Quality Control in Preliminary Examination: Reviewing Impact, Policies and Practices

co-organised by

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One of the most critical steps towards criminal justice for core international crimes[1] – be it in national or international jurisdictions – is the exercise of discretion to determine whether there is a reasonable or sufficient basis to proceed to a full criminal investigation without which there is no prosecution. This pre-investigative stage is known under different names, including 'preliminary examination' ('PE') which is used generically for the purposes of this project. Criminal procedure regimes usually set a threshold for the assessment of the seriousness of available incriminating information – such as "reasonable basis to proceed with an investigation" in Article 15(3) of the Statute of the International Criminal Court[2] ('ICC'). But apart from that, they tend to give the prosecution sweeping discretion in the conduct of the preliminary examination. As a consequence, PEs often involve a large degree of uncertainty for those directly concerned, they may extend over a long period of time, or they can easily become a graveyard for reports on or allegations of criminal conduct. Many allegations of core international crimes – typically, but not limited to, international sex crimes – do not make it beyond preliminary examination.

While legal systems depend on the flexibility afforded by discretionary power vested in lawyers, the sheer expanse of discretion in preliminary examination bolsters the power of the prosecutor *vis-á-vis* victims, judges, the public and, in international jurisdictions, the States concerned. Public

[1] For the purposes of this project, the term 'core international crimes' refers to genocide, war crimes, crimes against humanity, and crimes of aggression. Although these crimes are the main focus in the project, several questions raised are relevant to the preliminary examination of a wider range of offences.

[2] See http://www.legal-tools.org/doc/7b9af9/.

statements made by the prosecutor pursuant to a preliminary examination – or just keeping it open for several years – can cast shadows of incrimination over suspects, Governments and States alike (including non-States Parties), even if in the end the prosecutor were to conclude that there is no reasonable basis to proceed to a proper criminal investigation. In the case of the ICC, there is almost nothing a suspect or State can do about it except to prepare for the possible outcome and wait. Many criminal justice systems place such distinct power in the hands of the prosecutor from the moment he or she possesses incriminating information, even when the prosecution service is the weakest link of the system which has often been the case in international criminal justice.[3] While the war crimes trials and appellate proceedings have enjoyed intense media, government and expert attention the last twenty years, preliminary examination has received very little. This deficit is problemtic as a weak start often makes crooked and – as we have seen at the ICC – broken war crimes cases which undermine trust among victims, donors and the public. Human rights defenders also depend on sound preliminary examinations for their sources (during the documentation of violations) to agree to sharing materials with criminal justice actors. To pass from documentation to criminal investigation one must cross the bridge of preliminary examination. This is a critical dimension of the relationship between civil society and the rise of criminal justice for core international crimes.

This project seeks to contribute to a better understanding of preliminary examinations, their normative frameworks, and aspects requiring improvement, both in international and domestic settings. The project seeks to contribute to improvement, but it pushes no specific agenda of regulatory reform, be it in the form of procedural provisions, prosecution directives, or formal criteria. The project's open inquiry may well conclude that prosecutorial discretion in preliminary examination should not be further curtailed by binding regulation, but rather that its exercise should be more vigilantly assessed by prosecutors, and monitored by civil society. Prosecutorial professionalisation – as other forms of professionalisation, also in the public sector – requires an awareness on the part of prosecutorial leaders of the importance of self-questioning and self-improvement. This is a precondition for such professionalisation to take proper hold in the practice of criminal justice teams. It is this awareness and culture of quality control, including the freedom and motivation to challenge vigorously the quality of work, which this project seeks to advance. It follows the earlier CILRAP-project on 'Quality Control in Fact-Finding', and will be succeeded by a third project on 'Quality Control in Criminal Investigation'.[4]

Preliminary examinations have turned into one of the most important activities of the ICC. By September 2016, nine situations are under preliminary examination. Three of them (Afghanistan, Georgia, Iraq/UK) concern permanent members of the United Nations Security Council. The ICC Office of the Prosecutor ('OTP') has issued a 2013 *Policy Paper on Preliminary Examination*[5] and annual preliminary examination reports. Situations such as Palestine or Colombia count among the most complex and challenging areas of inquiry. Human rights fact-finding bodies call on the ICC to consider opening new proceedings. But the ICC faces constraints, in terms of its mandate, jurisdictional limitations, and resources. Attention has shifted from situation to situation. Only limited strategic and long-term thinking has been devoted to broader policy questions, such as the context, rationale and role of PEs, the suitability of the existing legal framework, ICC methodologies, public communication during PEs, the impact of PEs in and across situations, and lessons learned from specific case studies.

Call for papers

The 'Quality Control in Preliminary Examination' project seeks to address these and related challenges from the perspective of multiple disciplines and angles. The project started with a thematic expert meeting in The Hague in September 2015.[6] The next, second phase of the project is designed to take

[3] See Morten Bergsmo (editor): *Quality Control in Fact-Finding*, Torkel Opsahl Academic EPublisher, Florence, 2013, p vii (http://www.legal-tools.org/doc/5b59fd/).

[4] *Ibid*., 'Foreword by the Editor'.

[5] See http://www.legal-tools.org/doc/acb906/.

[6] See http://postconflictjustice.com/wp-content/uploads/2015/10/Report-Preliminary-Examination-and-Legacy_Sustainable-Exit_Reviewing-Policies-and-Practices.pdf and https://www.fichl.org/activities/the-peripheries-of-justice-intervention-preliminary-examination-and-legacy-or-sustainable-exit/.

stock of existing approaches to preliminary or pre-investigation examination, review ICC and national policies and practices, identify lessons from countries where the ICC has engaged in prolonged preliminary examination, and explore how a culture of quality control can be enhanced in preliminary examination. Papers will be discussed in a project conference to be held in The Hague on 13-14 June 2017, and considered for publication in an anthology to be edited by Professors Carsten Stahn and Morten Bergsmo. All papers will be reviewed by the editors.

Interested speakers should send a draft title and abstract of their proposal (500 words), written in English, together with a *curriculum vitae* to calls@cilrap.org. Proposals are reviewed on a rolling basis, and are due no later than 31 December 2016. Selected speakers will be notified no later than 15 January 2017. A draft version of selected papers is due on 1 June 2017. Submissions should be related to one or more of the themes listed below, with an express indication of the connection to the content of this concept note.

The themes include, but are not limited to, the following clusters with sub-topics:

1. Context of Preliminary Examinations

- Global context: What is the space of PEs in the global accountability architecture? How do they relate to other human rights or accountability mechanisms?
- Goals: What is the function of PEs? Should they be related to prevention, deterrence, or positive complementarity?
- Operation: What factors have prompted the opening of PEs or impeded their initiation?
- Leverage: What leverage do PEs carry? How is leverage created? Is there any expressivist value of the opening of a PE? How is it manifested? In the case of the ICC, is it more effective when it is in the shadow rather than in the spotlight?
- ICC mechanisms: To what extent is the ICC equipped to monitor ongoing violations that may amount to core international crimes? Should it provide advice or guidance on domestic policies or specific peace and justice dilemmas?
- Risks: What are the risks of PEs? To what extent do they make the ICC or other criminal jurisdictions vulnerable to criticism or manipulation?
- Infrastructure and funding: Are the existing organizational and institutional resources for preliminary examination of core international crimes adequate? Is the funding sufficient to meet goals and expectations?

2. Legal Foundations of Preliminary Examinations

- Regulation: Are existing legal frameworks of preliminary examination appropriate? Do PEs require more regulation, or is the partial absence of regulation an asset?
- Space of discretion: What aspects of PEs come within the ambit of prosecutorial discretion and operational policy? What aspects are (or should be) open to legal review?
- On-site access and link to investigations: Under what circumstances it is feasible to seek on-site access for purposes of information-gathering? How early should a case hypothesis be formulated?
- Prioritisation: Should there be criteria for the prioritisation of preliminary examinations, and, if so, to what extent is gravity helpful as a criterion?
- Time factor: Should there be time limits for PEs, or at least an ideal timeline? What are the pro and contra arguments?
- “Exit strategies”: How long should the preliminary examination of a situation remain open? What are appropriate “exit strategies” for PEs? Should there be any benchmarks, and if so, which? How should the closing of PEs be formalized?

3. Methodology

- Prosecution policies: Are existing methodologies used in preliminary examination adequate? Is it advisable to adopt a phase-based approach?
- Are PEs subjected to the same quality control mechanisms as investigations (including internal peer review among prosecutors and investigators)? What should be the role of prosecutors in PE decision-making and review of information on alleged core international crimes? Should there be several levels of review involving experienced criminal justice lawyers before important PE decisions are made?
- Sources: On what sources should PEs rely? Does so-called "big data" have any relevance for PEs?
- Transparency vs. confidentiality: To what extent is publicity of PEs a virtue? In what circumstances is confidentiality warranted? Can the ICC-OTP use a PE in public discourse about an ongoing investigation or prosecution?
- Relationship to other fact-finders: How can the relationship with non-criminal justice fact-finders be improved? What lessons can be learned from other fact finding or human rights monitoring bodies?

4. Case Studies or Situation-Related Analysis

- Case studies: What lessons can be learned from specific case studies? What effects did PEs in international criminal jurisdictions produce in specific contexts (that is, in situation or non-situation countries)? Is there evidence that PEs contributed to goals, such as deterrence, prevention or complementarity?
- Impact: To what extent is the impact of PEs related to the threat of investigations or media exposure, or other intermediate factors? How can impact be traced? What unintended consequences did the ICC produce? Have ICC PEs had detrimental effects, for example because of their duration or perceived political motivation?[7]
- Interaction with situation countries: Have ICC PEs affected domestic criminal policies, or executive, legislative or judicial practices in specific countries? Did they strengthen or weaken accountability initiatives at the domestic level? What about the effect on respect for the ICC in that country?
- Societal effects: What impact did PEs have on non-state actors or local communities? How did they affect societal discourse on peace and justice? Did they empower or disempower specific constituencies?
- Narratives and perceptions: What narratives are used in existing PEs? How are they construed? How do they align with local realities? How are they perceived by different entities: international institutions, affected states, NGOs, local communities?
- Consequences of inaction: What are the implications if the ICC does not open a PE or an investigation? How can it be avoided that inaction is perceived as an implicit toleration of atrocity, or as an indication of lesser 'gravity'?

[7] See the critical views of, for example, CHAN James: 'Judicial Oversight over Article 12(3) of the ICC Statute', FICHL Policy Brief Series No. 11 (2013), Torkel Opsahl Academic EPublisher, Oslo, 2013 (http://www.legal-tools.org/doc/bc46c4/), and XIAO Jingren and ZHANG Xin: 'A Realist Perspective on China and the International Criminal Court', FICHL Policy Brief Series No. 13 (2013), Torkel Opsahl Academic EPublisher, Beijing, 2013 (http://www.legal-tools.org/doc/9ff2b7/).