PRELIMINARY EXAMINATIONS BY THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT

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Abstract: The aim of this article is to provide an overview of the preliminary examinations conducted by the Office of the Prosecutor (OTP) of the International Criminal Court, i.e. of the activities of the OTP carried out in order to determine whether a situation, brought to the attention of the OTP, meets the legal criteria established by the Rome Statute to warrant investigation by the ICC. The article describes the legal framework for the preliminary examinations and the relevant practice of the OTP which was developed on the basis of this framework, including the application of the criteria of complementarity, gravity and the interests of justice (important source of information on the principles which govern the practice of the OTP in this regard is the Dratft Policy Paper on Preliminary Examinations, submitted by the OTP for consideration in October 2010). The article also, referring to recent opinions in doctrine, points to some unsettled, debatable or problematic legal aspects of the relevant practice of the OTP (possible imbalance between the prosecutorial discretion and judicial review of his inaction; the attitude of the OTP towards the "alternative methods of accountability", such as truth and reconciliation commissions; unsettled or vague application of the criterion of gravity; attitude of the OTP towards the issues of international peace and security within the framework of the "interests of justice" criterion). Finally, the article provides a brief overview of the current status of preliminary examination of the situations in Afghanistan, Colombia, Côte d'Ivoire, Georgia, Palestine, Guinea, Honduras, Korea and Nigeria.

Resumé: Cílem článku je poskytnout přehled o tzv. předběžných zkoumáních vedených Úřadem žalobce Mezinárodního trestního soudu, tj. o činnostech Úřadu prováděných za účelem posouzení, zda situace, která mu byla stanoveným způsobem předložena či na niž byl upozorněn, splňuje právní kritéria stanovená Římským statutem Mezinárodního trestního soudu pro zahájení vyšetřování. Článek popisuje právní rámec pro předběžná zkoumání a relevantní praxi Úřadu žalobce, která byla rozvinuta na základě tohoto právního rámce, včetně použití kritérií komplementarity, závažnosti a zájmů spravedlnosti (významným zdrojem informací o zásadách, jimiž se řídí v tomto ohledu praxe Úřadu, je návrh "policy paper" o předběžných zkoumáních, jejž Úřad předložil k posouzení v říjnu 2010). Článek také, s použitím odkazů na aktuální názory nauky, poukazuje na některé neustálené, diskutabilní či problematické aspekty relevantní praxe Úřadu (možná nerovnováha mezi volným uvážením/autonomií žalobce a jeho odpovědností/soudním přezkumem jeho nečinnosti; přístup Úřadu k "alternativním metodám odpovědnosti" jako např.

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komisím pravdy a smíření; neustálené či vágní používání kritéria závažnosti; přístup Úřadu k záležitostem "míru a bezpečnosti" v rámci použití kritéria zájmů spravedlnosti, atd.). Na závěr článek poskytuje stručný přehled aktuálního stavu předběžných zkoumání situací v Afghánistánu, Kolumbii, Pobřeží slonoviny, Gruzii, Palestině, Guineji, Hondurasu, Koreji a Nigérii.

Key words: International Criminal Court, Office of the Prosecutor, preliminary examinations, Draft Policy Paper on Preliminary Examinations, complementarity, gravity, interests of justice.

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1. Introduction

Preliminary examinations are the activities carried out by the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) in order to determine whether a situation brought to the OTP's attention meets the legal criteria established by the Rome Statute to warrant investigation by the ICC.[1] Within the framework of preliminary examinations, the OTP (the Prosecutor) uses his discretion, i.e. his power to decide whether or not to investigate the case. This discretion is an important manifestation of his functional independence within the system of the ICC – independence which is based on the interest of impartial justice on which the credibility and legitimacy of the criminal process before the ICC depends.[2]

[1] Draft Policy Paper on Preliminary Examinations, 4 October 2010, p. 1; see http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Policies+and+Strategies/Draft+Policy+Paper+on+Preliminary+Examinations.htm. When the Draft Policy Paper was published, the OTP asked for comments and questions on the Draft – these comments and questions should have been sent to the OTP by 1 December 2010. As of 10 August 2011, no final Policy Paper has been published.Some assumptions and conclusions contained in the Draft Policy Paper and mentioned in this article therefore might be changed in the final text of the Paper.

[2] O. Trifterrer, Commentary on the Rome Statute of the International Criminal Court, Observer's Notes, Article by Article, Second Edition, C. H. Beck – Hart – Nomos, 2008, p. 1066, para. 1. According to Carsten Stahn, "discretion empowers the Office and provides it with some autonomy to decide when to act and when not to act. Such powers help the Prosecutor to withstand pressure and temper political interference by various extraneous actors in the investigation and prosecution of crimes."; C. Stahn, Judicial review of prosecutorial discretion: Five years on; in: Carsten Stahn and Göran Sluiter (eds.), The Emerging Practice of the International Criminal Court, Martinus Nijhoff Publishers, 2009, p. 253. Some authors hold the view that the Statute has not quite managed to establish a balance between discretion (prosecutorial autonomy) and accountability, tending to privilege discretion over accountability, and that the (judicial) review of prosecutorial inaction has been neglected by the authors of the Statute. As Carsten Stahn puts it, "the statutory provisions fail to provide a coherent normative framework for the selection of situations and cases by the Prosecutor. The criteria outlined in the

The Draft Policy Paper on Preliminary Examinations (prepared by the OTP and submitted for consideration on 4 October 2010) provides that the preliminary examination process is conducted by the OTP (on the basis of the facts and information available) in the context of the following principles: (a) independence (no instructions from any external source; decison shall not be altered by the presumed or known wishes of any party or by the "cooperation seeking process"); (b) impartiality (applying consistent methods and criteria irrespective of the States and parties involved or the persons/groups concerned; no relevance of geo-political implications of the location of the situation, of geographical balance between situations or of parity within a situation between rival parties); and (c) objectivity (investigating incriminating and exonerating circumstances equally in order to establish the truth, ensuring due proces by providing all relevant parties with the opportunity to submit information they consider important).[3]

2. Inititation of a preliminary examination

The preliminary examination of "a situation" may be initiated by: (a) a decision of the Prosecutor exercising his *proprio motu* authority (article 15 of the Rome Statute), "taking into consideration any information on crimes under the jurisdiction of the Court, including information sent by individuals or groups, States, intergovernmental or non-governmental organisations"; (b) a referral of a situation to the Prosecutor by a State Party in accordance with article 14 of the Statute;[4] or (c) a Security Council referral under Chapter VII of the United Nations Charter (article 13 (b) of the Statute).

Once the situation has been triggered in any of the ways described above, the provisions of article 53(1)(a)-(c) of the Statute become relevant as the legal framework for a preliminary examination. According to this provision, "the Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute". In deciding whether to initiate an investigation, the Prosecutor shall, according to the above provisions of article 53, consider: (a) jurisdiction (temporal jurisdiction,

Statute contain various loopholes and open, in fact, a wide scope of interpretation to the Prosecutor, since they do not provide much guidance on the substantive content of the criteria governing the decision whether or not to inititate an investigation or to proceed with a prosecution. This uncertainty has provided an opportunity to the Prosecutor to shape the meaning of the concepts and to develop prosecutorial discretion outside the realm of legal thresholds."; see C. Stahn, ibid. p. 267. The concept of gravity (see below) is, according to C. Stahn, a good example of this uncertainty. He concludes (ibid., p. 278 and 279) that the the balance between prosecutorial autonomy and accountability should be refined, transparency of prosecutorial choices enhanced and that, due to the vagueness of the Statute and the Rules of Procedure and Evidence as regards the selection of situations and cases and review of prosecutorial inaction, greater normative clarification by ICC judges may be needed.

[3] Draft Policy Paper, p. 6-8, para 33-44.

[4] The declaration pursuant to article 12(3), which allows a State which is not a Party to the Statute to accept the ICC's jurisdiction "with respect to the crime in question", is not a (self) referral (but rather, to some limited extent, an analogy to ratification). To start an investigation in such a case, the OTP has to exercise its *proprio motu* authority pursuant to article 15 of the Statute.

material jurisdiction as defined in article 5 of the Statute and either territorial or personal jurisdiction),[5] (b) admissibility (complementarity and gravity) under article 17 of the Statute[6] and (c) the interests of justice.[7] According to the Draft Policy Paper on Preliminary Examinations, "preliminary examination activities will be conducted in the same manner irrespective of whether the Office receives a referral from a State Party or the Security Council or acts on the basis of information on crimes obtained pursuant to article 15. In all circumstances, the Office will analyse the seriousness of the information received and may seek additional information from States, organs of the United Nations, intergovernmental and non-governmental organizations and other reliable sources that are deemed appropriate".[8] However, it should be noted that, according to some opinions in doctrine, in the case of Security Council referrals, the prosecutorial discretion (whether to initiate an investigation or not) is inconsitent with the institutional division of powers between the Security Council (acting under Chapter VII) and the ICC and with the basic principles of international law. According to these arguments, when the Security Council refers a situation to the Court pursuant to article 13(b) of the Statute, such a referral is mandatory and binding and constricts the prosecutorial discretion (that the prosecutor otherwise enjoys under the Statute in cases initiated *proprio motu* or by referral from States Parties).[9] As regards this opinion, it may be replied that it is not supported by the wording of the relevant provisions of the Statute.[10] Moreover, such an automatic initiation of an

5 Article 53(1)(a): "…the Prosecutor shall consider whether: (a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed".

6 Article 53(1)(b): "… the Prosecutor shall consider whether: … (b) The case is or would be admissible under article 17".

7 Article 53(1)(c): … the Prosecutor shall consider whether: … (c) 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."

8 Draft Policy Paper, para 12 and 13, See also para. 28 of the Draft Policy Paper: "The Office will consider those factors irrespective of the way in which the preliminary examination is initiated. In particular, no automaticity is assumed where the Prosecutor receives a referral from a State Party or the UN Security Council." Before determining whether to initiate an investigation, the OTP also seeks to ensure that the State and other parties concerned have had the opportunity to provide the information they consider appropriate (Draft Policy Paper, para. 13).

9 J. D. Ohlin, Peace, Security and Prosecutorial Discretion, in: Carsten Stahn and Göran Sluiter (eds.), *supra* note 2, p. 188. In support of his argument, the author refers, i.a., to the necessity to distinguish between prosecutorial discretion as *per* an entire investigation of a situation and prosecutorial discretion as *per* a particular prosecution of a specific person and crime, and to article 18 of the Statute (creating the process for the Prosecutor's "complementary" deferral to a State's investigation with respect to criminal acts which may constitute crimes referred to in article 5) which only applies to referrals from States Parties or investigations inititated by the Prosecutor *proprio motu*. The author concludes that even the Rome Statute itself might be wrong in this regard and violate basic principles dealing with the structure of international organizations. He argues that in exercising his discretion in cases stemming from a Security Council referral, the Prosecutor should be limited to matters concerning individual cases.

10 See i.a. article 53(3) according to which the review of the decision by the Prosecutor not to proceed with an investigation is subject to review by the Pre-Trial Chamber and which expressly provides that such review may be requested by the referring party, including the Security Council.

investigation would go against the necessity to properly and independently consider, even in cases of Security Council referral, all the legal issues concerning the jurisdiction and complementarity with regard to the relevant "situation".

On the other hand, as regards *the threshold* to initiate an investigation, the policy of the OTP differentiates between referrals (by a State Party or the Security Council) and Prosecutor´s *proprio motu* authority pursuant to the provisions of article 15 of the Statute (based on analyzing the "communications"): in the first case the Prosecutor is, according to the OTP, obliged to initiate and investigation, unless "he determines that there is no reasonable basis to proceed" (article 53 para. 1), whereas in the latter case, the Prosecutor is obliged to do further steps towards the investigation only if he concludes that "there is a reasonable basis to proceed" (article 15 para. 3).[11] (In addition, when the Prosecutor acts *proprio motu*, he needs an authorization of the Pre-Trial Chamber to start an investigation in accordance with article 15 para. 3 and 4 of the Statute.) The above concept is reflected in the attitude of the OTP which in some cases encourages States Parties to "refer" (pursuant to article 14 of the Statute) the situtation under preliminary examination to the Prosecutor to expedite the activities of the OTP.[12]

3. Factors applied at the preliminary examination stage [article 53(1)(a)–(c)]

Consideration of jurisdiction in accordance with article 53(1)(a) of the Statute relates to the determination that there is a reasonable basis to believe that the information on alleged crimes falls within the subject-matter jurisdiction of the

[11] See the Annex to the "Paper on some policy issues before the Office of the Prosecutor: Referrals and Communications", September 2003, p. 1 and 2: "There are however important procedural differences between referrals and communications. Where the Prosecutor receives a referral, Article 53 provides that the Prosecutor shall initiate an investigation unless he determines that there is no reasonable basis to proceed under the Statute. … When the Prosecutor receives a communication, the test is the same but the starting point is reversed: the Prosecutor shall not seek to initiate an investigation unless he first concludes that there is a reasonable basis to proceed." This distinction between the situation which has been referred to the Prosecutor by a State Party or by the Security Council (obligation to inititiate an investigation unless …) on the one hand, and the situation which has been triggered by the Prosecutor acting *proprio motu* (which is regulated by not so madatory terminology) is also supported by W. Schabas, who suggests that "it is not easy to reconcile articles 15 and 53, and the better interpretation is that they operate in parallel. In other words, article 53 only governs situations that are referred to the prosecutor by the Security Council or States Parties. Where the prosecutor acts *proprio motu*, article 15 is the applicable provision, at least with respect to the decision to initiate an investigation."; see W. Schabas, The International Criminal Court: A Commentary on the Rome Statute, Oxford University Press, 2010, p. 659. This assertion is perhaps too broad – the parallel application seems to be relevant only as regards the threshold to initiate an investigation (see Rule 48 of the Rules of Procedure and Evidence: "In determining whether there is a reasonable basis to proceed with an investigation under article 15, paragraph 3, the Prosecutor shall consider the factors set out in article 53, paragraph 1 (a) to (c)."). Also as regards the threshold to initiate an investigation, it seems that the only thing one can say is that the assumptions concerning the "reasonable basis to proceed" (and therefore, perhaps, the focus of the activities of the Prosecutor) are or should be reversed.

[12] See Remarks of the Prosecutor to the 20th Diplomatic Briefing concerning the situtation in Côte d'Ivoire, 8 April 2011; available at http://www.icc-cpi.int.

Court; fulfils the requirements concerning temporal jurisdiction; and meets the requirement concerning territorial or personal jurisdiction (based either on Article 12 or a Security Council referral).[13]

The second criterion, contained in article 53(1)(b), consists of a reference to admissibility in accordance with article 17[14] and, therefore, requires an assessment of the complementarity [article 17 subparagraphs (a)-(c)] and gravity [article 17, subpragraph (d)] of a "case". It should be noted that the use of the term "case" in article 53(1)(b),[15] is a little bit misleading, since at this stage the Prosecutor should be examining and is able to examine only the whole "situation" (see article 13 of the Statute) that has been referred or communicated to him, i.e. not the "case", which exists only after the initiation of an investigation with regard to an identified set of incidents, individuals and charges.[16] According to some authors, this insufficient differentiation between "situations" and "cases" under the Statute may cause dificulties relating to the application of complementarity requirements with respect to "situations".[17] The OTP is aware of this terminological inconsistency of the relevant provisions of the Statute and concludes that, within the context of preliminary examinations, "the Office will consider admissibility taking into account the potential cases that would likely arise from an investigation into the situation based on the information available".[18]

3.1 Complementarity

The principle of complementarity, contained in Article 17 of the Statute, is one of the underlying principles of the Statute. The aim of this paper is not to analyze

[13] Draft Policy Paper, p. 8-9, para. 46.

[14] Article 17 (Issues of admissibility), para. 1: "Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute; (c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3; (d) The case is not of sufficient gravity to justify further action by the Court.".

[15] See also article 15(4) of the Statute.

[16] See W. Schabas, *supra* 11, p. 660.

[17] As C. Stahn puts it, "the wording of Article 53(1)(b) requires the OTP technically to apply standards governing the admissibility of the "case" under Article 17 in the context of the decision to investigate a situation. The requirements of Article 17 are ill-suited to address admissibility concerns (i.e. considerations of unwillingness or inability) at the situational stage since they are related to proceedings involving perpetrators and crimes."; C. Stahn, Judicial review of prosecutorial discretion, Five years on, in: C. Stahn and G. Sluiter (eds.), *supra* 2, p. 269.

[18] Draft Policy Paper, p. 10, para. 52. The OTP adds (Draft Policy Paper, para. 53) that "the identification of such potential cases is without prejudice to such individual criminal responsibility as may be attributed as a result of the Office's subsequent investigations. …". See also Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Corr., 31 March 2010, paras 50, 182 and 188. The OTP announced that the manner in which the OTP subsequently selects "cases" during the investigation should be elaborated in a separate policy paper of the OTP (Draft Policy Paper, p. 7, para. 35).

thoroughly this principle, but only to briefly point to some aspects of it relevant to the practice of the OTP in connection with preliminary examinations. According to the OTP's Draft Policy Paper on Preliminary Examinations, "complementarity involves an examination of the existence of relevant national proceedings in relation to the potential cases being considered for investigation by the Office, … taking in consideration the Office's policy to focus on those who appear to bear the greatest responsibility for the most serious crimes. Where relevant domestic investigations or prosecutions exist, the Prosecution will assess their genuineness."[19] If there are such national proceedings, the case is inadmissible, unless (where there is a pending investigation or trial) "the State is unwilling or unable genuinely to carry out the investigation or prosecution" [17(1)(a)] or unless the decision (national decision against the person concerned) "resulted from the unwillingness or inability of the State genuinely to prosecute" [17(1)(b)]. Factors for determining unwillingness and inability are enumerated in Article 17(2) and (3) and, in short, encompass: as regards the unwillingness – national proceedings and decisions undertaken or made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdicition of the Court, unjustified delays in the proceedings, lack of independence and impartiality of the proceedings; and, as for inability – total or substantial collapse or unavailability of the national judicial system and the resulting inability of the State to carry out its proceedings.[20]

However, in the practice of the ICC, another concept, inactivity [which is not mentioned in Article17(1), but is based on the intepretation *a contrario* of Art. 17(1)(a)-(c)] became an important criterion for assessing complementarity. Therefore, according to current practice of the ICC, a case would be admissible if the States with jurisdition over it have remained inactive in relation to that case or are unwilling or unable to genuinely carry out the proceedings; as a result, in the absence of any acting State, the ICC need not make any analysis of unwillingness or inability.[21] This principle of inactivity is connected with the concept of "uncontested admissibility", which was developed by the OTP in the early years of the functioning of the ICC and is linked to the concept of "self-referral" – by which States Parties to the Statute trigger the jurisdiction of the ICC pursuant to Article 14 of the Statute, but "against themselves", i.e. with respect to crimes committed on their own territory (this concept is not expressly included in the Statute and was also developed during the early days of the ICC).[22] The concept of "uncontested admissibility" (applied for

[19] Draft Policy Paper, p. 2, para. 8.

[20] As for the more concrete criteria applied in this regard by the OTP, see the Draft Policy Paper, p. 11-13.

[21] See Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-8, Decision on the Prosecutor's Apllication for a Warrant of Arrest, 24 February 2006, para. 19, 29, 40. See also W. Schabas, supra 11, p. 341.

[22] See W. Schabas, Prosecutorial discretion and gravity; in: C. Stahn and G. Sluiter (eds.), *supra* 2, p. 238: "… the prosecutor adopted the policy of inviting and welcoming voluntary referrals by territorial States as a first step in triggering the jurisdiction of the Court … Because the States concerned were parties to the Rome Statute, the prosecutor could well have launched investigations using his *proprio motu* powers, in accordance with Article 15, but he chose to proceed otherwise. It has since been

example in the situation of Uganda) means that the relevant State which is obliged to prosecute the crimes under the Statute declines to exercise its jurisdiction in favour of the prosecution before the ICC "as a voluntary step taken to enhance the delivery of effective justice" (which can be distinguished from a situation of its failure to prosecute "out of apathy" or a desire to protect perpetrators, which is, on the contrary, inconsistent with the struggle against impunity).[23] This approach is reflected also in the Draft Policy Paper on Preliminary Examinations, which provides that where the OTP has decided, using its *proprio motu* powers to trigger the preliminary examination phase, that there is a reasonable basis to proceed with opening an investigation, and before requesting authorization by the Pre-Trial Chamber, the OTP may inform relevant States of its determination and offer them the option to refer the situation to the Court (with the aim*, inter alia*, of increasing the prospects of cooperation).[24] This position is also connected with the OTP's "positive complementarity" policy, which is based on the interpretaion of the preamble and article 93(10) of the Statute and according to which at all phases of its preliminary examination activities, the OTP will seek to encourage genuine national investigations and prosecutions by the State concerned and to cooperate with and provide assistance to such State, whereas the OTP and the State may also agree to enter into burden sharing with the Court which would prosecute (only) the persons most responsible for the most serious crimes.[25]

The ICC deems the relevant State inactive when the specific crime(s) pursued by the Prosecutor are not the subject of the national proceedings, even if the accused may be facing other very serious charges before the national courts. In the Lubanga case, the Pre-Trial Chamber concluded that "for a case arising from the investigation of a situation to be inadmissible, national proceedings must encompass both the person and the conduct which is the subject of the case before the Court."[26] (In the Lubanga case, the accused was in custody in the Democratic Republic of the Congo in connection with the charges of genocide and crimes against humanity; the ICC noted that he was not, however, facing charges for recruitment of child soldiers, i.e. the crime for which the Prosecutor sought and the Pre-Trial Chamber consequently

held, by Pre-Trial Chamber I, that self-referral "appears consistent with the ultimate purpose of the complementarity regime."

[23] Informal expert paper, The principle of complementarity in practice, ICC-OTP, 2003, p. 19, fn. 24. An exeprt consultation held under the auspices of the OTP in 2003 concluded that "there may also be situations where the OTP and the State concerned agree that a consensual division of labour is in the best interests of justice; for example, where a conflict-torn State is unable to carry out effective proceedings against persons most responsible"; and that "there may even be situations where the admissibility is further simplified, because the State in question is prepared to expressly acknowledge that it is not carrying out an investigation." Ibid., p. 3 and 18. See also "Paper on some policy issues before the Office of the Prosecutor: Referrals and Communications", September 2003, p. 5; O. Trifterrer, *supra* 2, p. 613-615; W. Schabas, *supra* 11, p. 342-344.

[24] Draft Policy Paper, p. 16, para. 76.

[25] Draft Policy Paper, p. 19-20, para. 93-96.

[26] Prosecutor v. Lubanga, *supra* 22, para. 37.

issued, on the basis of the reasoning above, the arrest warrant.)[27] However, this strict approach is sometimes criticized as too exacting and non-realistic. According to these opinions, the activities of the ICC should be guided by the main object of the ICC to address impunity: the fact that the offender is being held accountable for other serious (or, possibly, even more serious, as in the case of Lubanga) crimes before the national courts is in accordance with the requirement of addressing impunity and should satisfy the test of complementarity set forth in the Statute.[28]

In this context, it is worth mentioning the attitude of the OTP towards the "alternative methods of accountability", such as truth and reconciliation commissions offering amnesties in return for truthful confession etc., and their relation to the assessment of the complementarity requirement. The Prosecutor officially acknowledges the significance of such alternative approaches, indicating that they may be somehow relevant to the exercise of his discretion [perhaps somehow within the context of the "interests of justice" mentioned in article 53(1)(c), see below], but did not suggest that they may be regarded as criminal proceedings as such for the purpose of assessing the admissibility and, therefore, pose any obstacle to the admissibility.[29] In its Policy Paper on the Interests of Justice of 2007, the OTP only generally reiterated, in relation to "other forms of justice" decided at the local level, the need to integrate different approaches, bearing in mind that the pursuit of criminal justice provides only one part of the necessary response to serious crimes, and "fully endorsed" "the complementary role that can be played by domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuance of a broader justice".[30]

3.2 Gravity

Apart from complementarity, a case may be judged inadmissible when it is not of sufficient gravity to justify further action by the ICC [Article 17(1)(d)]. The criterion of gravity is not defined in the Statute nor in the Rules of Procedure of Evidence. However, this criterion is to be regarded as an additional threshold of special, *additional gravity*, since the crimes included in articles 5 to 8 of the Statute are as such "grave", being "the most serious crimes of international concern".[31] The OTP, according to its own guidelines, assesses this criterion having regard to both quantitative and qualitative considerations, including: (a) the scale of the crimes

[27] Schabas, *supra* 11, p. 344.

[28] Trifterrer, *supra* 2, p. 615-616, para. 23.

[29] See W. Schabas, *supra* 11, p. 347; see further reports of the Prosecutor to the UN Security Council on the Sudan – U.N. Doc. S/PV.5321, U.N (13 December 2005). p. 3; Doc. S/PV.5459 (14 June 2006).

[30] Policy Paper on the Interests of Justice, ICC-OTP, September 2007, p. 7-8. The OTP also noted "the valuable role such measures may play in dealing with large numbers of offenders and in addressing the impunity gap" and stated that it will "seek to work with those engaged in the variety of justice mechanisms in any given situation, ensuring that all efforts are as complementary as possible in developing a comprehensive approach."

[31] Prosecutor v. Lubanga, *supra* 22, para. 41 and 45; Letter of the Prosecutor dated 9 February 2006 (Iraq), p. 8.

(number of victims, the extent of the damage), (b) nature of the crimes (specific elements of each offence such as killings, rapes, and other crimes involving sexual or gender violence and crimes committed against children, or the imposition of conditions of life on a community calculated to bring about its destruction), (c) manner of commission of the crimes (means employed to execute the crime, elements of particular cruelty, systematic or organized nature of the crimes resulting from the abuse of power or official capacity etc.) and (d) their impact (consequences on the local or international community, including the long term social, economic and environmental damage).[32] The OTP has already applied the considerations of gravity in situations leading to a decision not to proceed – i.a. in the situation in Iraq, where the OTP declined to open an investigation, having regard to the limited scale of conduct constituting war crimes by members of the armed forces of the United Kingdom.[33] However, it may be said that the application of the criterion of gravity is not yet settled and that the relevant practice of the OTP is sometimes questioned by the doctrine as vague, and therefore susceptible to be influenced by political considerations.[34]

[32] See Regulations of the Office of the Prosecutor (ICC-BD/05-01-09), Regulation 29 para. 2; Draft Policy Paper, p. 13, para. 67, 68 and 70.

[33] The Prosecutor came to the conclusion that: "… there was a reasonable basis to believe that crimes within the jurisdiction of the Court had been committed, namely wilful killing and inhuman treatment. … The number of potential victims of crimes within the jurisdiction of the Court in this situation – 4 to 12 victims of wilful killing and a limited number of victims of inhuman treatment – was of a different order than the number of victims found in other situations under investigation or analysis by the Office. … The OTP is currently investigating three situations involving long-running conflicts in Northern Uganda, The Democratic Republic of Congo and Darfur. Each of the three situations under investigation involves thousands of wilful killings as well as international and large-scale sexual violence and abductions. … Taking into account all the considerations, the situation did not appear to meet the required threshold of the Statute." See Letter of the Prosecutor dated 9 February 2006 (Iraq), p. 8 and 9.

[34] The above (supra 33) described "quantitative" attitude of the Prosecutor was questioned by the doctrine as ignoring the fact that other important factors should be relevant in the assessment (as regards Iraq, it was held that there is an additional element of gravity when war crimes are committed by troops as a result of an act of aggression resulting overall in ten thousands of victims); see O. Trifterrer, supra 2, p. 622, para. 28. According to W. Schabas, "the Prosecutor could not have been comparing the total number of deaths in Iraq with the total in the Democratic Republic of Congo or Uganda, because he would then have concluded that Iraq was more serious. Nor could he have been comparing the total number of deaths resulting from the crimes attributed to Lubanga with those blamed on the British troops in Iraq, because Lubanga was not charged with killing anybody. Thus, the quantitative analysis of gravity, which has a certain persuasive authority, appears to get totally muddled in imprecise comparisons. We need not totally dismiss the relevance of the relative numbers of victims in order to appreciate the need to consider other factors, such as the fact that crimes are committed by individuals acting on behalf of the State as contributing to the objective gravity of the crime."; see W. Schabas, Prosecutorial discretion and gravity, in: Carsten Stahn and Göran Sluiter (eds.), supra 2, p. 245. Worth mentioning is also the opinion of J. D. Ohlin, who, having regard to the vagueness of the gravity criterion, suggests that one can well imagine a situation in the future where a Prosecutor's decision is heavily influenced by matters of collective peace and security, but the decision is publicly justified by appealing to the gravity of the situation ("Such camouflaging would be easy to accomplish, especially since it is unclear what kind of legal threshold is established by the Rome Statute's use of the term 'gravity' in articles 17 and 53."); see J. D. Ohlin, Peace, Security and Prosecutorial Discretion, in: Carsten Stahn and Göran Sluiter (eds.), supra note 2, p. 200.

3.3 Interests of Justice

In addition to jurisdiction and admissibility, Article 53(1)(c) requires that the Prosecutor consider the "interests of justice" (taking into account the gravity of the crime and the interests of victims).[35] According to the OTP, the exercise of the Prosecutor's discretion referring to the "interests of justice" is exceptional in its nature, i.e. there is a presumption in favour of investigation or prosecution wherever the criteria establishing jurisdiction and admissibility [Article 53(1) (a) and (b)] have been met. Therefore, the interests of justice are only considered where the requirements of jurisdiction and admissibility are met and they serve only as a potential countervailing consideration that may produce a reason not to proceed. To sum up, the Prosecutor (according to the OTP) is not required to establish that an investigation is in the interests of justice – rather, the OTP will proceed unless there are specific circumstances which provide substantial reasons to believe that it is not in the interests of justice to do so at that time.[36]

The content of the notion "interests of justice" is not defined in the Statute. In its Policy Paper on the Interests of Justice, the OTP suggested that the following factors are relevant for an analysis of the "interests of justice": the gravity of the crime, the interests of victims and the particular circumstances of the accused; "other justice mechanisms" and "peace processes" were mentioned by the OTP only as "other potential considerations". According to the OTP, the concept of "the interests of justice" should not be conceived of so broadly as to embrace "all issues related to peace and security". The OTP´s policy is based on the assumption that the interests of justice provision should not be considered as "a tool for conflict management of the conflict in the relevant State", i.e. a tool requiring the Prosecutor to assume the role of a mediator in political negotiations. Such an outcome would, acccording to the OTP, run contrary to the explicit judicial functions of the OTP and the ICC as a whole; matters concerning international peace and security, or, in other words, "the interests of peace", should be dealt with not by the ICC, but by respective political institutions and organs, such as the UN Security Council, which is assigned an important and specific role in these political matters by the Statute. To sum up, in the view of the OTP, there is a strong presumption that investigations and prosecutions will be in the interests of justice, and therefore a decision not to proceed on the grounds of the interests of justice would be highly exceptional.[37]

[35] According to article 53(2)(c), the "interests of justice" should, similarly, be applied with regard to the assessment of a sufficient basis for a prosecution: "If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because: … (c) A prosecution is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime …".

[36] Draft Policy Paper, p. 15, para. 73.

[37] Draft Policy Paper, p. 15, para. 74 and 75. The OTP adds (in the Policy Paper on the Interests of Justice, p. 8-9) that "the Office will consider issues of crime prevention and security under the interests of justice, and there may be some overlap in these considerations and in considering matters in accordance with the duty to protect victims and witnesses under Article 68"; and that "in situations where the

This restrained attitude of the OTP towards the issues of international peace and security is sometimes questioned. It has been suggested that most investigations and prosecutions by the Court will involve circumstances of ongoing conflict or the fragile post-conflict context and that international criminal justice has often been associated with the quest for peace, and that, therefore, the OTP should adequately take into account also the "interests of peace".[38] However, in my opinion, the described formal approach of the Prosecutor, according to which, from the legal point of view, the "interests of peace" are not included in "the interests of justice" criterion, seems to be right and sound. This approach may be supported by the text of the Statute: contextual interpetations of the Statute including its *travaux preparatiores* indicate that the interests of justice should refer above all to the age and infirmity of the alleged perpetrator(s) or to other similar reasons (connected with the efforts to deliver justice to all persons involved) for a conclusion that a (future) prosecution(s) would be counter-productive.[39] From a broader perspective, to entrust "interests of peace" into the hands of the ICC might be even politically problematic: in this regard it should be mentioned that a decision of the Prosecutor not to proceed with an investigation, which is based solely on Article 53(1)(c) (i.e. on the "the interests of justice") cannot be made on arbitrary grounds – the Prosecutor is obliged to notify the Pre-Trial Chamber of such a decision in writing and with reasons for the conclusion, and this decision may be reviewed by the Pre-Trial Chamber on its own initiative (in contrast to other grounds for a decision not to proceed). Therefore, if the Prosecutor based his decision not to proceed on the political and more elusive issues of international peace and security, the ICC (Pre-Trial Chamber) would be involved in the sensitive disputes on international politics which, arguably, would not help the relevant situation nor the authority of the ICC. It seems to me that these political issues concerning the "interests of peace" should be dealt with by the competent political organs (above all the UN Security Council) which should not try to "make their life easier" by relying on the actions of the Prosecutor – who should insist on his non-political, judicial role.

As it is stated in the Draft Policy Paper, there are no other statutory criteria for preliminary examinations. As mentioned at the beginning in connection with the principles guiding the activities of the OTP, factors such as geographical or regional

ICC is involved, comprehensive solutions addressing humanitarian, security, political, development and justice elements will be necessary. The Office will seek to work constructively with and respect the mandates of those engaged in other areas but will pursue its own judicial mandate independently."

[38] W. Schabas, *supra* 11, p. 661- 666 (" … The real issue is whether the prosecutor, making determinations under Article 53, engages with the peace and justice dialectic or instead positions himself as an advocate for justice, leaving others to defend the interests of peace. The prosecutor's policy paper takes the latter approach, although a good case can be made for a more holistic perspective. Perhaps future prosecutors of the Court will attempt to balance the interests of justice and peace in the selection of cases, invoking, the interests of justice where deferral of prosecution may be useful in promoting an end to conflict.").

[39] Compare the analogous provision of Article 53(2)(c) concerning prosecutions; as for *travaux preparatoires*, see W. Schabas, *supra* 11, p. 663. On the other hand, it is to be recalled that in the preliminary examination phase when there is not yet a concrete case, it is difficult to apply these specific criteria.

balance are not a relevant criterion for a determination that a situation warrants investigation under the Statute.[40]

4. Time frame of preliminary examinations

No provision in the Statute or the Rules of Procedure and Evidence establishes a definitive time period for the completion of a preliminary examination. According to the policy of the OTP there are no timelines provided in the Statute for a decision on a preliminary examination and the timing and length of preliminary examination activities will necessarily vary based on the situation – the Prosecutor is obliged to continue with the examination until such time as the information shows that there is, or is not, a reasonable basis for an investigation. Thus, depending on the facts and circumstances of each situation, the OTP either initiates the investigation, or decides to decline to initiate an investigation where the information manifestly fails to satisfy the factors set out in article 53(1), or continues to asses relevant national proceedings (having regard to the complementarity criteria) or to collect information in order to establish a sufficient basis for a decision on further steps.[41]

It is true that in practice, there are great differences as regards the duration of a preliminary examination of different situations – for example in the case of Libya (a situation referred by the Security Council), the preliminary examination took only several days, whereas in case of the Central African Republic, CAR made the "self-referral" in January 2005 and the investigation was opened only in May 2007. In the case of exercising *proprio motu* powers of the Prosecutor, the duration of a preliminary examination is even longer – for example in the case of Colombia, the OTP made its prelimary examination public in 2006, without any determination having been made to date, i.e. beginning of August 2011. The lack of progress in the situtation referred to the OTP was challenged by CAR in 2005 before the Pre-Trial Chamber. The Chamber said[42] that the preliminary examination of a situation must be completed within a reasonable time from the reception of a referral by a State Party, and requested the Prosecutor to submit a report on the status of the preliminary examination, including an estimate of when the preliminary examination will be concluded. The Prosecutor reacted by challenging the authority of the Pre-Trial Chamber to request this information, arguing that the Pre-Trial Chamber is, under Art. 53(3), entitled only to review a decision by the Prosecutor not to proceed with an investigation, whereas, to that date, no such a decision had been made.[43] The Prosecutor also asserted that no provision in the Statute or Rules of Procedure and Evidence establishes a definitive time period for a preliminary examination. The

[40] Draft PolicyPaper, p. 2, para. 11.

[41] Draft Policy Paper, p. 2 (para. 14), p. 17-18 (para. 83-86).

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

[43] Situation in the Central African Republic (ICC-01/05), Prosecution's Report Pursuant to Pre-Trial Chamber III's 30 November 2006 Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the CAR, 15 December 2006.

OTP submitted the requested report, but expressly reserved its interpretation of Article 53(1) and the perogatives of the Prosecutor in this respect (i.a. saying that "it is hoped that a decision can be made in the near future").[44]

5. Review of the Prosecutor's decisions on preliminary examinations

According to the Rule 105, paragraph. 1 of the Rules of Procedure and Evidence, when the Prosecutor decides not to initiate an investigation under article 53, paragraph 1, he or she shall promptly inform in writing the source of the referral, i.e. the State Party or the Security Council. [In case of preliminary examinations inititated proprio motu, the Prosecutor – if he concludes that the information provided does not constitute a reasonable basis for an investigation – shall, according to article 15(6) and Rule 49, only inform those who provided the information, adducing reasons for the decision.] As regards the Pre-Trial Chamber, the Prosecutor is required by the Statute to notify it about its decision not to proceed with the investigation only where this determination is based upon the „interests of justice" [Art. 53(1), last sentence]. In both cases the notification must contain the conclusion of the Prosecutor and the reasons for it [Rule 105(3) and (5)]. A decision by the Prosecutor not to proceed with an investigation is subject to review by the Pre-Trial Chamber, in accordance with article 53(3); [some suggest that the Pre-Trial Chamber has discretion whether to proceed to a review or not ("may review")].[45] Such review may be requested by the referring party, i.e. either the State Party concerned or the Security Council, or, where the Prosecutor's decision is based solely on the "interests of justice", may be inititated by the Pre-Trial Chamber *proprio motu*.[46] In the case of a review requested by the State Party or Security Council, the Pre-Trial Chamber may only "request the Prosecutor to reconsider that decision". Thus, the Prosecutor is bound to reconsider his decision not to investigate, but he is not obliged to come to a different conclusion; if the Prosecutor stands by the original decision, there seems to be no further recourse. The Prosecutor is only required to notify, in writing, the final decision to the Pre-Trial Chamber – the notification (decision) shall be then communicated to all those who participated in the review.[47] Where the Pre-Trial Chamber decided on its own initiative to review a Prosecutor's decision not to proceed taken solely under the "interests of justice" provision, i. e. article 53(1)(c) [as well as article 53(2)(c)], the decision of the Prosecutor not to proceed shall be effective only if confirmed by the Pre-Trial Chamber [article 53(3)(b)]; when the decision is not confirmed, the

[44] Schabas, *supra* 11, p. 667-668.

[45] O. Trifterrer, *supra* 2, p. 1074, para. 34. The Court is also required to provide relevant victims with a notification of the decision not to inititate an investigation [Rule 92(2)].

[46] According to Carsten Stahn, it might mean that the Prosecutor may actually escape judicial review, if he bases decisions not to investigate (or prosecute) not on the "interests of justice", but on (broadly defined) gravity considerations according to Article 17(1)(d); C. Stahn, Judicial review of prosecutorial discretion: Five years on; in: Carsten Stahn and Göran Sluiter (eds.), *supra* 2, p. 270.

[47] See W. Schabas, *supra* 11, p. 668-669; O. Trifterrer, *supra* 2, p. 1075, para. 36.

Prosecutor shall proceed with the investigation.[48] In addition to that, according to article 53(4) of the Statute, the Prosecutor may, at any time, reconsider a decision (positive or negative, i.e. a determination that there is no reasonable or sufficient basis, as well as a positive decision to investigate)[49] whether to initiate an investigation or prosecution based on new facts or information.

6. Current status of preliminary examinations

As of the end of May 2011, the OTP had considered: (a) information on crimes from numerous sources including open sources and thousands of "communications"[50] (these open sources and communications were the basis for the proprio motu decision by the Prosecutor, pursuant to article 15(3) of the Statute, to submit a request for authorization of an investigation of the situation in Kenya); (b) three State Party referrals (Uganda, the Democratic Republic of Congo, Central African Republic); (c) two Security Council referrals (Darfur – Sudan and Libyan Arab Jamahiriya); and (d) two declarations accepting the jurisdiction of the ICC, lodged, pursuant to Article 12(3), by Cote d'Ivoire and the Palestinian National Authority. The Office has made public its preliminary examination of 17 situations, including those that have led to the opening of investigations (Uganda, DRC, CAR,Darfur, Kenya, Libya), those dismissed (including Venezuela and Iraq), and those that remain under preliminary examination: Afghanistan, Colombia, Cote d'Ivoire (in this case, the Prosecutor already asked, in the exercise of his powers to act *proprio motu*, for authorization to open an investigation), Georgia, Palestine, Guinea, Honduras, Korea and Nigeria.[51]

As regards Afghanistan, the OTP made its examination public in 2007. According to the reports of the OTP,[52] "it examines alleged crimes within the jurisdiction of the ICC by all actors involved." Since 2007, the OTP met with Afghan officials and organizations and sent requests for information to the Government of Afghanistan and to other governments concerned.

Preliminary examination of the situation in Colombia was made public in 2006. The OTP examines alleged crimes (committed during the internal armed conflict in Colombia) within the jurisdiction of the ICC and investigations/proceedings

[48] Rules of Procedure and Evidence, Rule 110(2).

[49] O. Trifterrer, supra 2, p. 1076, para. 40.

[50] According to the OTP, as of end of May 2011, 9214 such "communications" were received pursuant to article 15 of the Statute, of which 4316 were manifestly outside the jurisdiction of the Court. As regards information provided to those who communicate to the Prosecutor possible crimes under the Statute, the OTP, in accordance with Regulation 28 of the Regulations of the OTP, will send an acknowledgement in respect of all information received to those who provided the information. The OTP will also provide a regular overview of the number of article 15 communications received by the OTP - see „OTP Weekly Briefings" available at www.icc-cpi.int.

[51] See http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/.

[52] http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/Afghanistan/; See also „OTP Weekly Briefings".

conducted in Colombia against the allegedly most serious perpetrators, paramilitary leaders, guerrilla leaders, politicians and military personnel. The OTP is also analysing allegations of international networks supporting armed groups committing crimes in Colombia. With regard to this situation, the OTP has published on its website a written statement by Kai Ambos and Florian Huber, presented at last year's ICC-OTP thematic roundtable, on the Colombian Peace Process and the Principle of Complementarity of the Court.[53] According to this written statement, the Colombian Law 975 of 2005 ("Justice and Peace Law"), the aim of which is to deal with the consequences of the internal conflict, is only being applied to a very reduced number of members of illegal armed groups who accept to be prosecuted under a special criminal procedure. Therefore, the great majority of members of illegal armed groups and all state officials are excluded from the application of this law, which, according to the statement, poses the question whether there is a real willingness, in the sense of the Statute, to investigate and effectively prosecute these persons. The authors of the statement conclude that this fact, as well as the limited progress concerning the pending and ongoing investigations under the framework of Law 975 of 2005, the extradition of the paramilitary commanders to the United States (who are, consequently, on many instances no longer accessible as suspects or witnesses in national proceedings in Colombia) and other circumstances limiting independent investigations, indicate that "Colombia struggles with significant difficulties to comply with the prerequisites under Article 17 of the Statute". The authors of the statement are of the opinion that if no substantive progress on the various identified fronts is made in the short or medium term, it is becoming increasingly difficult to justify a (selective) non-intervention of the ICC.[54]

With regard to Georgia (crimes allegedly committed in the context of the armed conflict in South Ossetia in August 2008), the OTP made its examination public in August 2008. The Prosecutor requested information from the Governments of Russia and Georgia and the OTP conducted visits to Georgia and to Russia to consult issues concerning the examination.[55]

Côte d'Ivoire (which is not a Party to the Statute), in a declaration (of 18 April 2003) submitted pursuant to article 12(3) on 1 October 2003, accepted the jurisdiction of the ICC for crimes committed on its territory as of 19 September 2002. In December 2010,

[53] Kai Ambos, Florian Huber:The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: Is there sufficient willingness and ability on the part of the Colombian authorities or should the Prosecutor open an investigation now? Extended version of the Statement in the "Thematic session: Colombia", ICC, OTP-NGO roundtable, 19/20 October 2010, The Hague, 5 January 2011.

[54] Ibid., p. 6, 7, 10 and 11.

[55] It is worth mentioning that in May 2011, the Norwegian Helsinki Committee (non-governmental organisation monitoring compliance with the human rights provisions of the Organisation for Security and Cooperation in Europe) published a new report on Georgia, where it concluded that Georgian authorities "are at least both partly unable and partly unwilling to conduct an effective investigation into crimes falling within the jurisdiction of the ICC, allegedly committed during and after the August 2008 war". See http://humanrightshouse.org/Articles/16475.html.

the OTP received a new article 12(3) declaration, this time signed by the newly-elected president Ouattara, committing himself to cooperate with the ICC and confirming the declaration of 18 April 2003. In a second letter to the Prosecutor dated 4 May 2011, president Ouattara confirmed and specified his wish that the OTP conduct investigations into the most serious crimes committed on the entire Ivorian territory since 28 November 2010 (the date of the second round of the presidential election). On 23 June 2011 the OTP requested, pursuant to article 15 of the Statute, the Pre-Trial Chamber for authorization to open an investigation into war crimes and crimes against humanity allegedly committed in Côte d'Ivoire since 28 November 2010.

The examination of the situation in Guinea was made public by the OTP on 14 October 2009 (the initiation of the examination was a reaction to serious allegations surrounding the elections-related violence in Conakry on 28 September 2009). The OTP held various consultations and sent several missions to Guinea, i.a. to take stock of the investigation being conducted by the Guinean investigating judges into the events of 28 September 2009. According to the OTP, the Guinean authorities extended full cooperation to the ICC.

As for Nigeria, the OTP made its examination of the situation public in November 2010. The OTP has been analyzing the alleged crimes committed in Central Nigeria (violence between Muslims and Christians) since mid-2004.

The examination of the situation in Honduras was made public by the OTP in November 2010. The OTP has received many communications on crimes linked to the *coup* of June 2009. According to the OTP, there were different allegations, mostly regarding alleged massive cases of torture and more than a thousand people being arrested in one day. The OTP met with the representatives of Honduras in November 2010 – they provided relevant information and promised their full cooperation with the OTP.

In the case of Palestine, on 22 January 2009 the Palestinian National Authority lodged (in reaction to the military action by Israeli forces in Gaza in December 2008) a declaration with the Registrar under article 12(3) of the Statute, which allows a State which is not a Party to the Statute to accept the ICC's jurisdiction. According to the declaration, "the Government of Palestine hereby recognizes the jurisdiction of the Court for the purpose of identifying, prosecuting and judging the authors and accomplices of acts committed on the territory of Palestine since July 2002". Since then, the OTP has been examining issues related to the jurisdiction of the ICC with regard to this declaration: first, whether the declaration accepting the exercise of jurisdiction by the ICC meets statutory requirements (above all, of course, whether the Palestine may be regarded as a "State" pursuant to article 12(3)); whether crimes within the ICC's jurisdiction have been committed; and whether there are national proceedings in relation to alleged crimes. The OTP has received a number of various submissions on the issue of jurisdiction – in May 2010, the OTP published (on the website of the ICC) a "Summary of submissions on whether the declaration lodged

by the Palestinian National Authority meets statutory requirements".[56] Having regard to the sensitivity of this issue, the careful approach of the OTP is understandable; it might be the case that progress in this issue will be supported by the forthcoming events concerning the status of Palestine, including the planned 2011 United Nations recognition vote on the statehood of Palestine.[57]

The most recent preliminary examination concerns the Republic of Korea. The OTP made it public on 6 December 2010. The OTP received communications alleging that North Korean forces committed war crimes in the territory of the Republic of Korea (the shelling of a South Korean island on 23 November 2010 which resulted in the killing of South Korean marines and civilians and the injury of many others; and the sinking of a South Korean warship, hit by a torpedo allegedly fired from a North Korean submarine on 26 March 2010, which resulted in the death of 46 persons). The OTP is currently evaluating whether some of these incidents constitute war crimes, committed by North Korean forces in the territory of the Republic of Korea (which is a State Party to the Statute), under the jurisdiction of the ICC.

[56] Some submissions, supporting the view that the declaration meets statutory requirements, argue that: the term "State" is subject to variable defining characteristics under public international law and therefore lacks an unambiguous or 'ordinary' meaning; consider that the term "State" used in article 12(3) should be examined in the context of the Statute and its object and purpose; and hold the view that the ICC should rule on the applicability of article 12(3) in a manner that will enable the Statute to fulfil its objectives. Other submissions argue that the express wording of article 12(3) under the rules of treaty interpretation limits the acceptance of the jurisdiction of the ICC to a "State" in accordance with the ordinary meaning of the term. They note that the Statute gives no special meaning to the term "State" and that there is no basis to infer that article 12(3) includes entities that do not qualify as States under public international law. On the other hand, some suggest that Palestinian statehood is irrelevant to this analysis. They argue that, instead, the Palestinian National Authority (PNA) possesses an inherent right to exercise criminal jurisdiction within its territory and that the PNA can therefore transfer such jurisdiction to the ICC through an *ad hoc* declaration under Article 12(3). Others argue that the PNA cannot transfer a jurisdiction it does not possess fully, as it has entered into the Oslo Accords through which it has accepted not to exercise jurisdiction over Israeli nationals (and which provide that all powers and responsibilities not unequivocally transferred to the Palestinians were retained by Israel) – at most the PNA could only transfer criminal jurisdiction with respect to the conduct of its own nationals or other non-Israelis (some others try to counter this argument by asserting that this limitation by the Oslo Accords confirms that the PNA has inherent comprehensive criminal jurisdiction, including jurisdiction over Israeli nationals).

[57] See Ethan Bronner,"In Israel, Time For Peace Offer May Run Out", New York Times, 2 April 2011.