



The International Criminal Court through the lens of International Relations: the politics of law**

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Abstract

This paper seeks to argue that the International Criminal Court represents a relevant actor in the contemporary international arena concerning international criminal justice. The Court has learned valuable lessons in its first decade and is developing strategies to cope with State power play in the field while advancing international criminal justice. It has done so largely by pursuing alternative strategies beyond its core attribution, namely, the prosecution of prominent individuals charged with committing crimes found under the Rome Statute's jurisdiction. This claim will be defended through an analysis of the Preliminary Examination Process of the Office of the Prosecutor and the decisions that follow in past and present situations.

Resumo

O presente artigo argumenta que o Tribunal Penal Internacional é um ator relevante nas hodiernas relações internacionais que concernem o tema de justiça penal internacional. Ao longo da última década, o Tribunal desenvolveu estratégias para lidar com o jogo de poder de Estados no campo, avançando a justiça no direito penal internacional. Isso foi feito principalmente por meio de desenvolvimento de estratégias

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alternativas, diferentes da sua principal atribuição, a procuração de indivíduos proeminentes acusados por cometerem crimes sob a jurisdição do Estatuto de Roma. Esse argumento será defendido por meio da análise do poder de *proprio motu* do Gabinete da Procuradoria, contido no Artigo 15, o Processo de Exame Preliminar e suas aplicações.

1. Introduction

The International Criminal Court (ICC), seated at The Hague, in the Netherlands, has been operating for almost 12 years. That number shines in comparison to the age of some domestic courts in States where the rule of law has been adopted for centuries, but it is still groundbreaking for a court of its nature. No tribunal with jurisdiction over international criminal law has ever had permanent seating like the ICC does, despite an institutional heritage that can be traced to the post-World War II trials. Furthermore, it is not subjected to only a single situation and may seek or receive referrals on those it pertains relevant to investigate. Through this procedure, manned by the Office of the Prosecutor (OTP), the Court interacts directly with other actors in the international arena. These include other international organizations, States, both party or not to the Rome Statute, domestic and international civil society as well as domestic and international non-governmental organizations. This geographically and institutionally widespread interaction is a still underestimated and understudied asset of the ICC.

Though it may seem young, the ICC has already learned some important lessons and has devised its own strategies in its interactions with other actors while advancing the interests of international criminal law. This paper will focus on the Preliminary Examination Procedure, undertaken by the OTP, in order to review how this interaction comes to be. It will seek to identify, after analyzing how this process evolved in diverse situations, alternative strategies employed by the OTP in this interaction. Through this examination, the paper seeks to argue that the ICC is a relevant actor in contemporary international relations that monitors, exchanges with and serves as an example for other actors in that arena. The preventive and deterrent factor evoked in the Rome Statute is thus enacted not only through the core attribution of the ICC, namely, the investigation, prosecution and sentencing of international crime but also through these alternative strategies employed by the OTP in its positive approach to complementarity.

This will be done through an investigation pursued on the terms of international relations, not of legal scholarship. The argument wishes to identify in the interaction of the ICC with other actors, through the employment of alternative strategies of engagement, and assess the impact of the Court as an actor in the regime of international criminal law, broadly defined. The works of Abbott (1999) and Krasner (1982) on international law, international governance and regimes will be used towards the end of the paper. An approach from the field of International Relations (IR) as a scholarly enterprise is defended here as relevant because the IR perspective can shed light on legal institutions in places where legal approaches would remain silent. As advanced by Abbott:

“IR helps us describe legal institutions richly, incorporating the political factors that shape the law: the interests, power and governance structures of states and other actors; the information, ideas and understandings on which they operate; the institutions within which they interact.”

(1999, p.362)

In the next section of this paper, the ICC and the field of international criminal law will be reviewed. In the third section, current and past situations under Preliminary Examination, as well as the process itself, will be explored. A section on these alternative strategies of the OTP will then follow. The conclusions wrap up this paper with further considerations for enquiry.

2. The International Criminal Court and the field

The ICC started working on the 1st of July of 2002, the day the Rome Statute entered into force after its ratification by 60 State Parties. More than 10 years later, they now amount to 122 countries¹. The ICC is court of last resort and it investigates crimes against humanity, genocide and war crimes committed after the abovementioned date. Jurisdiction over the crime of aggression, present in the Rome Statute, is still pending. Jurisdiction is not only subject-matter and temporally constricted but also territorially or personally. The crimes to be investigated must have occurred on the territory of a State party or by a national of such States and situations can be referred by the own State party or initiated *proprio motu* by the OTP. Furthermore, situations may be referred to

¹ As of May, 2013. (ICC, 2014c).

the ICC by the United Nations Security Council (UNSC) or by a non-party State that issues a declaration accepting the jurisdiction of the Court. In these last cases, the strict territorial limitation does not apply.

The ICC is the first permanent international tribunal of its kind and operates on the principle of complementarity. It does not substitute national jurisdiction, but complements it when cases are not thoroughly addressed nationally, either by lack of capacity or will. It also holds special representation for victims during trial procedure, an innovative approach, beyond the traditional prosecution and defense.

The Court is composed of 4 organs: the Registry, the Presidency, the Judicial Divisions (Chambers) and the OTP². The first two are mostly administrative and representational. Our focus here will fall upon the OTP, considered for the purposes of this paper to be the main face of the ICC in international relations. This is because it is with the OTP that States and the UNSC interact directly through the procedure of opening and referring situations. This occurs mainly during the preliminary examination process, that will receive due attention here. Chambers, while of utmost important for ICC functioning, deals mostly with individuals charged in the cases open with the OTP. The bulk of interaction with outside parties, even during investigation phase, is done by the OTP. Both organs for public defense and victim representation also mostly interact with individuals.

Since its conception in 1998 and coming into force in 2002, the Rome Statute and the ICC have received a lot of international attention. First, the high-profile status of some of the individuals investigated caught the media's eye. Not only individuals but also the proceedings of opening situations have had international impact. Between the detainment of ICC personnel in Lybia in 2012 (Human Rights Watch, 2012), appeals of the international community for proceedings in Syria (Amnesty International UK, 2013) and the recent referrals from Comoros, Greece and Cambodia (ICC, 2013), along with the case of Ukraine (ICC, 2014f), the Court has featured on the front page of many news vehicles.

The Court's inception and implementation follows a trend that dates from the end of the Cold War, when *ad hoc* international and international/national tribunals started being installed to investigate and prosecute crimes committed during times of

² For more information, view ICC, 2014c.

civil war and genocide. These courts, like the ICC, prosecuted individuals and not states, a characteristic of international criminal justice proceedings. The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal of Rwanda are the most well known, but there are many more³. It can be argued that these institutional manifestations point to a trend towards the consolidation of a regime of international criminal law. Both the Nuremberg and Tokyo trials, set in post World War II, are also cited as predecessors, though they only prosecuted crimes in a war context, a restriction the ICC and the other *ad hoc* courts are not submitted to⁴. All of these tribunals advance the notion that the gravest international crimes cannot go unpunished and that institutions need to exist in order to combat impunity, assure accountability and deter the further perpetration of such acts. But, in contrast to these other tribunals, the ICC has, through the OTP, the power to initiate its own investigations, under the jurisdiction of the Rome Statute. This is a major advance in international criminal justice, one that opens up a bigger space of maneuver for the court as an independent actor in the international arena. Thus, the ICC is able to work as a deterrent agent, one of its main attributions, in the effort to combat impunity⁵. If it were constricted to State or UNSC referral, this deterrent effect would not be readily accessible.

More specifically, the OTP's Preliminary Examination Process (PEP) is of interest here mainly because it is during this time that the Office, and through it the ICC, shows initiative in dealing with other international actors, mainly States, but also non-State actors, particularly in what relates to the issues of complementarity and admissibility. This part of formal Court proceedings will be investigated in the next section.

3. The Office of the Prosecutor's initiatives

The OTP, as prosecution, deals with diverse phases of proceedings at the ICC. Since it is responsible for presenting a case for the opening of investigations to the Pre-Trial Chamber, the OTP is involved in work prior to the proper trial phase of the

³ Cambodia, Iraq, Lebanon, etc.

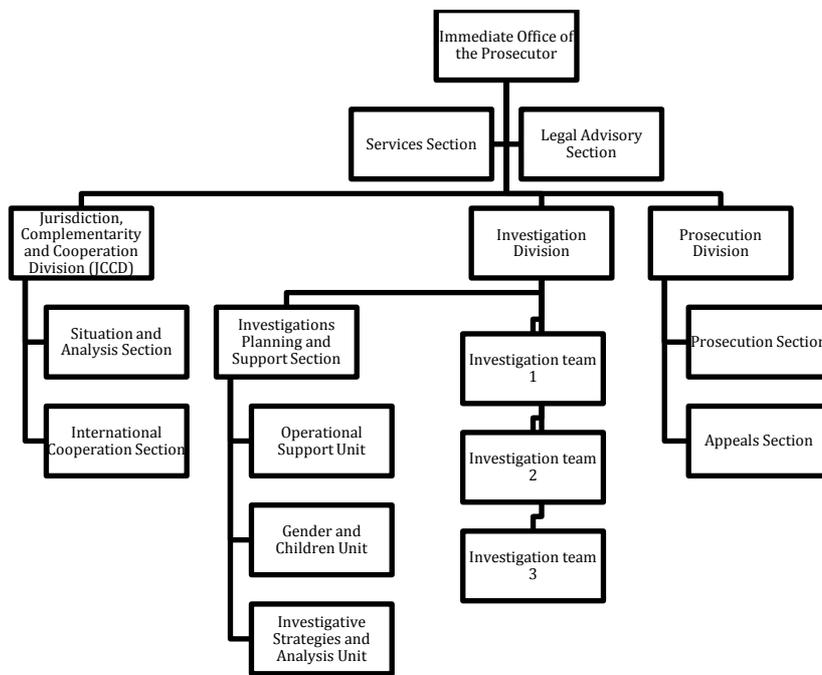
⁴ In the Rome Statute, crimes against humanity are understood as not necessarily happening in times of war. War crimes are the only ones that need to fulfill this condition.

⁵ As coined in the Rome Statute.

proceedings. It is during this phase that it has to determine, like most prosecution offices, if there is a reasonable basis to proceed.

Due to the international and complementary basis of the ICC’s jurisdiction, this particular phase of OTP proceedings, the PEP, is undertaken through cooperation with State parties. This work is conducted by the Jurisdiction, Complementarity and Cooperation Division (JCCD)⁶ of the OTP, in cooperation with the Information and Evidence Unit (IEU), part of the Services Section of the OTP, that receives all referrals and communications⁷ sent to the Prosecutor. The IEU has received a total of 10,352 article 15 communications, according to the latest numbers (OTP, 2013, p.1).

Chart 1: Structure of the Office of the Prosecutor



Source: ICC, 2014d.

3.1. Preliminary Examination Process

⁶ The OTP’s structure is made up of the Immediate Office of the Prosecutor, the Legal Advisory Section, the Services Section and three divisions: JCCD, Investigation Division and Prosecution Division. JCCD, of more importance here, is composed of the Situation and Analysis Section and the International Cooperation Section.

⁷ Any and all information sent to the Prosecutor under Article 15 of the Rome Statute is called a communication.

According to the most recent OTP report on the matter, once a communication or referral is received by the IEU, it undergoes a series of phases (OTP, 2013). Since now there are already situations open, a first assessment is made on whether the information pertains to a new or already existing investigation. If it is the latter, it is forwarded accordingly. If not, it is considered under the PEP, under the legal framework of Article 53(1) (a)-(c) of the Statute. The examination of a situation may be initiated by information sent under Article 15, referrals from State Parties or the UNSC or a declaration of a State not party to the Statute, accepting jurisdiction of the ICC under Article 12(3).

PEP consists of 4 phases of filtering that escalate according to the assertion of a minimum threshold of a reasonable basis to proceed, necessary for the presentation of the situation to the Pre-Trial Chamber, according to the Rome Statute. Despite this division into phases, the OTP states that it adopts a holistic approach to the PEP (OTP, 2013, p.5). The reasonable basis to proceed consists of assessment of jurisdiction (temporal⁸, territorial or personal and material⁹); admissibility (complementarity¹⁰ and gravity¹¹); and the interests of justice. In searching for further information to determine if an investigation can be open, the OTP may seek additional information from States, organs of the United Nations, intergovernmental and non-governmental organizations and other sources deemed appropriate, observing no timeline for its final decision. Once it has undergone all 4 phases, the OTP can decide to i) close the situation due to a decision not to proceed; ii) continue to collect information in order to establish sufficient factual and legal basis to render a determination; iii) complete the preliminary examination and proceed to the investigation. According to the Court's website, but not to OTP PEP reports, the OTP may also decide to continue to assess relevant national proceedings (ICC, 2014e).

The 4 phases are explained in further detail in the last column of the table below.

⁸ Date of entry into force of the Statute, namely 1 July 2002 onwards, date of entry into force for an acceding State, date specified in a Security Council referral, or in a declaration lodged pursuant to article 12(3)

⁹ Defined by Article 5 of the Rome Statute (genocide, crimes against humanity, war crimes and aggression)

¹⁰ Examination of the existence of relevant national proceedings in relation to potential cases being considered. Where these domestic proceedings exist, the OTP will assess their genuineness.

¹¹ Assessment of scale, nature, manner of commission of crimes and their impact.

Table 1: Situations Under Preliminary Examination per Phase

Preliminary Examination Phases		
Phase 1	none	initial assessment of all article 15 communications, identifying those crimes that fall under jurisdiction of the Court.
Phase 2	Honduras Republic of Korea Comoros Central African Republic	whether preconditions for jurisdiction are satisfied, if the crime is within subject-matter jurisdiction of the Court.
Phase 3	Afghanistan Colombia Georgia Guinea Nigeria	analysis of admissibility based on complementarity and gravity
Phase 4	none	examination of the interests of justice and the formulation of the final recommendation on the reasonability of initiating an investigation.
PE: Closed, decision not to proceed	Iraq Palestine Venezuela	
Source: ICC, PRELIMINARY EXAMINATIONS		

3.2. Situations under Preliminary Examination

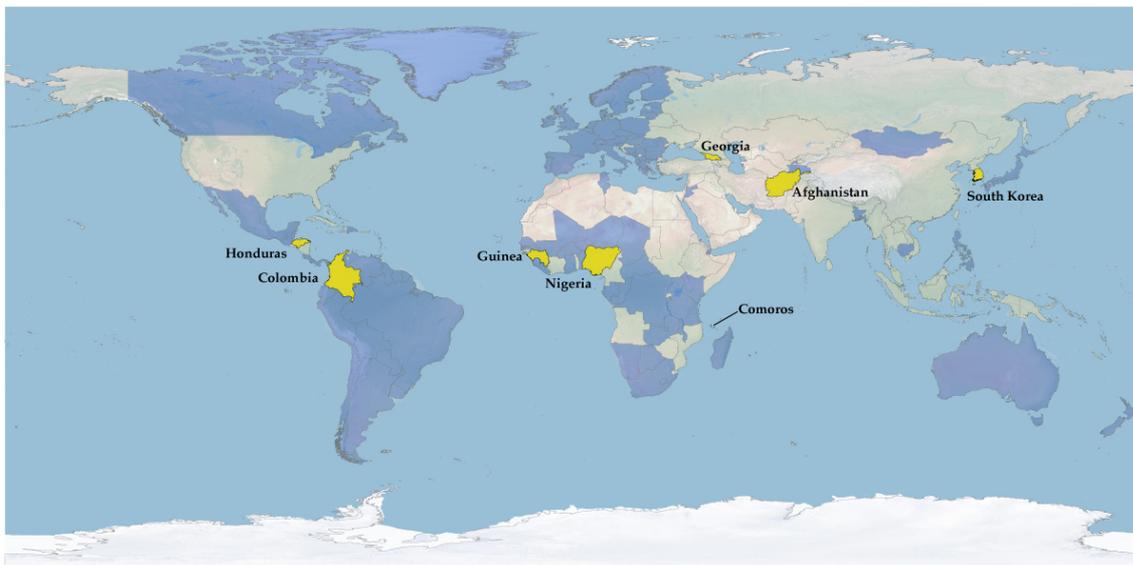
There are currently eight examinations under preliminary examination, as can be seen in the chart above, divided into the different phases of PEP filtering. All eight situations presently under investigation in the Court also went through this process before they were completed and the OTP decided to open them. Other 3 situations have closed, due to a decision not to proceed. We will now review some of these, selected according with their relevance to the development of different strategies of interaction

with domestic and international stakeholders, with special detail to what the OTP has been doing, as detailed in reports made public (OTP, 2011; OTP, 2012a; OTP, 2013). No particular focus on the narrative of events will be given due to space constraints.

3.2.1. Ongoing Preliminary Examinations

The map below shows, in yellow, those countries where the OTP is conducting preliminary examinations. Those in blue are State Parties to the Rome Statute, where the Court has territorial and personal jurisdiction. It is important to note that, despite the fact that all the situations currently under investigation at the ICC are from the African Continent, not all preliminary examinations are, thus responding to the critique that the ICC is an “African court”. The situations presently under PEP are divided into 2 phases. Greater attention will be paid to those under Phase 3 examination, where issues of admissibility are considered.

Image 1: Map of Present Preliminary Examinations (Yellow) and State Parties (Blue)



Source: ICC, 2014e.

3.2.1.1. Phase 2 Situations

Currently, Honduras, Comoros, the Republic of Korea and the Central African Republic are situations undergoing phase 2 examination. These situations are being

analyzed according to jurisdiction criteria and the OTP is seeking mostly clarification and further information on the alleged crimes that were referred or communicated to the Prosecutor.

Honduras

The ICC has jurisdiction over Rome Statute crimes committed in the country or by its nationals from 1 September 2002 onwards. On 18 November 2010, the OTP announced it was opening a preliminary examination into the situation. It has received, until 2013, 23 Article 15 communications on the matter (OTP, 2013, p. 15) and has decided to continue to evaluate the alleged crimes committed in the aftermath of the coup d'état of June 2009, despite having concluded that there is no reasonable basis to believe that crimes against humanity occurred during the coup, only violations of human rights. It is also analyzing allegations about recent conduct in Honduras, consulting with domestic and international partners (OTP, 2013, p.20). It continues investigating more recent allegations related to conduct following the presidential election of 2010, as well as those scheduled for 2013, with special attention to the possible characterization of escalation of violence (OTP, 2013, p.20).

Comoros

On May 2013 the OTP received a referral from the Union of the Comoros with respect to the May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza Strip, along with related 4 Article 15 communications (OTP, 2013, p. 21). Some clarifications are needed in the case: territorial scope of the referral entails both Comorian-flagged vessels and others bearing State Party flags, encompassing all alleged crimes from the initial incident on 31 May 2010 onwards. Since the Presidency of the ICC assigned this situation to Pre-Trial Chamber I on 05 July 2013, the OTP now has to determine whether there is reasonable basis to proceed with an investigation. The Office has found a significant number of discrepancies in the factual and legal characterizations of incidents and is seeking additional information from reliable sources in order to solve this in order to determine if crimes within the jurisdiction of the Court has been committed (OTP, 2013).

Republic of Korea

The ICC has jurisdiction over crimes committed in Republic of Korea (South Korea) territory, including registered vessels and aircrafts or by its nationals since 1 February 2003. The Democratic People's Republic of Korea (North Korea), the probable national origin of the perpetrators, is not a State Party to the Rome Statute, but the territorial criteria is already met in the alleged crimes that took place in the Yellow Sea in 2010. South Korea has provided relevant information to the OTP in 2011 and 2013 and other eight communications have been received on the matter. In order to characterize the alleged war crimes, the ICC needs to determine whether a war is occurring, a definition not contained in the Rome Statute and thus left to legal interpretation. The OTP is gathering information in order to assess if there is reasonable basis to proceed on the situation (OTP, 2013).

Central African Republic

The Central African Republic (CAR)'s territory and its nationals have been under ICC jurisdiction since 1 July 2002. There is already an investigation being pursued on crimes committed in the country in the 2002-2003 period, but civilians have sustained new attacks since September 2012. The OTP has found that these incidents and serious allegations constitute a new situation, unrelated to the previous one referred by CAR in 2004, thus the Office decided to open a new preliminary examination, made public on 7 February 2014 (Bensouda, 2014). Due to the little time past since this announcement, the situation does not figure in any of the released reports made available to the public.

3.2.1.2. Phase 3 Situations

There are presently 5 situations under Phase 3 examination, regarding admissibility issues, namely: Afghanistan, Colombia, Georgia, Guinea and the Republic of Nigeria. These encompass both complementarity and gravity issues, but most of the current considerations pertain to complementarity issues. The OTP states in its report repeatedly that it has taken a positive approach to complementarity and this paper focuses exactly on the strategies adopted in this scope. In order to highlight some of these, a more detailed overview of the first three cases undertaken, with special focus on

what the OTP has been doing in each situation. Both the Guinean and Nigerian situations saw the OTP employ similar strategies as to the ones related here.

Afghanistan

The ICC has jurisdiction over Afghanistan's territory and its nationals from 1 May 2003 onwards and the OTP has received 93 communications pursuant to the situation, which is under PEP since 2007 (OTP, 2013, p.7). Alleged crimes include killings, torture and other forms of ill-treatment, use of human shields, attacks on protected objects, abductions, imposition of punishments by parallel judicial structures and recruitment of child soldiers (OTP, 2013, p. 7-9), that amount to crimes against humanity and war crimes (p. 10-11) committed by all parties involved. The OTP has continued to gather and verify information, as well as engaging with relevant actors as it has deemed fit. Meetings with representatives of Afghan civil society and international non-governmental organizations have also been held, in order to discuss possible solutions to challenges raised, as well as to verify information (OTP, 2013, p. 13). The Office has decided to now consider, pursuant to this situation, admissibility issues and is examine the existence and genuineness of domestic proceedings, thus it recently promoted this situation to Phase 3. Indication of national activity to address accountability has been found (OTP, 2013, p.14).

Colombia

This situation has been under PEP since June 2004 and the OTP has received 146 related Article 15 communications (OTP, 2013, p. 29). Colombia and its nationals have been under Rome Statute jurisdiction since 1 November 2001, but jurisdiction over war crimes has been effective only since 1 November 2009, due to a national declaration pursuant to Article 124 of the Statute. The Prosecutor has requested both further information on alleged crimes and status of national proceedings to the Government of Colombia and has published an Interim Report on the Situation in November 2012. In it five areas of continuing focus were identified: i) follow-up on the Legal Framework for Peace (LFP) and other legislative developments; ii) proceedings related to the promotion and expansion of paramilitary groups; iii) proceedings related to forced displacement; iv) proceedings related to sexual crimes; and v) false positive

cases¹² (OTP, 2013, p. 29). Since the publication of this Interim Report, further information has been received concerning national proceedings (OTP, 2013, p. 31) and the OTP is monitoring the implementation of the LFP, in sync with a positive approach to complementarity (p.32); seeking clarification on the ongoing Military Justice Reform (p. 32-34); and identifying gaps or shortfalls of judicial activity (p. 34-35). The OTP has sent missions to Bogotá, where it met with senior officials from the three branches of government, national civil society, international non-governmental agencies and international organizations, as well as participated in public events and international conferences on international criminal law and international humanitarian (OTP, 2013, 35-36). Furthermore, the Office has shared its views with Colombian authorities in relation to compatibility between LFP and the Rome Statute, after various parties cited the OTP's strategy as a prosecutorial model for national jurisdictions and Fatou Bensouda has met with Colombian President Juan Manuel Santos to discuss the establishment of peace in the highest standards of justice in the country (OTP, 2013, p.36). The Office will continue to analyze proceedings and consult closely with Colombian authorities in order to ensure that genuine domestic proceedings take place (OTP, 2013, p.37).

Georgia

The country and its nationals have been under ICC jurisdiction since 1 December 2003 and the OTP made its preliminary examination of the situation public in 14 August 2008. It has received 3,854 related Article 15 communications (OTP, 2013, p. 38). Alleged crimes include the forcible displacement of Georgian population, attack against peacekeepers, unlawful attacks directed against the civilian population and civilian objects, destruction of property, pillaging and torture and other forms of ill-treatment, that the Office has found amount to war crimes and crimes against humanity (OTP, 2013, p. 39). On evaluation of admissibility, according to information available, both Georgia and Russia are conducting national investigations into alleged crimes committed during the armed conflict of August 2008 and the OTP has sought dialogue with relevant actors in order to assess and encourage these national proceedings. The

¹² Allegations that state actors, mainly members of Colombian army, have “deliberately killed thousands of civilians to bolster success rates in the context of the internal armed conflict and to obtain monetary profit from the State’s funds.

OTP has visited Georgia twice (OTP, 2013, p. 40) seeking updates and cooperation with authorities, also consulting with civil society and foreign diplomats (p.41). On the second visit, the Office also gave a presentation to national investigators and prosecutors on crimes under ICC jurisdiction (OTP, 2013, p. 41). Cooperation with other international partners, such as the Organization for Security and Cooperation in Europe has also been pursued (OTP, 2013, p. 41). A close follow-up of Georgian authorities' procedures as well as a mission to Moscow are being planned by the OTP (OTP, 2013, p. 41).

3.2.2. Completed Preliminary Examinations

The OTP has completed 8 PEPs, opening the following investigations: Central African Republic (2002-2003), Côte d'Ivoire, Darfur (Sudan), Democratic Republic of Congo (DRC), Kenya, Libya, Mali and Uganda. Proceedings on individual cases are most advanced in the DRC situation, the first one to be open at the ICC (ICC, 2004). Due to singularities contained in each case, this paper will analyze in further detail the situations of Mali, the most recent one to be closed and forwarded to the investigation phase. Other than Mali, there is only public material describing PEP for the cases of Libya and Côte d'Ivoire (OTP, 2011). But, similar to the Malian case, others can also be characterized as situations where no challenges to admissibility on complementarity grounds were found, mainly due to incapacity rather than unwillingness to open genuine domestic procedures. Only those situations open through UNSC referral, Darfur and Libya, prove to be an exception to this characteristic, where the referral of the situation on the ground and the authority of the international body referring the situation prove to override challenges to admissibility, due to findings of unwillingness to undertake domestic procedures.

Mali

Mali is the most recent situation to enter investigation phase, having been admitted on 16 January 2013. The PEP started in July 2012, upon referral by the Malian Government. During PEP, OTP determined that there was reasonable basis to believe that war crimes had taken place in the country since January 2012. There were no national proceedings pending in Mali or any other State investigating such crimes.

Through missions conducted to the country in the second semester of 2012, the OTP assessed that there was no reason to believe that opening an investigation would go against interests of justice and thus made its decision to complete the PEP (OTP, 2013, p. 52).

3.2.3. Closed Preliminary Examinations

Since it first started considering situations under PEP, the OTP has closed 3 situations, under different claims of inadequacy. Specific responses to each case, with detailed account on the argument behind the rejection was written and distributed to all those who sent in communications deemed relevant during PEP (Ocampo 2006a; Ocampo, 2006b). Only Palestine features in Preliminary Examination Reports (OTP, 2012a; OTP, 2013).

Iraq

In analyzing the situation of Iraq, the OTP highlighted that the ICC has no jurisdiction over the country or its nationals, neither has it received a declaration of acceptance under Article 12(3). Also, since deliberations on crimes of aggression were not concluded at the time and have still to be fully enacted, the ICC could neither examine if the decision to engage in armed conflict was legal (Ocampo, 2006a, p. 4). Few accounts of genocide and crimes against humanity were received. Information on war crimes was plentiful and actively sought by the Office and indication of reasonable basis to believe that crimes of willful killing and inhuman treatment had occurred (Ocampo, 2006a, p.8) but no indication of intentional attacks on civilian population was found (p. 5), a conclusion that may be reviewed if new facts arise (p.7). Despite the reasonable basis to believe crimes occurred, in reviewing admissibility, the aspect of gravity was not met (Ocampo, 2006a, p.8-9), argument that substantiated the decision to close the Preliminary Examination before considerations of complementarity.

Venezuela

In the Venezuelan case, the OTP found that, while territorial and national jurisdictions are accounted for, not all alleged incidents, particularly those related to the

April 2002 short-lived coup, occurred under the ICC's temporal jurisdiction, that started in 1 July 2002 in this country (Ocampo, 2006b, p. 3). Lack of precision and inconsistencies was found in much of the information received and allegations concerning crimes against humanity and found that there was no reasonable basis to believe they had occurred, nor were any allegations of war crimes or genocide received (Ocampo, 2006b, p. 3-4). Thus the decision to close this Preliminary Examination was taken on grounds of subject-matter.

Palestine

On the situation of Palestine, debate during PEP centered on jurisdiction criteria and the definition of State for the purpose of Article 12 of the Statute (OTP, 2012b, p.1). At the time, Palestine had not yet been recognized as a State by the United Nations General Assembly nor by its Secretary General. Thus the OTP held that it would not proceed with the preliminary examination on grounds of jurisdiction, since it was not able to recognize Palestine as a State (OTP, 2012b, p.3). This means that Palestine could neither become a State Party nor could it submit a declaration under Article 12(3) of the Rome Statute accepting the ICC's jurisdiction over its territory and nationals. Since no UNSC referral was in place, the Office found it could not proceed in the matter.

4. OTP and Alternative Strategies

So far, we have seen that the OTP has different strategies for dealing with situations that come to its attention. After entering Preliminary Examination, the Office can either complete a situation, thus entering the investigation phase; close it; continue the analysis of information; or, as suggested only in one of the sources, continue to assess relevant national procedures. During the whole PEP, the OTP is in direct contact with States, party and non-party; international organizations; international and domestic non-governmental organizations; and other actors. It is in this moment that the ICC as an actor in international arena can be identified, in interaction with its peers. Furthermore, it is at during Preliminary Examination that most of the deterrent reputation of the Court can be fostered and no decisions to proceed, complete or close a situation can be taken lightly by the OTP.

Of the situations reviewed, we can notice some important coincidences that can point to trends, not definite laws, in the proceedings of OTP reasoning during PEP. While paying particular attention to Preliminary Examinations completed and those under Phase 3 investigation, it is possible to see that the Office has created alternative strategies to cooperate and foster good practices in the domestic arena in those countries where it deems there is a minimum threshold of capacity and willingness to do so genuinely. This has been the case in the three cases highlighted here: Afghanistan, Colombia and Georgia. In all cases, a series of visits to the countries concerned and those involved were either completed or being planned. These were mainly organized to collect further information and clarify existing ones, but also saw cooperation attempts occur, as well as other events, such as international conferences and seminars on related subjects. A visit to Moscow is even mentioned in the report on Georgia (OTP, 2013), even though Russia is not a State Party. In Afghanistan, the OTP is cooperating with civil society and international non-governmental organizations “in order to discuss possible solutions to challenges raised by the situation in Afghanistan such as security concerns, limited or reluctant cooperation, and verification of information”(OTP, 2013, p. 13). Furthermore, we found that the OTP is now serving as a prosecutorial model for national jurisdictions, as cited by various parties in Colombian case (OTP, 2013, p. 36).

When one notices that all three Preliminary Examinations closed by the OTP were done on the grounds of jurisdiction or gravity, it becomes even clearer that complementarity is a relevant criterion taken very seriously and thoroughly explored by the Office, one that will justify the permanence of a situation on the list of situations under Preliminary Examination. No case has been closed, up until now, where the OTP has found that genuine domestic procedures were being pursued¹³. The alternative strategies, pursued while a situation is maintained under PEP, attest to the OTP’s creativity in interacting with other actors in the international arena. Although they are also juridical in scope, pertaining prosecutorial procedures and discussing the interests of justice, these are not the core attribution of the Court or the Office, but constitute alternative strategies of interaction in order to pursue justice. This is a consequence of the positive approach to complementarity adopted by the OTP. It is also a direct consequence of the permanent character of the ICC that distinguishes it from other

¹³ It remains to see if this is a selection bias; i.e. these cases are simply not reported to the ICC. But this is not important for the argument being supported here.

tribunals mentioned in a previous section. Due to the continuity of its proceedings and high degree of institutionalization, it is then free to pursue these alternative strategies.

These trends point to a split in the future activities of the OTP and with it the ICC, one internal and the other external. The former is the prosecution and proceedings under the Rome Statute, that constitute the core attribution of the ICC thought out by the State Parties that conceived the Statute. But the latter, external, relates to these alternative strategies employed in interaction with a diversity of other actors, where the ICC monitors, collects information, serves as an example and shares knowledge on both its own procedures and the broader scope of international criminal law. This also furthers and deepens the Court's goal of combating impunity, assuring accountability and deterring further perpetration of such crimes under its jurisdiction. It allows for the spread of a regime, defined by Krasner as "principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations", by adding to the coherence of principles, norms, rules and decision-making procedures adopted internationally (Krasner, 1982, p. 185). This goes beyond the traditional view of lawyers, that claim that legal institutions are apolitical (Abott, 1999, p. 377), mainly because it views the ICC as an institution that uses its position to pursue particular goals, even if not through direct political strategies such as threats and bribes, but through the more subtle rules of law (p. 377-378). As in the ECJ case studied by Abbott, one finds that "political actors will acquiesce so long as judges [and prosecutors]¹⁴ remain within the seemingly neutral and apolitical domain of law – an image that judicial craftsmanship can help maintain" (1999, p. 378). The ICC, mainly through its continued attention through the OTP to its ongoing situations under Preliminary Examination, thus stands as a relevant actor in international governance, capable even of influencing State behavior, as was reported in the three Phase 3 situations.

6. Conclusion

The ICC is a long way away from achieving its goal of fully preventing the perpetration of international crimes under the jurisdiction of the Rome Statute. It is also still struggling with attempts to bring about the end to impunity and assuring

¹⁴ My addition.

accountability internationally. But this does not mean that the work done until now is not important. In these almost 12 years of history, the ICC has achieved great results. Most importantly, it is starting to devise its own alternative strategies for interacting with other actors in the international arena in order to advance the construction of a regime of international criminal law, in a central way. By reviewing practices adopted by the OTP during Preliminary Examination of situations, this paper further seeks to argue that not only is this already happening but that this should continue to be pursued by the Office and broader Court.

Many aspects of this line of enquiry still need to be further researched. Among them, an analysis of the specific characteristics pertaining to the character of domestic regimes and the capacity of state apparatus across the different situations investigated by the OTP would greatly help to clarify the State-side of the interaction that was identified here. Not only would this help in understanding the social relations that already take place, it would also aid in the strengthening of such an international regime.

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