



Course Correction: Recommendations to the ICC Prosecutor for a More Effective Approach to “Situations under Analysis”

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Introduction

In the last few years, the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) increasingly has sought to raise the profile of its “situations under analysis.” These are situations—usually understood as a specific set of events in a given country—that the OTP is examining in order to determine whether to initiate a formal investigation.¹ While the OTP initially treated these preliminary examinations as confidential, it now routinely makes public the fact that it has initiated the examination and provides information on the different activities it is undertaking to further its analysis such as meetings with national authorities. This increased publicity is closely tied to the OTP’s policy of using preliminary examination to promote two aims at the heart of the Rome Statute: spurring national justice officials to pursue their own rigorous investigations (complementarity) and signaling to would-be rights violators that the international community is watching (deterrence).

Complementarity reflects a core principle of the Rome Statute system: the ICC is a court of last resort and a case is admissible before it only where there are no credible national

¹ Jurisdiction of the International Criminal Court (ICC) can be triggered in one of three ways: ICC member states or the Security Council can refer a specific set of events—known as a situation—to the ICC prosecutor or the ICC prosecutor can seek to open an investigation on his own initiative (“*proprio motu*”) with the authorization of an ICC pre-trial chamber. See Rome Statute of the International Criminal Court (Rome Statute), U.N. Doc. A/CONF.183/9, July 17, 1998, entered into force July 1, 2002, art. 13. Regardless of how the court’s jurisdiction is triggered, however, the Office of the Prosecutor (OTP) first analyzes the information it has before it regarding a situation to determine whether there is a reasonable basis for initiating a formal investigation. This process is known as “preliminary examination.” We discuss the factors that control the prosecutor’s determination under the Rome Statute, the ICC’s founding treaty, in part I below. There are currently nine situations under preliminary examination. These so-called “situations under analysis” are: Afghanistan, Georgia, Côte d’Ivoire, Colombia, South Korea, Honduras, Guinea, Nigeria, and Gaza. In two other situations—Iraq and Venezuela—the OTP decided not to proceed with an investigation following preliminary examination, while six other situations have been selected for investigation: Democratic Republic of Congo, Darfur, Uganda, Central African Republic, Kenya, and Libya.

proceedings. Complementarity respects the role of national courts and encourages the development of credible and independent judicial systems within national jurisdictions.

Given that the ICC prosecutor will only act in the absence of credible national proceedings, national authorities have the opportunity to avoid the ICC's intervention by undertaking genuine investigations and prosecutions at home. As a result, a situation that is under analysis by the ICC prosecutor can serve as an important point of pressure—a “sword of Damocles” hanging over the heads of national authorities, pushing them toward the fulfillment of their obligations to investigate and prosecute crimes in violation of international law. The time that it takes to carry out a preliminary examination can provide the ICC, and the OTP in particular, with opportunities to catalyze national proceedings. This can be understood as a component of “positive complementarity,” that is, active efforts to see the complementarity principle put into practice through national prosecutions of ICC crimes.

Deterrence is also a central aspiration of the Rome Statute system. As expressed in the preamble of the treaty, the ICC aims to “put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community] and thus to contribute to the prevention of such crimes.” It is too early to say with certainty whether the ICC is achieving this deterrent effect, although there is some anecdotal evidence to suggest that it has had some impact. Most likely, the ICC will have a significant deterrent effect only to the degree to which arrest and punishment for serious international crimes becomes more certain.² Still, where crimes are ongoing in a given situation, the fact that the situation is under analysis by the ICC could serve as a warning to perpetrators and would-be perpetrators that they may be held to account. In some circumstances this could help to prevent an escalation in violence.

² For example, the arrest of Thomas Lubanga to face charges of enlisting and conscripting child soldiers raised awareness that the use of children as participants in conflict is unlawful; militia and rebel leaders in the Democratic Republic of Congo and Central African Republic told Human Rights Watch researchers that they did not want to end up like Lubanga or in The Hague. See Human Rights Watch, *Making Kampala Count: Advancing the Global Fight against Impunity at the ICC Review Conference*, May 2010, <http://www.hrw.org/en/reports/2010/05/10/making-kampala-count-0>, pp. 71-72. But these effects are likely undermined where there is no prospect for arrest. The Congolese government has failed to arrest Lubanga's co-defendant, Bosco Ntaganda, a former rebel leader incorporated into the Congolese army as a general. The government claims that his arrest would harm the peace process in eastern Congo. Human Rights Watch documented a wave of forced recruitment, including of children, by Ntaganda and officers loyal to him between September and December 2010, marking a repeat of the same crimes for which Ntaganda has been sought by the ICC since 2006. “DR Congo: Rogue Leaders, Rebels Forcibly Recruit Youth,” Human Rights Watch news release, December 20, 2010, <http://www.hrw.org/en/news/2010/12/20/dr-congo-rogue-leaders-rebels-forcibly-recruit-youth>. In addition, leaders of the Lord's Resistance Army wanted on ICC arrest warrants since 2005—who have not been apprehended due partly to difficulties in accessing them as a result of their operating in remote areas of Congo—continue to author atrocities against civilians, including brutal killings and abductions in the Democratic Republic of Congo and Central African Republic. See, for example, “CAR/DR Congo: LRA Conducts Massive Abduction Campaign,” Human Rights Watch news release, August 11, 2010, <http://www.hrw.org/en/news/2010/08/11/cadr-congo-lra-conducts-massive-abduction-campaign>.

The OTP's evolving approach to situations under analysis offers significant opportunities for advancing justice. At the same time, it carries a significant risk: public announcements that the ICC may act to intervene in a given situation raise expectations that it will, and if it ultimately decides not to open an investigation, frustrated expectations may end up damaging the credibility and legitimacy of the ICC among affected communities and the broader public.

Over time, a pattern of raised expectations followed by failure to act can also dilute the impact of announced OTP preliminary investigations in helping catalyze national prosecutions and deterring ongoing crimes. The OTP should also take care to avoid improperly publicizing aspects of a possible investigation—such as the names of possible perpetrators before a decision to investigate has even been taken—in a manner that could undermine the due process rights of potential accused or the reputation of others and call into question the impartiality of any subsequent investigation.

These challenges are inherent to attempting to use the preliminary examination process to help catalyze national prosecutions and deter ongoing crimes. But the OTP's implementation of its policy has not always managed these challenges as effectively as it could have, in some instances with negative repercussions for the ICC's credibility. The OTP's approach to its situations under analysis has been marked by inconsistency—or at least the appearance thereof—in how it engages national authorities and lack of transparency as to both the process and status of pending examinations. In addition, the OTP has sometimes made statements about the prospects of ICC action where it is unclear whether the OTP has actually reached a determination that it could intervene. These statements may be aimed at complementarity or deterrence, but by seeming to depart from legal analysis, they instead raise questions about the credibility of the OTP's analysis and could have negative due process implications.

This report analyzes the OTP's effort to catalyze national prosecutions or have a deterrent effect in situations under analysis. We see this effort as an important initiative, but believe the OTP's practices can be improved. After providing an overview of the preliminary examination process, we examine how the OTP has used this period to influence national authorities. We then identify four areas where we believe the OTP can strengthen its approach.

We urge the prosecutor—particularly as he prepares to leave office at the conclusion of his nine-year term—to draw lessons learned from experiences to date to develop a more effective and rigorous strategy, and below we make some recommendations to this end. The

prosecutor’s development of a clear, transparent strategy will strengthen the hand of the new ICC prosecutor—to be elected at the end of 2011—in improving the OTP’s approach to situations under analysis and will mark an important contribution to the institutional development of the OTP and the ICC.

I. Overview of OTP preliminary examination process

“Situations under analysis” are situations the Office of the Prosecutor is assessing to determine whether to open a formal ICC investigation. This section provides an overview of the procedures developed by the OTP for carrying out such preliminary examinations, and, in particular, its four-phased approach to the analysis.

Information about possible crimes falling within the ICC’s jurisdiction first comes to the OTP through one of two channels: communications or referrals. These channels relate to the three mechanisms that can trigger ICC jurisdiction—*proprio motu* investigations (Rome Statute, articles 13(c) and 15), Security Council referrals (article 13(b)), and state party referrals (article 13(a)).

“Communications” are information received by the OTP under article 15 of the Rome Statute, which permits the prosecutor to open an investigation *proprio motu* (“on his own initiative”) with the authorization of a pre-trial chamber of judges. Not all such communications, however, will lead to a preliminary examination. Instead, and consistent with article 15(2)’s instruction that the prosecutor “analyze the seriousness of information received,” the OTP first filters out information regarding crimes manifestly outside the ICC’s jurisdiction. This is known as Phase 1. Situations that survive this initial filter then enter Phase 2 and become formally “situations under analysis.”³

As of April 11, 2011, the OTP had received 9,146 communications pursuant to article 15, of which 4,271 were manifestly outside of the jurisdiction of the court.⁴ Pending situations under analysis that have arisen out of communications are Guinea, Colombia, Afghanistan, Georgia, Honduras, Nigeria, and South Korea (for acts committed by North Korea on South Korea’s territory).

³ Office of the Prosecutor, International Criminal Court (OTP), “Policy Paper on Preliminary Examinations (DRAFT),” October 4, 2010, http://www.icc-cpi.int/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP_Draftpolicypaperonpreliminaryexaminationso4101.pdf (accessed April 26, 2011), para. 86 (“Draft Policy Paper”).

⁴ OTP, “Weekly Briefing,” issue no. 82, April 5-11, 2011, http://www.icc-cpi.int/NR/rdonlyres/DA36410D-5E1F-4AE6-B3F7-3EDFD14ACACC/283219/OTPWeeklyBriefing_511April2011.pdf (accessed April 26, 2011), p. 4.

By contrast, situations referred to the ICC prosecutor by the Security Council or a state party are automatically considered to be situations under analysis and directly enter Phase 2. In addition, the prosecutor has indicated that situations directly enter Phase 2 when a declaration has been lodged under article 12(3), which permits a state to temporarily accept the jurisdiction of the ICC. As of this writing, there are no pending situations under analysis arising out of referrals, but Côte d'Ivoire and Gaza are subject to preliminary examination on the basis of article 12(3) declarations.

Beginning with Phase 2—which marks the formal start of a preliminary examination—the OTP examines the factors listed in article 53(1) of the Rome Statute which control the prosecutor's determination as to whether to initiate an investigation. These are

- whether there is “a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed” (article 53(1)(a); Phase 2);
- whether “the case is or would be admissible under article 17” (article 53(1)(b); Phase 3); and
- whether “taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice” (article 53(1)(c); Phase 4).⁵

Phase 2 is further divided between Phase 2(a) which looks at temporal and geographical or personal jurisdiction and Phase 2(b) which looks at whether the alleged crimes are crimes under the ICC statute.

Admissibility—assessed in Phase 3—has two components. First, a potential case must be of sufficient gravity to justify further action by the ICC. Second, the principle of complementarity must be satisfied; that is, national authorities must have shown themselves unable or unwilling to carry out genuine investigations and prosecutions into the

⁵OTP, “Draft Policy Paper,” para. 86. According to the OTP, the “interests of justice” is a “countervailing consideration that may produce a reason not to proceed. As such, the Prosecutor is not required to establish that an investigation is in the interests of justice. Rather, the Office will proceed unless there are specific circumstances which provide substantial reasons to believe it is not in the interests of justice to do so at that time.” *Ibid.*, para. 73. OTP has issued a separate policy paper addressing its understanding of the term “interests of justice” in detail. See OTP, “Policy Paper on the Interests of Justice,” September 2007, <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIinterestsofjustice.pdf> (accessed April 26, 2011); see also Human Rights Watch, *Policy Paper: The Meaning of “The Interests of Justice” in Article 53 of the Rome Statute*, June 2005, <http://www.hrw.org/node/83018>.

case.⁶ The OTP's assessment of these criteria is then included in an internal report to the prosecutor, which is accompanied by a recommendation as to whether there is a reasonable basis to investigate. The decision of the prosecutor is based on this report.⁷

Phases 2 through 4 are conducted sequentially, although there may be a certain fluidity in the OTP's approach given that information relevant to more than one phase may be received by the OTP at any point. Recently, the OTP has indicated that it is assessing jurisdiction with regard to the 12(3) declaration submitted by the Palestinian National Authority; "analyzing crimes" in Honduras, South Korea, Afghanistan, and Nigeria (presumably Phase 2 inquiries); checking whether genuine national proceedings are being carried out in Guinea, Colombia, and Georgia (presumably Phase 3 inquiries), and in the "process of preparing to open an investigation" in Côte d'Ivoire (presumably because the preliminary examination has established that it is proper to proceed).⁸

While the phased approach described above applies equally to all situations under analysis, there are different thresholds for determining whether an investigation will be opened depending on whether the situation arises from a referral or a communication. For referrals from states parties and the Security Council, the Rome Statute presumes that an investigation will be opened "unless [the prosecutor] determines that there is no reasonable basis to proceed."⁹ When it comes to investigations initiated by the prosecutor *proprio motu*,

⁶ Given that at the pre-investigation stage there are as yet no cases (understood to mean the an "identified set of incidents, individuals, and charges"), the prosecutor has interpreted the reference to admissibility of "the case" in article 53(1)(b) as requiring examining the admissibility of "potential cases that would likely arise from an investigation into the situation." OTP, "Draft Policy Paper," para. 52. This approach has been confirmed by an ICC pre-trial chamber in a majority decision authorizing the prosecutor to open an investigation in Kenya. See *Situation in Kenya*, ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, March 31, 2010, <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf> (accessed April 26, 2011), paras. 48-50.

⁷ OTP, "Regulations of the Office of the Prosecutor," ICC-BD/05-01-09, April 23, 2009, <http://www.icc-cpi.int/NR/rdonlyres/FFF97111-ECD6-40B5-9CDA-792BCBE1E695/280253/ICCBDO50109ENG.pdf> (accessed April 26, 2011), reg. 29. While this regulation is specific to communications received under article 15, we assume the same procedure applies to preliminary examinations pursuant to Security Council and state referrals. The OTP's conduct of its analyses seems to have changed over time. Earlier statements of OTP policy identified only three phases of analysis—the first an initial review, the second a "more detailed legal and factual analysis" and the third "advanced analysis and planning" for "the most serious situations." This third phase might have even involved the preparation of an investigation plan and the creation of an OTP joint team (that is a team of staff spanning the three divisions of the OTP, the Investigation Division, the Prosecution Division, and the JCCD). See OTP, "Referrals and Communications," annex to the "Paper on some policy issues before the Office of the Prosecutor," September 2003, http://www.icc-cpi.int/NR/rdonlyres/278614ED-A8CA-4835-B91D-DB7FA7639E02/143706/policy_annex_final_210404.pdf (accessed April 26, 2011), p. 7.

⁸ OTP, "Presentation to the New York Working Group," April 14, 2011, unpublished document on file with Human Rights Watch, p. 4. The situation in Côte d'Ivoire has recently been assigned to Pre-Trial Chamber II in anticipation of the prosecutor's request for authorization to open an investigation. "Situation in Côte d'Ivoire assigned to Pre-Trial Chamber II," ICC press release, May 20, 2011, <http://www.icc-cpi.int/NR/exeres/FBD2D966-93CF-4A86-B590-46293E819A65.htm> (accessed May 28, 2011).

⁹ Rome Statute, article 53(1).

the Rome Statute requires the prosecutor to make an affirmative finding that there is a reasonable basis to proceed.¹⁰

The OTP has indicated that there is no specific timeline governing its preliminary examinations,¹¹ and, indeed, the Rome Statute does not provide for one. The time required for assessing the article 53(1) factors is likely to vary from situation to situation. For example, information about alleged crimes may be more or less difficult to obtain. And a determination as to complementarity may be more straightforward where there is a complete absence of national proceedings as opposed to where there are proceedings that need to be evaluated for their relevancy and genuineness. As discussed below, however, the absence of even general guidance on timelines for the examinations, coupled with the fact that some situations under analysis have been open for several years, is harming the ICC's credibility in some affected communities and among some key constituencies.

II. Influencing national authorities through preliminary examinations

Central to current OTP policies and practices is the understanding that preliminary examinations afford opportunities for the OTP to deter ongoing or future crimes and spur national authorities to conduct their own investigations. According to the OTP, “at all phases of its preliminary examination activities, consistent with its policy of positive complementarity, the Office will seek to encourage where feasible genuine national investigations and prosecutions by the State(s) concerned and to cooperate with and provide assistance to such State(s) pursuant to article 93(10) of the Statute.”¹² In addition, it “may decide to make public its activities in relation to the preliminary examination activities in order to contribute to the prevention of future crimes and encourage genuine national proceedings.”¹³

These recent statements of policy reflect an evolution over several years in the OTP's approach. While the OTP initially provided only limited information about its situations under analysis and kept some situations confidential, the OTP has recently decided to make

¹⁰ Ibid.

¹¹ OTP, “Draft Policy Paper,” paras. 83-85.

¹² Ibid., para. 94. Under article 93(10) of the Rome Statute, states may request assistance from the court (including the transmission of evidence) for the purposes of conducting national investigations or trials of ICC crimes or other serious crimes in national law.

¹³ Ibid., para. 89. In so doing, the OTP is “guided inter alia by considerations for the safety, well-being, and privacy of those who provided the information or others who are at risk on account of such information.” Ibid.

public the fact that a situation is under analysis as a routine matter.⁴⁴ Some information about the OTP's situations under analysis is included in briefings from the office and its weekly bulletin, which it began distributing in July 2009.⁴⁵ The OTP has also made a number of efforts in recent months to publicize its preliminary examination procedures, including through inviting comments on a draft "Policy Paper on Preliminary Examinations" and briefing the annual Assembly of States Parties (ASP) session in December 2010 and the ASP Bureau's working groups on the OTP's policy and practice in situations under analysis.

In addition to making public the fact of its analysis once a situation is subject to OTP analysis, the OTP has indicated that as a matter of policy it will make public certain aspects of its examination "activities" provided confidentiality and security considerations permit.

These activities are by-and-large aimed at collecting information necessary to carry out the analysis. The OTP may, for example, "monitor situations, send missions, [and] request information." The OTP may "hold public or confidential meetings in order to receive additional information on matters under analysis." OTP policy documents provide that in order for it to make information about its analysis public, it may "disseminate statistics on information on alleged crimes under Article 15; make public the commencement of a preliminary examination through press releases and public statements; publicize events, such as OTP high-level visits to the concerned countries, so that information can be factored

⁴⁴ There does not appear to be a consistent approach, however, to when the fact of the analysis is made public. For Georgia, Kenya, Guinea, and South Korea, the OTP made public statements that it was monitoring alleged crimes (in Kenya and Georgia, these were later characterized by the OTP as making public its examination in these situations) within days or weeks of first reports of alleged crimes. See "ICC Prosecutor: alleged war crimes in the territory of the Republic of Korea under preliminary examination," December 6, 2010, <http://www.icc-cpi.int/NR/rdonlyres/40BB19F9-3193-4A76-9E70-EB8BE39363B3/282744/KoreaEng1.pdf> (accessed April 26, 2011) (examination encompasses incidents in March and November 2010); "ICC Prosecutor confirms situation in Guinea under examination," OTP press release, October 14, 2009, <http://www.icc-cpi.int/Menu/Go?id=bc2f99e-f7b7-4ae2-afdb-69e5688e9193&lan=en-GB> (accessed June 10, 2011) (stadium massacre occurred on September 29, 2009); "Prosecutor's statement on Georgia," OTP press release, August 14, 2008, <http://www.icc-cpi.int/NR/rdonlyres/86CCD94E-B221-4F61-B977-091B86A8707C/280149/GeorgiaStatement20080815.pdf> (accessed April 26, 2011) (armed conflict in South Ossetia began on August 7, 2008); "OTP statement in relation to events in Kenya," February 5, 2008, <http://www.icc-cpi.int/NR/rdonlyres/1BB89202-16AE-4D95-ABBB-4597C416045D/0/ICCOTPST20080205ENG.pdf> (accessed April 26, 2011) (post-election violence began in late December 2007). But for Nigeria and Honduras, the announcement that these were situations under analysis followed reports of alleged crimes by a year or more. See OTP, "Weekly Briefing," issue no. 64, November 16-22, 2010, <http://www.icc-cpi.int/NR/rdonlyres/E38711EB-ED1A-49F8-8765-F1E7C96A4F36/282710/WBENG.pdf> (announcing Honduras and Nigeria as new situations under analysis as of November 18, 2010, but with the analysis dating from 2004 onwards in Nigeria and from the July 2009 coup in Honduras). This may merely reflect the OTP's ongoing evolution in its policy and its fairly recent decision to make public all situations under analysis. It may also reflect that the OTP had not received communications as to these crimes until some time after their commission.

⁴⁵ These weekly briefings are available from <http://www.icc-cpi.int/Menu/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Weekly+Briefings/>.

in by relevant departments within States and [international organizations]; and issue periodic reports on the status of its preliminary examination.”¹⁶

In addition, the OTP has committed itself to some activities aimed explicitly at promoting a deterrent effect and/or complementarity. In addition to providing information to national authorities under article 93(10) of the Rome statute,¹⁷ the OTP may, for example, “make preventive statements noting that crimes possibly falling within the jurisdiction of the Court are being committed”¹⁸ and “help the countries concerned, civil society and the international community to better identify the steps required to meet national obligations to investigate and prosecute serious crimes.”¹⁹ It may also do so by “increasing its reactivity to upsurges of violence potentially falling within the jurisdiction of the Court,” “reinforcing early interaction with States, [international organizations] and [nongovernmental organizations] to verify information on crimes;”²⁰ and including “officials, experts, and lawyers” from ICC situation countries in OTP activities, its Law Enforcement Network (LEN), and trainings.²¹

Human Rights Watch has previously emphasized the importance of bringing increased transparency and publicity to situations under analysis as part of a strategy aimed at catalyzing national proceedings.²² The collection and assessment of information necessary for analysis is likely to bring the OTP into contact with national authorities and other relevant actors, including intergovernmental organizations and civil society. Consciously seeking to use these interactions to enhance prospects for deterrence or national prosecution can strengthen the ICC’s contributions to human rights protection and the fight against impunity, even in situations where the ICC may not itself carry out investigations or prosecutions. The fact of ICC jurisdiction—promoted through statements of the OTP—can also serve to introduce the importance of accountability early on into international responses to crisis situations.

¹⁶ OTP, “Prosecutorial Strategy 2009-2012,” February 1, 2010, <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf> (accessed April 26, 2011), paras. 38-39; see also OTP, “Draft Policy Paper,” paras. 89-90.

¹⁷ See, for example, OTP, “Prosecutorial Strategy 2009-2012,” para. 17 (the Office will “provid[e] information ... to national judiciaries upon their request pursuant [sic] Article 93(10), subject to the existence of a credible local system of protection for judges or witnesses and other security-related caveats; sharing databases of non-confidential materials or crime patterns”).

¹⁸ *Ibid.*, para. 39.

¹⁹ *Ibid.*, paras. 17, 38. The “international community” seems to include those “in political mediation such as UN and other special envoys, thus allowing them to support national/regional activities which complement the Office’s work,” and “development organizations and donors’ conferences to promote support for relevant accountability efforts.” *Ibid.*, para. 17.

²⁰ *Ibid.*, para. 40.

²¹ *Ibid.*, para. 17.

²² See, for example, Human Rights Watch, *Courting History: The Landmark International Criminal Court’s First Years*, July 2008, <http://www.hrw.org/en/reports/2008/07/10/courting-history-o, p. 71>.

In addition, increased transparency responds to the legitimate interests of affected communities in knowing the status and eventual outcome of a situation subject to preliminary examination by the OTP. Increased public understanding of the criteria guiding the OTP's decision-making process also should help combat accusations of selectivity or bias in the court's investigations.

There is some evidence that the fact of ICC jurisdiction and actions of the OTP in situations under analysis have furthered the goals of complementarity and deterrence.

For example, in 2003, the government of Côte d'Ivoire submitted a declaration under article 12(3) of the Rome Statute that accepted the jurisdiction of the ICC as of September 19, 2002, (the date on which a mutiny by troops sparked civil war in that country). In 2004, the government-controlled National Radio and Television aired messages that replaced earlier appeals to ethnic hatred with ones of restraint, a day after the UN special advisor on the prevention of genocide warned that the situation could be taken up by the ICC.²³

In Guinea, statements by the OTP regarding a possible ICC investigation appear to have been a factor in the appointment of a panel of judges to investigate the September 28, 2009, stadium massacre in Conakry in which at least 150 Guineans were killed and 100 women raped. This has since been followed by four missions of OTP officials and staff to Guinea; during its missions the OTP has engaged with judges and government officials to assess progress in national prosecutions.²⁴

The OTP has also made efforts to deter crimes in ICC situations under analysis—even where such potential crimes do not relate directly to the incidents under analysis—by reminding national authorities of the potential for ICC jurisdiction. In advance of elections in Guinea and Côte d'Ivoire (the latter of which was accompanied by violence that became the subject of examination by the OTP, even though the initial OTP examination there had been opened several years earlier), the ICC prosecutor made a statement cautioning that electoral violence could lead to the commission of crimes within the ICC's jurisdiction, as had been the case in Kenya.²⁵

²³ See Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace*, July 2009, <http://www.hrw.org/en/reports/2009/07/07/selling-justice-short-0>, pp. 124-25.

²⁴ See Human Rights Watch, *"We Have Lived in Darkness": A Human Rights Agenda for Guinea's New Government*, May 24, 2011, <http://www.hrw.org/en/reports/2011/05/24/we-have-lived-darkness-0>, pp. 20-23.

²⁵ OTP, "Weekly Briefing," October 19-25, 2010, <http://www.icc-cpi.int/NR/rdonlyres/111A878E-C79C-4197-B260-24ABDC186C3C/282595/WBENG.pdf> (accessed May 4, 2011), p. 5; see also "Statement to the press by Ms Fatou Bensouda,

Expectations that preliminary examinations can have these secondary effects should be realistic, however. The likelihood of success varies from situation to situation, and depends on a number of factors not within the prosecutor's control.

For example, when it comes to catalyzing national prosecutions, ICC states parties who through their membership in the ICC have a standing commitment to fight impunity are likely to have a stronger incentive to carry out national prosecutions than non-states parties that are the subject of Security Council referrals. ICC states parties may even already have relevant national legislation (laws embodying the provisions of the Rome Statute through "implementation" of the treaty) and, through the ratification and implementation processes, pro-accountability constituencies within parliament or civil society.

The likelihood of catalyzing national prosecutions or deterring crimes may also differ depending on whether the situation is under analysis as a result of a state or Security Council referral or as a result of article 15 communications received by the OTP. As indicated above, the Rome Statute creates a heavy presumption that the OTP is to open formal investigations into situations referred by governments and the Security Council, limiting the OTP's flexibility in making use of the preliminary examination process to influence national authorities. In addition, where a state has self-referred a situation within its jurisdiction to the ICC prosecutor, it has essentially indicated that it is unwilling or unable to carry out investigations and prosecutions, giving the prosecutor little reason to use the preliminary examination process to try to encourage national proceedings.²⁶ Even when prompted by state referrals, however, the preliminary examination process may still present important opportunities to deter crimes, particularly by making clear that crimes committed by all parties to violence—including the referring government—could be subject to the ICC's jurisdiction once an investigation is opened.

Even putting aside situation-specific factors, using preliminary examinations to influence national authorities or potential violators is no easy task and requires a careful balancing act. While the fact that a situation may come before the ICC initially provides an incentive for authorities to stop crimes or to start their own investigations, that leverage is likely to wane with the passage of time.

Deputy Prosecutor," Conakry, November 10, 2010, <http://www.icc-cpi.int/NR/rdonlyres/B59BE3D8-0824-41A0-8D1E-BF231A16531B/282901/FatouGuineaENG.pdf> (accessed May 4, 2011).

²⁶ The ICC prosecutor will still independently assess admissibility, however. For example, in the Central African Republic situation, the OTP explained that its preliminary examination required waiting for a decision of the government's *Cour de Cassation* before proceeding, see OTP, "Draft Policy Paper," para. 85, notwithstanding the fact that the situation had been referred to the OTP for investigation and prosecution by the government.

As noted above, there are sometimes reasons for OTP delays, such as making space for national authorities to investigate where there is a real prospect of action. But as time passes, authorities may also become desensitized to impending ICC action. And with a number of pending situations being analyzed simultaneously by the OTP, national authorities may judge that the chances their situation will be selected for investigation do not warrant changing their behavior. Such assessments are particularly likely when national authorities are aware of the OTP's limited capacity to carry out the many tasks before it.

To sustain its leverage in such circumstances, the OTP may be tempted to further amplify the public profile of a pending examination. But this too carries significant disadvantages.

First, the OTP may end up sidelined from its main task: analysis leading to a determination as to whether or not to open an investigation. There are limits to the resources the OTP should devote to publicizing its preliminary examination activities or to carrying out activities aimed at enhancing prospects for catalytic or deterrent effects.

Second, the OTP may in some circumstances inadvertently subvert national efforts. Public statements that the ICC might act in a given situation are likely to generate significant attention, including among affected communities and, through the media, the broader public. Among affected communities, repeated statements that the ICC might act inevitably raise expectations that it will. Particularly where confidence in national authorities to deliver justice is low, this can deter these constituencies from undertaking efforts to press their governments to carry out their primary obligations to bring accountability.

Third, over time OTP failure to act—either because the OTP has yet to reach the end of its analysis or because it concludes that no investigation is warranted—can undermine the credibility of the ICC and disappoint the legitimate expectations of affected communities for justice. It can also give rise to broader perceptions of the ICC as a paper tiger, lessening the weight future statements of possible ICC action may carry.

In our view, these challenges and risks are inherent to the ambitious and important task the OTP has set for itself by seeking an enhanced role and impact during the preliminary examination process. Meeting these challenges requires a rigorous assessment of the factors that may make an OTP intervention more or less successful, and the development of strategies to mitigate risks where efforts to catalyze national prosecutions or deter crimes are pursued during a preliminary examination.

The OTP has acknowledged on paper that its provision of public information about preliminary examination activities is also aimed at “fulfill[ing] its mandate without raising undue expectations of ICC investigations.”²⁷ In practice, however, the OTP’s approach to its situations under analysis has tended to exacerbate this risk, while inadequately meeting the challenges of influencing national authorities.

III. Shortcomings in the OTP’s approach to preliminary examination

In spite of the OTP’s strong and laudable policy commitment to using preliminary examination to deter crimes and help catalyze national justice efforts, shortcomings in its current approach are limiting the prospects for success.

In this section, we discuss four shortcomings: (1) inconsistency across situations, or the appearance thereof, in engaging national authorities; (2) limited public reporting on its analyses; (3) lack of clear timelines for carrying out its analyses and, in some cases, years-long processes without a decision; and (4) overstating at times the prospects of ICC action in a manner that may have credibility and due process implications.

A. Appearance of inconsistency in engaging national authorities

As noted above, objective differences between situations will justify and even require different approaches by the OTP. But the OTP has differed in its engagement with national authorities in ways that give rise to the appearance of an inconsistent approach or one lacking a clear strategy.

The OTP is monitoring national proceedings in Guinea, Georgia, and Colombia and seeking to encourage those proceedings, as it did in Kenya. But based on public sources and reporting, the OTP’s engagement with Kenyan and Guinean authorities has been markedly more intense and meaningful than in Georgia or Colombia.

In Kenya, the OTP sought to put increased pressure on national authorities over the course of 2009 as promises to conduct national investigations were made but then failed to materialize. In February 2009, as the Kenyan parliament debated bills for the establishment of a special tribunal for national prosecutions, the OTP issued a statement recalling that

²⁷ OTP, “Prosecutorial Strategy 2009-2012,” para. 39.

crimes committed during the post-election violence were under analysis.²⁸ In July 2009, the prosecutor made public an agreement reached between his office and a Kenyan government delegation to The Hague that either Kenya would prosecute crimes or make a referral to the ICC.²⁹ Three months later and with no sign of national prosecutions, the prosecutor sought a state referral from Kenya, proposing a three-tier approach, with the ICC prosecuting those most responsible and the Kenyans carrying out prosecutions of other perpetrators and conducting a truth commission.³⁰ When no referral was made, the prosecutor in November 2009 petitioned the pre-trial chamber to authorize an ICC investigation.³¹

The OTP has similarly sought to keep pressure on the authorities in Guinea. The OTP made three missions over the course of 2010 and a fourth in 2011. Each mission was marked by public statements, including during press conferences, encouraging national authorities to carry out investigations and prosecutions.³² On a few occasions, ICC representatives challenged the Guinean authorities, saying “either they [the government] must prosecute or

²⁸ “ICC Prosecutor reaffirms that the situation in Kenya is monitored by his office,” February 11, 2009, <http://www.icc-cpi.int/NR/rdonlyres/06455318-783E-403B-8C9F-8E2056720C15/279793/KenyaOTPPublicCommunication20090211.pdf> (accessed April 26, 2011).

²⁹ “Kenyan High-Level Delegation meets ICC Prosecutor,” OTP press release, July 3, 2009, <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200109/press%20releases/pr431> (accessed April 26, 2011).

³⁰ “ICC Prosecutor Supports Three-Pronged Approach to Justice in Kenya,” OTP press release, September 30, 2009, <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200109/press%20releases/pr456> (accessed April 26, 2011).

³¹ It was only after this investigation led to requests for summonses to appear for six accused in two cases and as the Kenyan government was contesting the admissibility of the cases, that the government alleged it was conducting investigations into senior leaders. See Letter of S. Amos Wako, Attorney General to Matthew Iteere, Commissioner of Police, April 14, 2011, annex 1 in *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang*, ICC-01/0901, “Filing of Annexes of Materials to the Application of the Government of Kenya Pursuant to Article 19 of the Rome Statute,” April 21, 2011, <http://www.icc-cpi.int/iccdocs/doc/doc1062626.pdf> (accessed May 3, 2011) (instructing the police commissioner to expedite investigations and to conduct investigations into those named by the ICC). At the time the ICC pre-trial chamber authorized investigation in Kenya it found that there were no relevant national proceedings regarding the types of offenses and high-level individuals likely to be targeted in the ICC investigation. The chamber also noted that the information it had received demonstrated “inadequacies or reluctance” on the part of the Kenyan government to address the post-election violence as a general matter. See *Situation in the Republic of Kenya*, ICC-01/09, “Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya,” March 31, 2010, <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf> (accessed May 28, 2011).

³² “La CPI se prononçant sur les événements du 28 septembre: ‘si nul résultat tangible n’est atteint, le Bureau du Procureur prendra ses responsabilités’,” *Le Jour*, April 2, 2011, http://www.lejour.info/index.php?option=com_content&view=article&id=2176:la-cpi-se-prononcant-sur-les-evenements-du-28-septembre-qi-nul-resultat-tangible-nest-atteint-le-bureau-du-procureur-prendra-ses-responsabilitesq-&catid=3:societe&Itemid=4 (accessed April 20, 2011); “Statement to the press by Ms Fatou Bensouda, Deputy Prosecutor,” Conakry, 10 November 2010; “Déclaration à la Presse Guinéenne,” May 24, 2010, <http://www.icc-cpi.int/NR/rdonlyres/E8ECD7CD-963E-403F-8E64-DA7FAAE595E5/281955/Guinea3.pdf> (accessed April 26, 2011); “OTP Mission to Guinea: Statement by Mrs Fatou Bensouda, Deputy Prosecutor,” February 19, 2010, <http://www.icc-cpi.int/NR/rdonlyres/25184FEE-1BCF-48EF-B358-B7F9D3F5FCA9/281566/FatousstatementGuinesENG1.pdf> (accessed April 26, 2011).

we will.”³³ Guinean authorities have taken some steps to start investigations. A panel of three investigating judges was appointed in early 2010. As of June 2010, two individuals had been detained for their alleged involvement in the September 2009 crimes. Since then, a third person has been charged with crimes related to the September 2009 killings and rapes and on January 19, 2011, Interpol issued a Red Notice (red notices allow an already issued domestic warrant to be circulated worldwide with the request that the wanted person be arrested with a view to extradition) for Aboubacar Sidiki Diakité, the then-head of the Presidential Guard, or red beret troops, directly implicated in the September 2009 crimes³⁴.

There has been scant information, however, regarding progress on the investigation and no evidence of government efforts to locate the over 100 bodies believed to have been disposed of secretly by the security forces. The OTP has praised both the technical ability of the investigating judges and their demonstrated independence and freedom from government interference, and, following its most recent mission, the OTP issued a declaration recognizing the cooperation of the Guinean authorities and the new government’s commitment to bringing perpetrators to justice. But it also urged the government to increase accountability efforts and reiterated the ICC’s responsibility to take action if the government fails to do so promptly and adequately.³⁵

In Guinea, OTP officials highlighted the possibility that national prosecutions would become an example in fulfilling national obligations to prosecute, and, for Kenya, suggested the

³³ “ICC prosecutor to Guinea for massacre probe,” Agence France-Presse, February 15, 2010, <http://www.rnw.nl/international-justice/article/icc-prosecutor-guinea-massacre-probe> (accessed June 1, 2011). We discuss below in part III.D the importance of substantiating such strong statements promising ICC action to avoid the risk of inflating expectations that are later disappointed where the ICC does not act.

³⁴ See Human Rights Watch, *Bloody Monday: The September 28 Massacre and Rapes by Security Forces in Guinea*, ISBN: 1-56432-584-9, December 2009, <http://www.hrw.org/node/87190>, pp. 98-99; UN Security Council, Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea, S/2009/693, December 18, 2009, <http://www.unhcr.org/refworld/docid/4b4f49ea2.html> (accessed September 20, 2010), paras. 229-35.

³⁵ See Human Rights Watch, *“We Have Lived in Darkness,”* pp. 20-23. As explained in greater detail in *“We Have Lived in Darkness,”* Human Rights Watch believes that the primary obligation to provide accountability for the perpetrators of the September 2009 violence rests with national authorities in Guinea, consistent with the principle of complementarity. Human Rights Watch has nevertheless identified several key challenges to ensuring that domestic investigations and prosecutions are conducted fairly, impartially, and effectively. These challenges include deep-seated weaknesses within the judicial system, lack of adequate security for judicial personnel, the absence of a witness protection program, existence of the death penalty, and lack of a domestic law within the Guinean criminal code against crimes against humanity and torture. In order to ensure justice for the serious international crimes committed in 2009, the Guinean authorities should promptly and credibly address these challenges. Human Rights Watch believes Guinea and its international partners should push for the simultaneous progression of the investigation and trial of those responsible for the 2009 violence and much-needed improvements in the judicial system and the legislative framework which underpins it.

government could set a positive example either by conducting prosecutions or by referring the situation to the ICC.³⁶

The OTP does not seem to have taken as active an approach in Georgia or Colombia. In the Georgia situation, the OTP has so far made a total of five missions. While the second mission to Georgia was accompanied by a press release, it used notably less direct language than had OTP press releases publicizing engagement with national authorities in Kenya and Guinea. The press release welcomed good cooperation by Georgian authorities and stated “[i]t is mandatory that those most responsible for serious crimes be investigated,” without committing the ICC to action in the absence of action by national authorities.³⁷ The OTP also made two missions to Russia in connection with the Georgia case. And the press release that accompanied the OTP’s second mission to Russia—only recognizing the cooperation of the Russian authorities—was even less pointed than the press release on the Georgia mission had been.³⁸ Our research indicates that neither Georgia nor Russia have taken meaningful steps to bring to account those responsible for international human rights and humanitarian law violations by their forces during the 2008 Georgian-Russian conflict over South Ossetia.³⁹

³⁶ See “OTP Mission to Guinea: Statement by Mrs Fatou Bensouda, Deputy Prosecutor,” February 19, 2010; “ICC Prosecutor: Kenya Can Be an Example to the World,” OTP press release, September 18, 2009, [http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20\(2009\)/pr452](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2009)/pr452) (accessed April 26, 2011). The prosecutor’s exhortation that Kenya be “an example to the world” was criticized by some Kenyan authorities, who perceived it as inappropriately taking the government to task. A flier purporting to be the first issue of “ICC Watch” circulated at the January 2011 African Union (AU) summit as some Kenyan officials campaigned for support for a deferral of the ICC’s investigations by the UN Security Council cited this statement by the prosecutor as confirming “the image of the ICC as a ‘rogue court’ dominated by the prosecution’s peculiar publicity-seeking, activist style and utterances.” See “ICC Watch,” vol. 1, no. 1, 2011, on file with Human Rights Watch, p. 2. While on the face of it the prosecutor’s statement seems designed to encourage rather than sanction national authorities, the reaction to it demonstrates the sensitive contexts in which the OTP operates and the importance of paying careful attention to the content of public statements should be underscored. We discuss this further in part III.D below.

³⁷ “No impunity for crimes committed in Georgia: OTP concludes second visit to Georgia in context of preliminary examination,” OTP press release, June 25, 2010, <http://www.icc-cpi.int/Menus/Go?id=57643f8d-815d-4b72-96bd-40c363fb43co&lan=en-GB> (accessed April 26, 2011). As we discuss in part III.D below, the OTP should, of course, not make any statements committing to ICC action if it has not reached the conclusion that the ICC’s jurisdictional and admissibility requirements are met.

³⁸ “Georgia preliminary examination: OTP concludes second visit to the Russian Federation,” OTP press release, February 4, 2011, <http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/georgia/pr625> (accessed April 26, 2011).

³⁹ Human Rights Watch, *World Report 2011* (New York: Human Rights Watch, 2011), Georgia and Russia chapters. In 2008 Georgian authorities opened an investigation into violations of international human rights and humanitarian law. This is a general investigation into all violations committed by all sides. The authorities claim they have interviewed thousands of victims and witnesses within this investigation. However, the investigation has made little progress. The authorities claim that they cannot conduct a full investigation into indiscriminate or disproportionate attacks, due to Georgia’s lack of access to South Ossetia. However, if the Georgian government is serious about accountability, it should be investigating how the decision to use indiscriminate weapons such as cluster munitions was made and hold responsible those who ordered or who are implicated as a matter of command responsibility in indiscriminate attacks. Such an investigation would not require access to South Ossetia.

In Colombia, the prosecutor began with strong rhetoric then appeared to back off. OTP engagement in Colombia—which began even before the OTP’s analysis was made public in 2006—included a March 2005 letter to the government requesting information about the then-draft Law 975 (commonly known as the “Justice and Peace Law”) and follow-up questions about the law’s implementation and about the investigation of paramilitary accomplices in the political system. The prosecutor subsequently made two visits (in 2007 and 2008) and sent additional letters requesting information about national proceedings. The ICC prosecutor’s expressions of interest in the Colombian proceedings received extensive coverage in the Colombian media, and may have been one reason why the Colombian government did not follow through on proposed initiatives that would have provided effective immunity for paramilitaries or their accomplices.⁴⁰

But the prospect of ICC investigation in Colombia was not accompanied by consistent efforts to press Colombian authorities to prosecute the individuals who would most likely be the subject of ICC investigations (that is, senior officials and rebel leaders believed responsible for the most serious crimes falling within the ICC’s jurisdiction).⁴¹ Media reports in 2010 indicate that the OTP has begun monitoring reported extrajudicial killings in Colombia (known as “false positives”),⁴² but there have been no significant OTP efforts to highlight publicly the shortcomings in the implementation of the Justice and Peace Law. Rather than effectively increase pressure, the prosecutor has sent equivocal messages. In one interview he stated that “Colombia has learned, it seems to me, and can teach. The concept of the Law of Justice and Peace is very interesting, very unique. It’s important to keep a close eye in order to accomplish it. There [remains the challenge for] judges and prosecutors [to] wrap up cases and show that it works.” But he then seemingly went on to dismiss the significance of continued observation: “The fact that I am observing this doesn’t mean anything bad. It’s simply something that you also know: that in Colombia there is still an armed conflict.”⁴³ The prosecutor has not made any official decision to end the analysis of Colombia.⁴⁴

⁴⁰ See Human Rights Watch, *Selling Justice Short*, pp. 107-08.

⁴¹ See generally Human Rights Watch, *Smoke and Mirrors: Colombia’s demobilization of paramilitary groups*, July 31, 2005, <http://www.hrw.org/en/reports/2005/07/31/smoke-and-mirrors-o>; *Breaking the Grip? Obstacles to Justice for Paramilitary Mafias in Colombia*, October 16, 2008, <http://www.hrw.org/en/reports/2008/10/16/breaking-grip-o>; *Paramilitaries’ Heirs: The New Face of Violence in Colombia*, February 3, 2010, <http://www.hrw.org/en/reports/2010/02/03/paramilitaries-heirs-o>.

⁴² “Corte Penal Internacional indaga por la libertad de militares de los ‘falsos positivos,’” *El Tiempo.com*, May 2, 2010, <http://www.eltiempo.com/archivo/documento/CMS-7691492> (accessed April 26, 2011).

⁴³ Edulfo Pena, “Colombia puede ofrecer su experiencia’: fiscal jefe de la CPI,” *El Tiempo.com*, December 6, 2010, (accessed May 11, 2011) (informal translation).

⁴⁴ We discuss the challenging decision as to when to close out a situation under analysis in part III.C below.

Inconsistency or the appearance of inconsistent approaches across situations can create a number of problems. First, inconsistency can weaken the OTP's leverage by conveying that only certain situations are likely to lead to ICC intervention. Second, inconsistency opens the OTP to criticism that its interest in a given situation is motivated by political or other non-legal factors. Third, perceptions that the OTP takes an ad hoc approach to preliminary examinations can lead people to question the seriousness of the OTP's analysis. Taken together, these factors can jeopardize the ICC's credibility.

Given that objective differences between situations will necessitate different approaches and that limited resources will require the OTP to make difficult decisions in choosing which situations to prioritize, the OTP will always be subject to some allegations of inconsistency. But by developing a clear strategy for determining how and whether to influence national authorities during preliminary examinations the OTP can avoid unnecessary missteps.

B. Limited public reporting

The OTP has not consistently provided public updates on situations under analysis despite stated commitments that it would do so.

All situations under analysis are now public and some information about developments in these situations is included in the OTP's weekly briefing. The OTP reports on its activities as well as on political developments or statements of government officials and reports of United Nations agencies and nongovernmental organizations. It does not include in its briefings, however, any substantive assessment of the article 53(1) factors in pending situations under analysis.

When the OTP decided not to open investigations in Venezuela and Iraq in 2006, it issued short reports detailing its analysis.⁴⁵ These reports have been useful in explaining the OTP's decisions and countering claims of selectivity in the OTP's choice of situations. But the OTP has not issued comparable reports to explain interim or preliminary conclusions as to the 53(1) factors in any other situation.

⁴⁵ "OTP response to communications received concerning Venezuela," February 9, 2006, http://www.icc-cpi.int/NR/rdonlyres/4E2BC725-6A63-40B8-8CDC-ADBA7BCAA91F/143684/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf (accessed April 26, 2011); "OTP response to communications received concerning Iraq," February 9, 2006, http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (accessed April 26, 2011).

Opportunities for such reporting are rife. As already noted, the OTP has indicated that it is assessing national proceedings in Colombia, Guinea, and Georgia. This would place these three situations in Phase 3 of the analysis, meaning that the OTP has already reached a conclusion in the preceding Phase 2 that there is a reasonable basis to believe that crimes falling within the ICC's jurisdiction have taken place.⁴⁶ The OTP has yet to make public its analysis as to the crimes that have occurred.

Significantly, the OTP's interim reporting practices may soon change: the OTP has now committed itself to interim reporting as a matter of policy, and we understand that the OTP is now preparing to make public interim reports on its situations under analysis in the coming period, starting with Colombia.

The importance of interim reporting cannot be overstated. Reporting helps establish that the OTP is undertaking a serious inquiry and it can help spur national proceedings. Conversely, OTP failure to issue such reports can cast doubt on whether the analysis is actually proceeding. This is particularly true where, as with Colombia, Côte d'Ivoire, and Afghanistan, examinations have been open for lengthy periods.

Although the OTP has recently signaled it is moving toward opening an investigation in Côte d'Ivoire, this announcement appears to relate to violence following the disputed election in late November 2010.⁴⁷ But, as indicated above, the government of Côte d'Ivoire made an article 12(3) declaration in 2003 and the OTP opened its analysis that same year, with little public information from the OTP since that time regarding its assessment of possible crimes. Although the then-Ivorian authorities blocked the OTP's efforts, interim reporting could have publicly identified this obstacle.

The absence of reporting over long periods tends to make the publicity the OTP has sought for its analyses appear more like posturing than rigorous examination to determine whether or not to investigate. And such perceptions may undermine the catalytic effect the examination may otherwise have had.

⁴⁶ This does not mean, however, that the OTP has made a determination that these crimes are sufficiently grave to merit ICC investigation. An assessment of "gravity" is a component of admissibility, assessed alongside the existence of national proceedings during Phase 3.

⁴⁷ Edith M. Lederer, "AP Interview: International Criminal Court prosecutor to ask judges to open Ivory Coast probe," Associated Press, May 2, 2011, <http://www.newser.com/article/d9mvmtppo0/ap-interview-international-criminal-court-prosecutor-to-ask-judges-to-open-ivory-coast-probe.html> (accessed June 1, 2011).

The potentially negative effects of initial publicity followed by silence can also be pronounced where new situations are announced with little explanation. As indicated above, the OTP has recently adopted a practice of making public all situations under analysis, that is, all situations where communications have been received about crimes not manifestly falling outside the ICC's jurisdiction. This sets a relatively low bar for the announcement of new situations under analysis; an announcement of a new situation, without more, does not suggest anything about the OTP's prospective assessment as to whether the ICC's jurisdiction and admissibility requirements will be met.

Recent announcements of new situations under analysis, however, have not adequately explained this fact. For example, the OTP's announcement in December 2010 that South Korea was now a situation under analysis on the basis of attacks allegedly committed by North Korea on its territory attracted considerable media attention, particularly given the very public nature of the announcement made by the prosecutor at UN headquarters during the annual meeting of ICC states parties.⁴⁸ The limited nature of the alleged crimes at issue—two incidents of possible war crimes, the shelling of Yeonpyeong Island on November 23, 2010 (which left four dead) and the sinking of a South Korean warship on March 26, 2010 (which left 46 dead)—is quite different from the crimes that were then the subject of the ICC's investigations in other situation countries. The announcement also followed one of the two incidents by several months, at a time when a possible standoff with North Korea dominated news headlines.

As the prosecutor indicated in his statement, the announcement was apparently triggered by communications received by the OTP the previous week regarding possible war crimes committed in South Korea. And the prosecutor's statement situated the announcement in the context of updating states parties on situations under analysis, noting that in these situations it is the OTP's obligation to examine whether the legal criteria in the Rome Statute are met and warrant opening an investigation. Even though making public that South Korea is now a situation under analysis is completely consistent with the OTP's new policy making all such situations public, the timing of the announcement and the absence in the announcement of further detailed explanation regarding preliminary examination procedures still gave the impression that the OTP was simply jockeying to assert the ICC's relevance. The OTP could have made its announcement in a manner that better explained its

⁴⁸ The prosecutor referred to the opening of the situation in his opening remarks to the Assembly of States Parties. "Statement by Mr. Luis Moreno-Ocampo, Prosecutor of the ICC to the Ninth Session of the Assembly of States Parties," New York, December 6, 2010, http://www.icc-cpi.int/iccdocs/asp_docs/ASP9/Statements/ICC-ASP9-statements-LuisMorenoOcampo-ENG.pdf (accessed May 3, 2011), p.5.

process of preliminary examination—including that it now makes public *all* situations under analysis—avoiding some of the misperceptions that arose.

Reporting failures can also lead to missed opportunities to spur national prosecutions. By setting out preliminary conclusions and noting weakness in national responses, the OTP can point national authorities toward the actions required to comply with their international obligations and can provide important information to domestic and international civil society groups that support such actions. In this sense, interim reports are likely to be among the most effective tools the OTP has at its disposal to encourage national proceedings.

C. Absence of timelines for analysis and decisions on investigations

As explained above, there is no statutorily prescribed timeline for OTP preliminary examinations. While this is not necessarily a problem, it becomes one when a situation has been under preliminary examination for years without any indication as to whether or not the OTP intends to open a formal investigation.

There are sometimes good reasons that an OTP examination into one situation will proceed on a somewhat different timeline than an examination into another situation. The time necessary to carry out an analysis will differ depending on the underlying facts of the given situation, including whether there are national proceedings that needed to be evaluated for their relevancy and genuineness. It will also differ depending on how the situation came to the attention of the OTP. If it came as a government or Security Council referral, there is a presumption in favor of opening a formal investigation (the prosecutor must pursue the case unless he concludes there is *no* reasonable basis to proceed); if, however, the prosecutor is examining whether to open an investigation pursuant to his article 15 *proprio motu* powers, he must make an affirmative showing to the pre-trial chamber that there *is* a reasonable basis to proceed.

Consideration of the possible catalytic and deterrent effects of preliminary examinations can lead to further justifiable differences in timelines. The need to demonstrate that an ICC intervention is possible, for example, may mean that for a certain period it is preferable that the OTP not make a decision as to whether or not to open an investigation, even where progress in its analysis may permit it to do so. Civil society groups and international partners may be able to use the pending status of the OTP's examination in advocacy efforts to spur

national proceedings. This was the case, albeit unsuccessfully, in Kenya, in a campaign to press national authorities to set up a domestic special tribunal.⁴⁹

While the above factors argue against attaching inflexible timelines to the preliminary examination phases, the OTP could usefully provide general guidance on the estimated length of time an analysis may take. The OTP has not provided this general guidance and has routinely kept situations under analysis for several years without taking a decision regarding investigation. The OTP's analysis of Côte d'Ivoire dates back to 2003, for example, while preliminary examinations in Colombia and Afghanistan have been ongoing publicly since 2006 and 2007, respectively. This seems to contradict earlier statements of OTP policy which, while acknowledging that "imposing rigid timetables" would be unworkable, nonetheless promised that the OTP would "strive to complete all analyses as expeditiously as possible in order to reach timely decisions whether to investigate."⁵⁰

The addition of new situations under analysis in rapid fashion—as was the case at the end of 2010 when Honduras, Nigeria, and South Korea were all announced as situations under analysis within a matter of weeks—without any decisions on long-open preliminary examinations tends to further dilute the impact of OTP examinations. And issuing a decision in a new situation while leaving open longer-standing examinations can contribute to a sense of inappropriate "queue jumping," a sense that factors other than legal analyses are dictating where and when the OTP chooses to act. This was the case, for example, when the prosecutor announced he would seek to open an investigation in Kenya, bypassing longstanding and still pending analyses in Colombia, Afghanistan, and Côte d'Ivoire.⁵¹

⁴⁹ The prospect of a possible ICC investigation in Gaza—pending a determination as to whether the article 12(3) declaration made by the Palestinian Authority can confer jurisdiction—has at least helped to keep alive discussions about domestic accountability. It has added to the pressure on Israel and Hamas to conduct credible investigations, pressure initially exerted by reporting by the UN secretary-general and expert committees on a report issued by the UN Fact Finding Mission on the Gaza Conflict (Goldstone commission). This has yet to translate into accountability, however. Hamas has conducted no criminal investigations to date. While Israel's military has conducted dozens of criminal inquiries, see Israel Defense Forces Military Advocate General Corps, "101 with the Deputy Military Advocate for Operational Affairs," article dated 9 March 2011, <http://www.mag.idf.il/163-4544-en/patzar.aspx> (accessed May 19, 2011), the state of many of these investigations was still unclear as of March 2011, more than two years after the December 2008-January 2009 conflict. See Kenneth Roth, "Gaza: The Stain Remains on Israel's War Record," *The Guardian*, April 15, 2011, <http://www.hrw.org/en/news/2011/04/05/gaza-stain-remains-israels-war-record> (accessed May 3, 2011).

⁵⁰ OTP, "Referrals and Communications," p. 3.

⁵¹ This effect is perhaps not so pronounced where investigations are open pursuant to a Security Council or state referral, given that the Rome Statute compels the OTP to open an investigation in those circumstances unless there is *no* reasonable basis to proceed. This can provide an explanation for moving faster in those situations as compared to situations that remain open pursuant to article 15 communications. As indicated above, it can also lessen the flexibility the OTP may have to try to bring about national prosecutions or deter crimes through the preliminary examination process.

Human Rights Watch believes that general guidelines on timelines for the different preliminary examination phases would help to bring greater transparency to the OTP's examinations. Such guidelines, coupled with interim reporting on the status of specific analyses, could help supply answers to why certain situations have moved forward while others have not, strengthening the credibility of the OTP's examination and its hand with national authorities.

We believe it is equally important that the OTP also develop a sense of when a situation under analysis should be suspended or closed out. Keeping situations under analysis open for indeterminate periods fails to respond to the legitimate expectations of affected communities and advocates for justice, and limits the OTP's ability to use preliminary examinations for catalytic or deterrent effects.

To be sure, pressure on national authorities is difficult to maintain once the OTP has issued a decision on whether or not to investigate. Where the OTP decides not to investigate, the "sword of Damocles" has been lifted; and where the OTP announces it is opening a formal investigation, national authorities may decide they have little interest in expanding the circle of accountability beyond those few individuals likely to be targeted by ICC investigations. But an assessment by the OTP that there is no ICC case could also help refocus efforts on national solutions, particularly where constituencies have been divided between those seeking a national option and those favoring the ICC option. In any event, the primary purpose of preliminary examinations under the Rome Statute is to reach decisions regarding investigations. Keeping analyses open indefinitely or otherwise departing too far from that primary mandate in the service of possible catalytic or deterrent effects does not serve the credibility of the OTP or the ICC.

One reason that some preliminary examinations are kept open may be that the OTP considers the legal threshold for opening an investigation to have been met, but does not currently have the resources available to proceed or has determined that an announcement now would jeopardize the safety of victims, witnesses, or OTP staff.

Indeed, an earlier statement of OTP policy acknowledged the role of resource constraints: "[T]he limited resources of the Office mean that not every situation can be immediately investigated, but some prioritization based on the factors in article 53 is necessary. In the course of such analysis, the Prosecutor can still monitor developments, follow up with

States, encourage genuine national proceedings, and prepare for possible investigation where necessary.”⁵²

While this acknowledgment has dropped out of current statements of OTP policy, the resources available to the court—set on an annual basis by the ICC’s states parties—do constrain its ability to act. As we recommend below, when resource constraints factor into decisions about situations under analysis, the OTP should openly acknowledge that fact, lending increased transparency and credibility to OTP decision-making. In turn, ICC states parties should ensure that the court is equipped with the resources necessary to carry out its mandate.

D. Public statements overstating the likelihood of ICC action or raising due process concerns

In its public statements on situations under analysis, the OTP has on occasion asserted the likelihood of ICC action that appears to go beyond what the OTP has publicly stated about the substance of its analysis and conclusions. In addition, on at least one occasion such a statement—by naming a potential suspect—could raise due process concerns. While such strong statements are clearly designed to maximize leverage on national authorities (and in the short term may in fact succeed), over time they could undermine the credibility of the OTP’s analyses and have the opposite effect.

As violence erupted in Côte d’Ivoire following presidential elections in which incumbent president Laurent Gbagbo did not cede power to his opponent Alassane Ouattara, the ICC prosecutor issued a statement declaring, “First, let me be clear: I have not yet opened an investigation. But, if serious crimes under my jurisdiction are committed, I will do so. For instance, if as a consequence of [Gbagbo supporter] Mr. Charles Blé Goudé’s speeches, there is massive violence, he could be prosecuted. Secondly, if UN peacekeepers or UN forces are attacked, this could be prosecuted as a different crime.” The statement then referred to the possibility of an African state referring the situation to the OTP, and concluded “[v]iolence is not an option. Those leaders who are planning violence will end up in the Hague.”⁵³

⁵² OTP, “Referrals and Communications,” pp. 1, 4.

⁵³ “Statement by ICC Prosecutor Luis Moreno-Ocampo on the situation in Côte d’Ivoire,” OTP press release, December 21, 2010, <http://www.icc-cpi.int/NR/rdonlyres/2FD9D3E4-A7A8-4BFB-9640-4408DC114BC8/282844/Ivorycoast.pdf> (accessed April 27, 2011).

This direct threat of ICC action against a named individual could lead some observers to question the impartiality of any subsequent investigation, whatever the merits of the case. It could raise questions as to whether the prosecutor investigated “incriminating and exonerating circumstances equally,” as required by the Rome Statute.⁵⁴ The statement also assumes that article 53 criteria would be satisfied permitting the ICC prosecutor to open an investigation, but the OTP does not substantiate this assessment with any reference to the OTP’s conclusions based on the facts on the ground as they were in late December 2010.

Similarly, press comment by an OTP official around the time of the OTP’s first mission to Guinea in February 2010 promised: “there is no alternative: either they [the government] must prosecute or we will.”⁵⁵ This statement, likely an effort to spur Guinean authorities to institute national proceedings following their October 2009 promise to do so⁵⁶, seems to indicate that the OTP already had satisfied itself that it could open a formal investigation according to the article 53 criteria. The comment, however, is silent as to an important Rome Statute criterion, that of gravity. The gravity requirement—a component of admissibility under article 17—requires not only that ICC crimes have been committed, but that these crimes be of sufficient seriousness to merit the ICC’s attention. While serious crimes were alleged to have occurred in Guinea, the article 17 criteria merit discussion.⁵⁷ It would have been helpful and bolstered the OTP’s credibility had that statement contained some substantiation that the gravity threshold had been met. And if the OTP had yet to reach that conclusion, the credibility of the OTP and its analysis would have been better served by avoiding language implying that it had.

As set out above, an inherent challenge in seeking to use preliminary examination to spur national prosecutions or deter crimes is keeping the prospect of an ICC intervention credible while also taking care to manage expectations. This must be done in a manner that respects

⁵⁴ Rome Statute, art. 54(1)(a).

⁵⁵ “ICC prosecutor to Guinea for massacre probe,” Agence France-Presse, February 15, 2010, <http://www.rnw.nl/international-justice/article/icc-prosecutor-guinea-massacre-probe> (accessed June 1, 2011).

⁵⁶ “Guinea Minister visits the ICC—Prosecutor Requests Information on National Investigations into 28 September Violence,” OTP press release, October 21, 2009, http://www.icc-cpi.int/menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/guinea/guinea%20minister%20visits%20the%20icc%20_%20prosecutor%20requests%20information%20on%20national%20investigations%20into%2028 (accessed April 27, 2011).

⁵⁷ Notwithstanding the serious nature of the crimes alleged to have occurred in Guinea, when compared with the scale and scope at issue in the ICC’s existing investigations at the time of the February 2010 announcement (in Darfur in Sudan, Democratic Republic of Congo, Uganda, and Central African Republic), legitimate questions may be asked as to whether events in Guinea reach the gravity threshold. The OTP has set out criteria it uses to assess gravity in OTP, “Draft Policy Paper,” paras. 67-72.

high professional standards and the due process rights of possible suspects.⁵⁸ When it comes to public statements, this can be a difficult balancing act.

In Kenya, the OTP's earliest public statement was measured, noting the ICC's jurisdiction over Kenya as a state party and the OTP's continued monitoring and assessment of alleged crimes, but not committing to ICC action.⁵⁹ Press comments by OTP officials as the analysis continued, however, stated that the ICC would step in unless national authorities acted,⁶⁰ heightening expectations of an ICC investigation. Such expectations already had been raised by the Waki Commission's instruction that should national authorities not investigate the post-election violence, Kofi Annan—the chair of the African Union panel appointed to mediate an end to the crisis—would hand over a sealed list of alleged perpetrators to the ICC prosecutor for investigation.

The back-and-forth between the OTP's promises to act if national authorities did not and the government's counter-promises to conduct national trials over the course of 2009 was characterized by a leading Kenyan civil society representative as “a game of chicken. Or dare. Who is going to blink first? Who is going to call the other's bluff?”⁶¹ That the prosecutor eventually did seek an investigation made good on earlier OTP statements. Nonetheless it indicates the difficult line to be walked between the legitimate use of public statements and press comment to ratchet up pressure on national authorities, while not prejudging the situation or overpromising on what the ICC will deliver.

Nearly unqualified assertions of the possibility of ICC action do little to maintain this balance. Such statements inflate expectations while simultaneously straining the credibility of the analysis itself, giving a sense of “game playing” on the part of the OTP that is not conducive to maintaining leverage with national authorities and that could raise due process concerns where individuals are named. Where individuals are named, it is also not conducive to perceptions of the OTP's impartiality, which can have broad implications for

⁵⁸ See UN Guidelines on the Role of Prosecutors, Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, U.N. Doc. A/CONF.144/28/Rev.1 at 189 (1990), art. 13(b) and (c) (“In the performance of their duties, prosecutors shall ... protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim ... [and] keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise.”).

⁵⁹ “OTP statement in relation to events in Kenya,” February 5, 2008.

⁶⁰ See, for example, Ben Agina, “The Hague beckons, says Annan,” *The Standard*, April 1, 2009; “ICC may try Kenya violence suspects: prosecutor,” Agence-France Presse, July 3, 2009.

⁶¹ L. Muthoni Wanyeki, “We Remember, And Have Evidence,” *The East African*, November 9, 2009, <http://allafrica.com/stories/200911090793.html> (accessed May 31, 2011).

the court's credibility, separate and apart from limiting the OTP's ability to effectively influence the national authorities of its situations under analysis.

IV. Recommendations

The Office of the Prosecutor's use of the preliminary examinations to help catalyze national prosecutions and to deter ongoing crimes has been an important tool in promoting international justice. While these effects are secondary to the primary purpose of reaching a decision regarding whether or not to move forward with an ICC investigation, they nonetheless carry tremendous potential for increasing the ICC's positive impact. As set forth above, this is not without significant challenges. First, the likelihood for success in any given situation depends on variables that are largely outside of the OTP's control. Second, maximizing leverage on national authorities requires a careful balancing act that maintains the credibility of potential ICC action while not inflating expectations of action that cannot be met. Third, any public actions by the OTP need to take into account the due process rights of potential criminal suspects.

The OTP's efforts to implement its policy have often fallen short of meeting these challenges. A more rigorous approach by the OTP is needed, one that builds on a better understanding of how and when increased publicity for its preliminary examinations and other measures targeted directly at catalyzing national prosecutions or deterring crimes can best be utilized. We urge the prosecutor before leaving office to develop a strategy to this end. Such a strategy would help the OTP target its limited resources on situations where the likelihood of impact with national authorities is greatest, ensuring more effective and consistent implementation going forward. It would also bolster the credibility and legitimacy of the OTP and help it fulfill its primary mandate to conduct investigations and bring prosecutions.

Human Rights Watch makes the following recommendations to the OTP in developing this strategy:

- **Draw lessons learned from practice to date**

The OTP's current approach to situations under analysis reflects the gradual development of policy over its first years of operation. The OTP has gathered sufficient experience to draw some lessons as to how effective its efforts have been, both in helping catalyze national prosecutions and in deterring future crimes. Every situation will be different—any evaluation should take the differences into account—and, going forward, the response and engagement of the OTP will very much need to be tailored to the specifics of the national landscape. But

an assessment of practice to date could help give some indication of what kinds of pressure, under what kinds of circumstances, have produced positive results, as well as where additional or different OTP actions could have been more effective.

- **Ensure that OTP public statements provide sufficient context and protect due process**

The public announcement that a situation is under analysis can attract considerable attention. This may be desirable and appropriate to a strategy of maximizing influence with national authorities. But where insufficient information is provided—for example, to contextualize a decision to announce a new situation under analysis or to substantiate strong assertions of future ICC action—such statements can actually undermine the OTP’s effectiveness. Publicly naming suspects before an investigation has begun may also raise due process concerns. The OTP should carefully craft its public statements to avoid these outcomes. The OTP, for example, might state more clearly its policy of publicly announcing situations under analysis once the threshold between Phase 1 and Phase 2 is crossed. This could help temper expectations of immediate action and help counter perceptions that such announcements reflect politicized posturing by the OTP rather than appropriate transparency. Similarly, statements should take care not to go beyond where the OTP’s own examination stands.

- **Make use of interim reports to increase rigor, transparency, and accountability**

We have repeatedly stressed the difficult balancing act that the OTP needs to perform between helping spur national authorities to act by highlighting possible ICC action and creating expectations that the ICC ultimately does not meet, undermining its credibility. While this is a genuine challenge with no easy answers, our observations suggest that bringing increased transparency to the OTP’s preliminary examination activities would help. Specifically, we recommend that the OTP institute a practice of issuing periodic reports detailing its assessment of the article 53 criteria and steps taken to influence national authorities with respect to a given situation under analysis.

There are a number of ways in which these reports would make the OTP’s policy more effective and correct some of the problems we identify above in the OTP’s current approach. First, these reports—by demonstrating more credibly that the OTP’s analysis is proceeding and, where national proceedings are at issue, pointing to gaps to be filled—would increase leverage with national authorities. This includes the use that civil society and other

stakeholders invested in accountability could make of such reports to press authorities to act. Second, the reports would periodically inform affected communities of the status of the OTP's examinations, helping to manage expectations even where no final decision has been taken as to whether or not to open an investigation. Third, once a decision has been taken, the reports would provide a basis for comparing the OTP's analysis to its analyses in other situations, helping counter any sense of partiality in the selection of situations. Fourth, such reports would provide the OTP an opportunity to candidly acknowledge where extra-legal considerations—such as resource constraints or safety—are preventing the OTP from initiating investigations, improving the appearance of consistent application of article 53 criteria.

If produced consistently, such reports could strengthen the overall legitimacy of the OTP's preliminary examination work, minimizing accusations of posturing and game playing. While this is important in its own right, it is also essential to maintaining a credible threat of future ICC action, upon which any prospect of catalyzing national prosecutions or deterring crimes depends. Confidentiality, due process rights of the accused, and the well-being and security of victims and witnesses place appropriate limits on what the OTP can and should make public about its analysis, but there is still much more the OTP can be doing to update the public on the status of its preliminary examinations.

- **Provide general guidance on how long preliminary examinations can be expected to take**

The OTP's lengthy open-ended analysis of several situations has strained the credibility of its preliminary examinations. Interim reporting would help, we believe, to demonstrate that these analyses are proceeding and offer explanations for why no decision has been reached. We think this could be enhanced by developing an approximate timetable for the duration of preliminary examinations, one that gives a sense of how many months (or range of months) the different phases should take under typical circumstances and identifies factors that are likely to slow down or expedite analysis. While fixed deadlines are unlikely to be realistic or conducive to achieving catalytic or deterrent effects and the duration of analysis will differ from situation to situation, such an approximate timetable, coupled with interim reporting, would help guide and inform expectations.