Questions & Answers

PRELIMINARY EXAMINATIONS BY THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT

The Office of the Prosecutor (OTP) of the International Criminal Court (ICC) - the world's first permanent international court- has announced that it is examining ten situations on four continents, including Afghanistan, Chad, Colombia, Côte d'Ivoire, Georgia, Guinea, Honduras, Nigeria, Republic of Korea, and Palestine. To date the OTP has published the conclusions of its preliminary examination into alleged crimes committed in Iraq[1] and Venezuela[2] dismissing the cases on grounds that the statutory requirements needed to open an investigation had not been satisfied, and has moved from preliminary examination to full fledged investigations in DRC, Uganda, CAR, Kenya and Sudan. The present factsheet provides specific information on the initial "preliminary examination" phase.

Q: What does it mean when the Prosecutor of the International Criminal Court (ICC) announces that a country is under preliminary examination by his Office?

A: By ratifying the Rome Statute – the International Criminal Court's founding treaty – a State agrees that it has the duty to investigate and prosecute the crimes included in the Rome Statute, namely genocide, war crimes and crimes against humanity. It also agrees that should it fail to do so, the ICC may open an investigation, if the situation fulfills all jurisdictional requirements.

These requirements include the temporal (that the crimes in question occurred after July 1, 2002 or after the date in which the statute entered into effect for the territory in question) and the material (crimes against humanity, genocide and war crimes). Further, the Court has jurisdiction only over territories and nationals of states parties, unless the situation comes to the attention of the Court through the United Nations Security Council (see below). Finally, the Court will assess whether the situation or case is admissible.

The ICC can exercise jurisdiction over crimes if one of the following conditions is met:

1) a State Party refers a situation to the ICC;
2) the United Nations Security Council (UNSC), acting under Chapter VII, refers a situation to the ICC;
3) a country that is not a State Party to the Statute lodges a declaration pursuant to article 12 (3) accepting the jurisdiction of the Court;

[1] http://www.icc-cpi.int/NR/rdonlyres/04D143C8-19FB-466C-AB77-4CDB2FDEBEF7/143682/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf
[2] http://www.icc-cpi.int/NR/rdonlyres/4E2BC725-6A63-40B8-8CDC-ADBA7BCAA91F/143684/OTP_letter_to_senders_re_Venezuela_9_February_2006.pdf

4) the ICC Prosecutor decides to open an investigation acting under his *proprio motu* powers, on the basis of communications and information he has received from individuals, groups, States, intergovernmental or non-governmental organizations.

Thus a preliminary examination is initiated where one of these four conditions is met and the Prosecutor has made an initial assessment that the situation warrants further analysis.

Q: Which criteria guide the Prosecutor's admissibility analysis?

A: Given that the ICC will only intervene if a country is unable or unwilling to investigate and prosecute nationally, the Prosecutor must determine if either of these criteria are being met.

Complementarity: The admissibility analysis involves determining whether there are national proceedings underway or completed for the same crimes and in relation to the same alleged perpetrators.

Gravity: The ICC is meant to investigate and prosecute only the gravest of crimes. The gravity analysis includes an assessment of the manner, scale, nature and impact of the alleged crimes perpetrated in the context of a specific situation.

Even if the OTP decides positively on complementarity and gravity, the office will carry out an "interests of justice" analysis which requires the Office to "assess 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."

Q: What are some of the actions that the Prosecutor can take during the preliminary examination phase?

A: Article 15 of the Rome Statute grants the Prosecutor the authorization to "initiate investigations *propio motu* on the basis of information on crimes within the jurisdiction of the Court." It also notes that the Prosecutor "shall analyze the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate and may receive written or oral testimony at the seat of the Court." This phase offers the Prosecutor the opportunity to request further information, to conduct missions to the country to meet with different stakeholders and to monitor developments.

The Prosecutor's timely intervention into situations where there are threats of future crimes against humanity, war crimes or genocide, or where alleged crimes are already taking place can also serve as a powerful deterrent for the perpetration of future crimes.

Q: What is the timeline to move from preliminary examination to investigation?

A: ICC legal texts provide no specific timeline for the Prosecutor's decision to open an investigation into a situation. The Office of the Prosecutor has the following options in regard to how to proceed.

(1) It can determine that a specific examination does not fulfill the requirements needed to open an investigation and therefore dismiss it.
(2) It can continue to monitor national proceedings and/or gather information for an indefinite period in order to amass the necessary legal and factual basis to make its determination.
(3) It can decide to open an investigation. If the Prosecutor is proceeding under his *propio motu* powers, he must request authorization by the Pre-Trial Chamber to do so.

Before determining whether to open an investigation the Prosecutor will also make sure that States and other relevant parties have had the chance to provide all the information they feel is relevant.

Background materials

ICC-OTP Weekly Briefings:
http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Weekly+Briefings

Draft Policy Paper on Preliminary Examinations, ICC Office of the Prosecutor, 2010:
http://www.icc-cpi.int/NR/rdonlyres/E278F5A2-A4F9-43D7-83D2-6A2C9CF5D7D7/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf

ICC Webpage on Communications Referrals and Preliminary Examinations:
http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/

Policy Paper on the Interests of Justice, ICC Office of the Prosecutor, September 2007:
http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf

CICC Webpage on Court Developments in Relation to Other Countries: http://www.coalitionfortheicc.org/?mod=developments

CICC's policy on the referral and prosecution of situations before the ICC:

The Coalition for the ICC is not an organ of the court. The CICC is an independent NGO movement dedicated to the establishment of the International Criminal Court as a fair, effective, and independent international organization. The Coalition will continue to provide the most up-to-date information about the ICC and to help coordinate global action to effectively implement the Rome Statute of the ICC. The Coalition will also endeavor to respond to basic queries and to raise awareness about the ICC's trigger mechanisms and procedures, as they develop. The Coalition as a whole, and its secretariat, do not endorse or promote specific investigations or prosecutions or take a position on situations before the ICC. However, individual CICC members may endorse referrals, provide legal and other support on investigations, or develop partnerships with local and other organizations in the course of their efforts. Communications to the ICC can be sent to: ICC P.O. box 19519 2500 CM the Hague The Netherlands