crimes."⁵

Judicial scrutiny of the preliminary examination process has been limited. In the context of the Central African Republic examination, the pre-trial chamber in 2006 pressed the prosecutor for information on the status of a pending examination, which had been initiated by the Central African Republic's referral. The judges insisted that an examination "must be completed within a reasonable time ... regardless of its complexity."⁶ For its part, the prosecutor's office responded that because no decision had been taken, the judges had nothing to review.⁷ The issue progressed no further, and the judges never insisted on a particular timetable. In the Comoros situation, the pre-trial chamber (acting upon a request from the Government of Comoros) instructed the prosecutor to reconsider her decision to close its preliminary examination. That request led to an extended exchange between the judges and the OTP that was ultimately resolved when the Appeals Chamber required the prosecutor to reconsider its decision but also reaffirmed that the prosecutor "retains ultimate discretion over how to proceed."⁸

³ Int'l Criminal Court Office of the Prosecutor, [Report on Preliminary Examination Activities](#) (Dec. 13, 2011).

⁴ Int'l Criminal Court Office of the Prosecutor, [Policy Paper on Preliminary Examinations](#) (Nov. 2013).

⁵ *Id.*

⁶ [Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic](#), ICC-01/05-6 (Nov. 30, 2006).

⁷ [Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic](#), ICC-01/05-7 (Dec. 16, 2006).

⁸ [Decision on the Admissibility of the Prosecutor's Appeal against the "Decision on the Request of the Union of Comoros to Review the Prosecutor's Decision Not to Initiate an Investigation"](#), ICC-01/13 OA (Nov. 6, 2015).

These encounters suggest that the judges are concerned about the prosecutor's use of her discretion during the preliminary examination phase, but they have not yet directly challenged the prosecutor's freedom to continue preliminary examinations indefinitely.

Further judicial review of the preliminary examination phase is conceivable, as is action by the Assembly of States Parties. While it appears unlikely given its stated positions, the OTP may itself decide that some limitations on the length of preliminary examinations would be appropriate. From whatever quarter, however, a move to limit the length of preliminary examinations must involve consideration of several practical, political, and institutional concerns.

The Dangers of Indeterminacy

The Rome Statute was designed to ensure that there was accountability for the most serious international crimes, and the most obvious concern about extended preliminary examinations is that it delays that justice (at least via the Court). For affected populations, an extended examination may raise and then dash hopes for accountability, perhaps generating disillusionment with the Court and international institutions more broadly.

The delay represented by an extended preliminary examination—problematic on its own—may also render ICC prosecutions less likely if the prosecutor does eventually decide to open an investigation. With years having passed since certain alleged crimes occurred, prosecutors may find that evidence critical to prosecutions will be stale. Critical witnesses may have disappeared or died. It is noteworthy that the Georgia investigation—which remained at the preliminary examination stage for more than six years—has not produced any charges (at least that are publicly known).

Recently, Anni Pues argued that the prosecutor's approach violates several of the prosecutor's fundamental obligations.⁹ In supporting that conclusion, Pues draws on decisions by the European Court of Human Rights and the Inter-American Court of Human Rights, both of which have emphasized the obligation of national prosecutors to undertake investigations promptly. Perhaps inadvertently, the OTP's own paper on preliminary examinations bolsters that point. It notes that the OTP will consider "unjustified delay" a relevant factor in determining whether national justice systems are addressing crimes while insisting a few pages later that its own preliminary examinations may last indefinitely.

Specifically, Pues argues that preliminary examinations left open indefinitely violate the prosecutor's statutory obligations to investigate impartially and effectively. To remedy that damaging situation, she suggests that the prosecutor adopt a policy goal of limiting the length of preliminary examinations to three years. Such a limitation would "better safeguard the commitments to transparency, impartiality, and ultimately to the duty to investigate effectively."¹⁰

As Pues notes, the broadest danger posed by indeterminate preliminary examinations is the perception they feed that the prosecutor is selecting situations to investigate on criteria other than the law and the evidence. When the prosecutor opens one investigation in a matter of days or weeks but takes years to decide on another, it is unsurprising that observers see other factors—including politics—at work. I recently presented evidence that the preliminary examination process is skewed toward opening investigations in referral contexts and against doing so when the prosecutor is operating on her own initiative (*proprio motu* examinations).¹¹ The record shows that the prosecutor has moved much more quickly and decisively toward investigations in situations referred to the Court. Differences in gravity, at least as measured in terms of civilian casualties, do not fully account for the divergence

⁹ Anni Pues, *Towards the "Golden Hour"?: A Critical Exploration of the Length of Preliminary Examinations*, 15 J. INT'L CRIM. JUST. 435 (2017).

¹⁰ *Id.* at 452.

¹¹ David L. Bosco, *Discretion and State Influence at the International Criminal Court: The Prosecutor's Preliminary Examination*, 111 AJIL 395 (2017).

between these groups of situations. Given this record, it is important to consider whether political factors, including the wishes of the most involved states, may have influenced the prosecutor's timing.

An array of commentators has already decided that the prosecutor is operating unfairly. The most common criticism centers on the regional disparity in investigations. As of this writing, all but one ICC full investigation has centered on Africa. Complaints about this distribution have been most acute on that continent, with several leaders accusing the Court of regional or even racial bias. "The ICC was supposed to address the whole world," said Rwandan president Paul Kagame, "but it ended up covering only Africa."¹² Those making these critiques rarely acknowledge facts inconvenient for their analysis, including that most of the court's Africa investigations were explicitly requested by the state most involved. But the accusation of bias has persisted and even migrated, blending into a more generalized critique that the Court is the handmaiden of affluent Western member states. When Philippines president Rodrigo Duterte recently called for a mass withdrawal from the Court, for example, he echoed complaints about the Court's double standards and the influence of European states in its operations.¹³

While few of the ICC's political critics make the connection explicit, part of the accusation appears to be that the prosecutor has abused the wide discretion of the preliminary examination phase to delay potential investigations sensitive to its most weighty members (and other powerful states) while moving quickly where the geopolitical stakes are low and where powerful governments have no objection to the Court's work.

Space for the Prosecutor

The significant reputational downsides to the prosecutor's current practice must be set against formidable arguments for maintaining ample prosecutorial discretion. Time limits would pose an immediate practical complication. Many of the situations in the preliminary examination pool feature chronic, low-level violence and instability. Situations of this sort include Colombia, Nigeria, and Palestine. From the OTP's perspective, some of these situations may be hovering below the (admittedly vague) threshold for a full investigation. Applying a time limit in these contexts might place the prosecutor in the uncomfortable position of closing preliminary examinations only to face pressure to reopen them during flares in violence or as new information about potential crimes emerges. In this context, a protracted preliminary examination may be preferable to a confusing series of opened, closed, and then reopened examinations.

Another advantage to maintaining wide temporal discretion centers around the concept of positive complementarity. The Rome Statute is clear that the best venue for justice is the national courts of the states most affected. For many national systems, however, developing the political will and ability to address mass atrocities, particularly those involving senior state officials, can be a protracted task involving lengthy negotiations, legislation, and even the creation of specialized judicial mechanisms. Given these realities, patience from the prosecutor may maximize the chances for accountability at the national level.

It is fair to ask how much leverage a pending preliminary examination actually provides, particularly if the preliminary examination stretches on and domestic actors see little evidence that the Court is prepared to act. The innovation of the annual update can be helpful here in that it provides a mechanism for the Court to publicly signal its view of national proceedings and the direction of its complementarity analysis. There is evidence that the annual report served as a prod to several states involved in the Afghanistan situation, including the Afghan and U.S. governments, to provide additional information to the prosecutor's office.

A final argument in favor of preserving the prosecutor's discretion rests on institutional and even political considerations. The prosecutor faces very difficult choices in managing the OTP's scarce resources. The move from a

¹² Faisal Edroos, *Rwanda's Paul Kagame Accuses the ICC of Bias Against Africa*, AL JAZEERA (Apr. 29, 2018).

¹³ Alexis Romero, *Duterte Urges Other Countries to Withdraw from International Criminal Court*, PHIL. STAR (Mar. 19, 2018).

preliminary examination to an investigation is a consequential one that involves reassigning limited staff and resources. In this context, it is fitting and even vital that the prosecutor retain the space to decide when an investigation has a chance of success. This calculation could even appropriately include the prosecutor's assessment of the political climate. For example, launching an investigation when the territorial state or states involved will not cooperate would likely be a futile gesture. Perversely, it might put potential witnesses in untenable positions and encourage the destruction of evidence. In a strategy document, the OTP addressed concerns like these and emphasized that they place the ICC in a very different situation from a domestic prosecutor:

Will the necessary assistance from the international community be available, including on matters such as the arrest of suspects? In short, will it be possible in all reality to initiate an investigation at all? These are not matters which need normally trouble a domestic prosecutor, but they are all relevant to an ICC prosecution and they all underline the necessity of State support for the Office of the Prosecutor in the bringing of any investigation.¹⁴

Inhospitable political environments can change, however. After a few years, a change of government or an otherwise altered political dispensation may quickly render an investigation of past crimes feasible. A time-constrained prosecutor would likely have already closed the preliminary examination; a prosecutor who retains flexibility could more easily take advantage of the opportunity.

Conclusion

In the end, the arguments for maintaining prosecutorial freedom are the most convincing, not least because the OTP's own increased openness about the status of preliminary examinations appears to be exercising a gentle but significant pressure on the prosecutor to remain minimally active on all open files and to explain her approach to concerned governments and the public at large. Insisting that the prosecutor's activities remain open to the light is a better solution than subjecting her activities to the clock.

¹⁴ Int'l Criminal Court Office of the Prosecutor, [Paper on Some Policy Issues Before the Office of the Prosecutor 2](#) (Sept. 2003).