

# Proceedings of Preliminary Examinations before the International Criminal Court - In the light of the jurisprudence –

سير إجراءات الدراسات الأولية أمام المحكمة الجنائية الدولية

- على ضوء الاجتهادات القضائية -

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## Abstract:

Preliminary examinations are an essential part of the procedures followed before the International Criminal Court (ICC), which are undertaken by the Office of the Prosecutor (OTP) by filtering out crimes and selecting the most dangerous to deter its perpetrators, mean while it eases the burden for the court, and encourages the states to pursue national prosecutions, so that the Prosecutor will ultimately reach the decision to initiate an investigation or not .that a part of it is subject to the supervision or control of the Pre-Trial Chamber according to the situation. In view of the lack of legal texts regulating them, the Office of the Prosecutor and the court judges deliberately tried to enrich them and fill the voids.

**Keywords :** ICC- the Prosecutor- Preliminary examinations- investigation.

## الملخص:

تعد الدراسات الأولية جزءاً أساسياً من الإجراءات المتبعة أمام المحكمة الجنائية الدولية ، التي يقوم بها مكتب المدعي العام من خلال تصفية الجرائم واختيار أخطرها لردع مرتكبيها ، حيث أنها تعمل كألية لتخفيف العبء الملقى على عاتق المحكمة ، ويشجع الدول على متابعات القضايا الوطنية ، ليصل المدعي العام في نهاية المطاف إلى اتخاذ قرار الشروع في التحقيق من عدمه. علماً أن جزءاً منه يخضع لإشراف أو رقابة الدائرة التمهيدية حسب الحالة. ونظراً لعدم وجود نصوص قانونية كافية تنظمها ، فقد اجتهد مكتب المدعي العام وقضاة المحاكم إثرائهم وسد الفراغات. الكلمات المفتاحية: المحكمة الجنائية الدولية، المدعي العام، الدراسات الأولية، التحقيق.

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## **Introduction :**

After the Ex-Yugoslavia and Rwanda tribunals, the world community reflect on creation of permanent International Criminal Court (ICC), this court has several offices and practice many activities, by this activities there is a step of preliminary examination, However it has only marginal importance in the Rome Statute and the Statutes of the Ad-hoc tribunals were silent on the methods of preliminary examinations, for this reason the jurisprudence developed for removing confusion and ambiguity on some issues .

The Prosecutor (OTP) start the preliminary examination on the base of referral from a State party in the treaty of Rome, based on the referral of Security council or by declaration made by a non party State. But before to proceed the investigation, he must during the preliminary examination ensure that there is a reasonable basis for it with regulated condition necessary for the jurisdiction, admissibility and interest of justice.

In the counterpart the Prosecutor have the authority to conduct preliminary examinations, the Rome Statute acknowledged subjecting part of his authority to make his decisions about the investigation to the oversight of the Pre-Trial Chamber, to ensure greater credibility for the benefit of the International Criminal Court, as the process is a step towards documenting human rights violations, bringing justice to rights holders and addressing criminals.

Through this study, we will shed light on the preliminary examinations as practiced by the Prosecutor and the scope of the embodied oversight of the Pre-Trial Chamber. We will deal with the subject in two sections; **the first includes the Preliminary Examination conduct procedure and the second deals with the result of preliminary examinations.** This aspect, includes the scope of the conduct of preliminary examinations by the Office of the Prosecutor within the limits of the supervision exercised, over him by the Pre-Trial Chamber in addition to the results obtained.

### **1. The Preliminary Examinations Conduct Procedures:**

The Office of the Prosecutor has set out regulations clarifying how to conduct preliminary examinations under the provisions of the Statute that lack clarity, bearing in mind that the decisions reached in the end are governed by the subsequent control exercised by the judges of the Pre-Trial Chamber.

#### **1.1. Actions Taken by the Prosecutor:**

The decision to open or not a preliminary examination is legally more complex, politically controversial and more related to notions of the legitimacy of the ICC than was envisioned by the authors of the Rome Convention<sup>1</sup>. The authority of the Prosecutor was expanded to initiate investigations or legal prosecution in the case of serious crimes that concern the international community<sup>2</sup>.

<sup>1</sup> - Wharton, & Grey, Lifting the Curtain: Opening a Preliminary Examination at the International Criminal Court, Journal of International Criminal Justice, 2018, p. 30. online :<https://scholar.uwindsor.ca/lawpub/109>

<sup>2</sup> - Abdelkader ELBOUKIRAT , international criminal justice: Punishment of crimes against humanity, Office des publications universitaires d'Alger , 2 ed,2007,p229.



The conduct of Preliminary examinations, whether on an proprio-motu initiative or by a referral from the State Party or a referral from the Security Council, requires coming up with a decision regarding carrying out the investigation or refraining from it<sup>1</sup>. In this regard, the Office of the Prosecutor has identified four successive stages aimed at filtering and treating cases<sup>2</sup>.

**The First Stage:** This stage includes the processes of analysis and verification of the seriousness of the received information, in addition to control the trivial or political charges<sup>3</sup> related to the crimes alleged in accordance with Article 15<sup>4</sup>, where it makes a preliminary distinction as follows<sup>5</sup>:

- Information related to matters outside the jurisdiction of the Court.
- Information related to a case under preliminary examination.
- Information that relates to a case under investigation or constitutes a basis for prosecution.
- Information connected to issues that do not fall outside the Court's jurisdiction and are not related to the aforementioned, but require further examination.

Referring to the activities report issued by the Office of the Prosecutor for the year 2020, we notice that this latter received during the relevant year, 813 cases within the framework of Article 15 of the Statute.

**The Second Stage:** is the official opening of the preliminary examination of a specific case, where the Office of the Prosecutor undertakes the legal and factual assessment in order to determine the extent to which the alleged crimes fall within the jurisdiction of the Court. This stage ends with a report on the jurisdiction<sup>6</sup>.

Currently, there are two cases at this stage related to the governments of Bolivia and Venezuela 2. As the Office of the Prosecutor started the preliminary examinations based on its receipt of a referral by the Government of Venezuela on February 13<sup>th</sup>, 2020 pursuant to Article 14/1 regarding crimes against humanity that have occurred in its territory since 2014, as a result of coercive measures taken unilaterally by the United States of America. The case is under preliminary examination by the Prosecutor<sup>7</sup>.

**The Third Stage:** during which the admissibility of the case is evaluated in terms of complementarity and gravity, pursuant to Article 17<sup>8</sup>, and the Office of the Prosecutor continue to collect information on substantive and personal jurisdiction, especially if new related crimes occur<sup>9</sup>.

<sup>1</sup> - ICC-OTP, Policy Paper on Preliminary Examination, The Hague, ICC, November 2013, para 77

<sup>2</sup> - ICC-OTP, Report on Preliminary Examination Activities 2020, The Hague, ICC, 2020, para 15.

<sup>3</sup> - Klamberg, Mark, Commentary on the Law of the International Criminal Court, 2017, p. 188.

<sup>4</sup> - ICC-OTP, Policy Paper on Preliminary Examination, op.Cit, para 78.

<sup>5</sup> - ICC, Regulations of the Office of the Prosecutor, The International Criminal Court, The Hague, 2009, p. 6.

<sup>6</sup> - ICC-OTP, Policy Paper on Preliminary Examination, op.Cit. para 80.

<sup>7</sup> - ICC. Situation in VenezuelaII, preliminary examination. online: <https://www.icc-cpi.int/venezuelaII> (accessed 03/07/2021).

<sup>8</sup> - ICC, Statute of Rome of the International Criminal Court, The Hague, ICC, 2011, p. 13.

<sup>9</sup> - ICC-OTP, Policy Paper on Preliminary Examination, op.Cit, para 82.



Can be observed the word Gravity or Gravity threshold, it is appears as the indicator in article 17/1/b of the Rome Statute , which provides that the court shall determine a cases inadmissible where the case does not have sufficient gravity<sup>1</sup> .

According to the author **Margaret M. De Guzman** this Gravity plays two important roles in the ICC regime. First, it provides a legal basis for the Court's jurisdiction as well as the exercise of that jurisdiction; and second, is an important factor in the Prosecutor's discretionary selection of situations and cases to pursue<sup>2</sup>.

Currently, the Office of the Prosecutor is dealing with three cases in the admissibility stage, which are: Venezuela 1, Colombia and Guinea. We will address two of them, as preliminary examinations began on June 2004 for crimes against humanity in the Colombian state. As for war crimes, they started until November 1<sup>st</sup>, 2009 as a result of Colombia's activation of Article 124<sup>3</sup>. These crimes happened due to the conflict between the government's military forces and armed rebel groups.

Regarding the situation of Guinea, the Office of the Prosecutor announced on 14 October 2009 the beginning of preliminary examinations based on the fact that he had received many communications after the Conakry massacre took place on 28 September 2009<sup>4</sup> by the Guinean armed forces, which lead the Prosecutor to consider that there is a basis to believe that there have been crimes against humanity in accordance with Article 7<sup>5</sup>, because the purpose of the court is to prosecute and punish the most serious crimes that included in articles 6 to 8 bis of the ICC statute and concerned the international community<sup>6</sup> .

**The Fourth Stage:** Based on the results of the previous stages, the Prosecutor focuses on evaluating the interest of justice and its impact on the subsequent report, either by adopting a decision to initiate the investigation or rejecting it in accordance with Article 53/1, referring in his report to the legal qualification of the alleged crimes, the facts surrounding them, the places where they were committed, the persons involved in them while they occurred<sup>7</sup>. It shall be noted that the Prosecutor, during the preliminary examinations, does not have the authority to investigate except for the purpose of receiving testimony or sending requests for information to reliable sources and field missions.

<sup>1</sup> - **Meguni Ochi**, Gravity threshold before the international criminal court: an overview of the court's practice,2016, p2 , available at <https://www.internationalcrimesdatabase.org/upload/documents/20160111T115040-Ochi%20ICD%20Format.pdf>

<sup>2</sup> - **Margaret M. de Guzman**, Gravity and the Legitimacy of the International Criminal Court, Fartham international law journal , vol 32,issue 5, 2008, p 1405. Available at: <https://ir.lawnet.fordham.edu/ilj/vol32/iss5/2>

<sup>3</sup> - Rome Statute, op.Cit, p. 73.

<sup>4</sup> - **ICC-OTP**, Situation in Guinea, preliminary examination. online:<https://www.icc-cpi.int/guinea>(accessed 04/07/2021).

<sup>5</sup> - ICC-OTP,Report on Preliminary Examination Activities 2020,op.Cit. para 40.

<sup>6</sup> - **William A.Schabas**, An introduction to the International criminal court, Cambridge university press- UK, 3ed, 2007,pp186-187.

<sup>7</sup> - ICC-OTP,Policy Paper on Preliminary Examination,op.Cit. para 84.



At the present time, the Office of the Prosecutor has completed the cases of Nigeria<sup>1</sup>, Ukraine<sup>2</sup> and the Philippines<sup>3</sup> and requested permission from the Pre-Trial Chamber to open an investigation based on the existence of reasonable basis believing that crimes against humanity and war crimes have occurred, knowing that, on February 5<sup>th</sup>, 2021, it obtained permission to investigate the situation of Palestine from the Pre-Trial Chamber<sup>4</sup>.

Whereas, it decided to close the preliminary examinations of the case of Iraq against Britain<sup>5</sup> on December 9<sup>th</sup>, 2020 because it was not admissible at the present time, as a result of of the unconvincing element of danger.

The ongoing preliminary examinations give insight into the “positive complementarity” efforts of the Office of the Prosecutor, and may shed further light on the unexamined concept of “interests of justice” which had not been largely examined<sup>6</sup>. After the completion of the aforementioned four phases, the Prosecutor issues his decision to investigate or not, but this remains

dependent on the pattern he follows when opening the preliminary examinations and the results reached. On the one hand, and with reference to Article 53/1<sup>7</sup>, we conclude that when the Prosecutor conducts the preliminary examinations by his own initiative and finds that there is no reasonable basis for opening the investigation due to the absence of the element of jurisdiction or admissibility, his decision cannot be reconsidered. The matter is different if he bases his decision on the fact that this does not serve the interests of justice, because he is obliged to inform the Pre-Trial Chamber which can review the decision of the Prosecutor not to initiate the procedure.

On the other hand, if it ends with a decision not to initiate the procedure and the referral is made by the State Party or by the Security Council, then, pursuant to Article 53/3/a<sup>8</sup>, Prosecutor shall notify the parties and the Pre-Trial Chamber if his decision is based on the fact that the investigation is not in the interests of justice<sup>9</sup>, the parties of referral can submit a

<sup>1</sup> - ICC-OTP, Situation in Nigeria, preliminary examination. online: <https://www.icc-cpi.int/nigeria> (accessed 12/07/2021).

<sup>2</sup> - ICC-OTP, Situation in Ukraine, preliminary examination. online: <https://www.icc-cpi.int/ukraine> (accessed 12/07/2021).

<sup>3</sup> - ICC-OTP, Situation in Philippines, preliminary examination. online: <https://www.icc-cpi.int/philippines> (accessed 12/07/2021).

<sup>4</sup> - ICC-OTP, Situation in Palestine, preliminary examination. online: <https://www.icc-cpi.int/palestine> (accessed 12/07/2021).

<sup>5</sup> - ICC-OTP, Situation in Iraq/Uk, preliminary examination. online: <https://www.icc-cpi.int/iraq> (accessed 12/07/2021).

<sup>6</sup> - Grey, & Wharton, The Full Picture: Preliminary Examinations at the International Criminal Court, Canadian Yearbook of International Law, 2019, p. 64. online: <https://scholar.uwindsor.ca/lawpub/108>.

<sup>7</sup> - Statute of Rome, op.Cit. p. 33.

<sup>8</sup> - *Ibid.* p. 33.

<sup>9</sup> - **Nasreddine BOUSMAHA**, international criminal court: article by article analysis of the Rome convention, vol 2, edition Houma Algeria, 2008, p3.





request to the Pre-Trial Chamber to review the decision, and the latter can review, on its own initiative, its decision if the refusal was well-founded because the investigation did not serve the interests of justice under Article 53/3/b<sup>1</sup>.

Accordingly, if the Prosecutor finds that there is a reasonable basis for initiating the investigation, he shall submit a request for permission to the Pre-Trial Chamber in addition to a report attached to a recommendation in this regard pursuant to the provisions of the Clause 29-1 of the Office of the Prosecutor Regulations and the Article 15/3 of the Rome Statute .

## 1.2. Oversight Exercised by the Pre-Trial Chamber:

This mechanism was established as a result of the opposition of the United States of America to any authority that would authorize the Prosecutor with the power of the proprio-motu initiative. Therefore, after negotiations, it was concluded that the Prosecutor's decisions were subjected to post-monitoring exercised by the Pre-Trial Chamber, in order to prevent the Prosecutor's abuse of his authority to take the investigative decision, which may be based on political, not legal, backgrounds. For this reason, two types of oversights are established. We will address them and shed light on the limits of this oversight.

### First - Patterns of Oversight:

The Pre-Trial Chamber exercises two types of oversights, the first of which is characterized by being absolute and the other restricted<sup>2</sup>. As a result, the discretionary power of the Prosecutor is narrowed or expanded.

**A-Absolute Oversight:** In order that the Prosecutor cannot escape with his decisions from oversight after the completion of the preliminary examinations, The drafters of the Court's statute have restricted his authority, especially if he acted on proprio-motu initiative, as Article 15/3 of the Rome Statute obligated him to submit a request for permission from the Pre-Trial Chamber whenever he reached the conclusion of the investigation, thus, activation of investigation remains contingent on the Pre-Trial Chamber's approval since it is an absolute authority for this latter and restricted for the Prosecutor. Not to mention the possibility of the Pre-Trial Chamber, on its own initiative, to review the Public Prosecutor's decision to not initiate the investigation if it was reasoned that this procedure did not serve the interests of justice in accordance with the provisions of Article 53/3-b<sup>3</sup>, which reflects the absolute oversight authority of the Pre-Trial Chamber, as the prosecutor's decision does not become valid unless he adopt it.

On the other hand, the Pre-Trial Chamber can request the Prosecutor to reconsider his decision not to conduct the investigation, at the request of the referring State party or the

<sup>1</sup> - Ibid. p. 33.

<sup>2</sup> - **Amoulgam, AZE Kerté**, Examens Préliminaires À La Cour Pénale Internationale : Fondements Juridiques, Pratique Du Bureau De La Procureure Et Développements Judiciaires, Revue québécoise de droit international. Québec : Société québécoise de droit international, 2019, p. 192.

<sup>3</sup> - Statute of Rome, op.Cit. p. 33.



Security Council, as the case may be, the Prosecutor is restricted by reviewing his decision<sup>1</sup>. In all cases, and whenever it was his proprio-motu initiative, then, the moving from the preliminary examinations stage to the stage of investigation requires the permission of the Pre-Trial Chamber<sup>2</sup>.

**B-Conditional Oversight:** This type of oversight is characterized by being subject to a standing condition, as the Pre-Trial Chamber cannot exercise its oversight unless a certain condition is met, so it is restricted to it.

And it is characterized by flexibility in confronting the Prosecutor since he does not restrict his authority in all cases, taking as example article 53/3-a<sup>3</sup> which shows, through our analysis, that the decision of the Prosecutor to not conduct an investigation with regard to referrals issued by the States Parties or the Security Council is not automatically subject to the oversight of the Pre-Trial Chamber, but rather remains conditioned on a written request from the referring parties<sup>4</sup>, and in the absence of that the oversight process becomes impossible.

Of course, the Pre-Trial Chamber oversight which is practiced in its two forms, is not only a legal or political option, but rather a performance option par excellence<sup>5</sup> which aims at evaluating the activity of the Public Prosecutor.

#### **Second - The limits of the Pre-Trial Chamber Oversight:**

The judicial review exercised by the Pre-Trial Chamber within the framework of the subsequent oversight over the decisions taken by the Prosecutor is insufficient and has its limitations, especially in the negative decisions to not initiate the investigation, as they are oversighted according to the referral pattern, because in the case of referral by the State party or the Council of Security, they may base their request for a review of the decision on criteria of jurisdiction, admissibility or the interests of justice before the Pre-Trial Chamber<sup>6</sup>. This latter has to either support the Prosecutor's decision or ask him to reconsider it in whole or partly.

Nevertheless, the Prosecutor remains free to change his decision or not, because the decision of the Pre-Trial Chamber is not of a mandatory nature but is a recommendation<sup>7</sup>. The

<sup>1</sup> - **Rashid, Farid Mohammed**, The Role of the Prosecutor in the International Criminal Court: Discretion, Legitimacy, and the Politics of Justice, PhD Thesis University of East London Business and Law, 2016. pp.55-56.

<sup>2</sup> - **Amougam AZE Kerté**, op.Cit. p. 192.

<sup>3</sup> - Statute of Rome, op.Cit. p. 33.

<sup>4</sup> - **ICC**. Situation of Comoros, Greece and Cambodia, Decision on the request of the Union of the Comoros to review the Prosecutor's Decision not to initiate an investigation, ICC-01/13-34, ICC-PRE-TRIAL CHAMBER I. 16/07/2015. para 3.

<sup>5</sup> - **Carsten, & Bergsmo**. Quality Control in Preliminary Examination. s.l. : Torkel Opsahl Academic EPublisher, 2018. p. 160. Vol. 2.

<sup>6</sup> - Rome Statute, op.Cit, art 53/3(a). p. 33.

<sup>7</sup> - **Manon, Dosen**. Sélection et hiérarchisation des affaires devant la CPI : les dits et non-dits de la politique pénale du Procureur, La Revue des droits de l'homme. s.l. : Actualités Droits-Libertés, 2016. para 26.



Prosecutor had taken some negative decisions<sup>1</sup> among them the case concerning the Comoros which is a state party as we had seen in detail previously, on 6 November 2015, the office of the Prosecutor issued a decision to not investigate the ships that were subjected to Israeli raids, since it is not dangerous enough for the International Criminal Court to pursue with reference to article 53/1 (B) and 17<sup>2</sup>, and on 16 July 2014 and at the request of the Union of the Comoros, the Pre-Trial Chamber petitioned the Public Prosecutor to reconsider his decision due to a lack of assessment of the seriousness criterion. And renewed request in November 2018, on 2 December 2019; after revision, the Prosecutor asserts his position that the International Criminal Court specializes in examining cases that meet the required criteria, including the presence of the element of sufficient gravity<sup>3</sup> and what was examined in the case case under study. The Pre-Trial Chamber was satisfied with the request, despite its lack of conviction, and this reflects the limitations of its supervisory authority over the Prosecutor.

The matter does not depend on the insufficiency of oversight, but it may sometimes exceed it to the point of complete paralysis of the oversight mechanism because the Rome Statute did not speak about the specific deadlines for the completion of preliminary studies, this opens the way for the Public Prosecutor to exploit this loophole to his advantage. Indeed, the fact has proven that some preliminary examinations have continued for more than ten years, such as the cases of Colombia, Guinea, Afghanistan and Nigeria, which is a long period and the Pre-Trial Chamber cannot exercise any kind of oversight as long as the prosecutor has not issued his decision.

In the case of Central Africa, upon its request, the Pre-Trial Chamber issued a decision on 30 November 2006 that the Public Prosecutor Office must provide information regarding the preliminary examinations, the status of the current progress and the estimated date of completion of the preliminary studies, provided that it is within a reasonable time<sup>4</sup>, However, the Public Prosecutor Office confirmed, on its part, through the general policy document for the preliminary examinations 2013<sup>5</sup>, that the statute did not stipulate a specific deadline for the completion of preliminary studies, but rather it depends on the situation and the discretionary power of the Prosecutor<sup>6</sup>. It is not possible to exercise oversight over the conduct of preliminary examinations<sup>7</sup>, and therefore the Central African case revealed to us a fundamental procedural vacuum, which is the lack of oversight of the Pre-Trial Chamber with the absence of a decision.

<sup>1</sup> - See also , situations in Korea, Honduras, Gabon, Iraq/Uk, preliminary examination.

<sup>2</sup> - Statute of Rome, op.Cit. pp. 33-13.

<sup>3</sup> - Situation of Comoros, Greece and Cambodia, preliminary examination, online, op.Cit.

<sup>4</sup> - **ICC**. Situation in the Central African Republic, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, ICC-01/05-6, ICC-Pre-Trial Chamber III. 30 November 2006. p. 5.

<sup>5</sup> - **ICC-OTP**. Policy Paper on Preliminary Examination, op.Cit. para 14.

<sup>6</sup> - **Dosen, Manon**. op.Cit. para 37.

<sup>7</sup> - **Amoulgam, AZE Kerté**. op.Cit . p. 196.





Accordingly, the procedural system for this stage developed by the Office of the Prosecutor, as well as the oversight exercised by the Pre-Trial Chamber, yielded tangible results, which we will address in the second part.

## 2. End of preliminary examinations:

Preliminary examinations aim to achieve practical results in accordance with the objectives set by the Rome Statute and the Prosecutor faces criticism in the exercise of his discretion.

### 2.1. The results of the work of the public prosecutor during the preliminary examinations:

Conducting preliminary examinations does not necessarily lead to the result of opening an investigation, regardless of the type of referral, whether it is on a personal initiative or by a referral from the State party or the Security Council, it may happen and end without initiating the investigation. Certainly, the Prosecutor in both cases is obliged to respect the basis of independence, integrity and objectivity.

#### First - the preliminary examinations that ended with the investigation :

Most of the preliminary examinations carried out by the Prosecutor of the International Criminal Court culminated in the decision to initiate the investigation because he found a reasonable and serious basis for that, which we will show through the table provided, which includes cases suspended until 07/31/2020<sup>1</sup>.

**Table 1- The preliminary examinations that ended with the investigation.**

N	Situation	Ratified the Rome statute	Self-referral(SR)	Legal basis	crimes	Context of crimes	ICC investigation opened
			Security council referral(SC)				
			Prosecutor Proprio Motu(PM)				
01	Uganda	June 2002	December 2003(SR)	13-a	-War crimes -C.against humanity.	Conflict between LRA and NA in Uganda*	In July 2004 (since 01/07/02)
02	Congo	April 2002	April 2004(SR)	13-a	-War crimes -C.against humanity.	Armed conflict in the DRC	In June 2004 (since 01/07/02)

<sup>1</sup> - ICC. Situations under investigation. [En ligne] <https://www.icc-cpi.int/pages/situation.aspx> (accessed 12/07/2021).

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03	Central African I	October 2001	December 2004(SR)	13-a	-War crimes -C.against humanity.	Conflict in CAR with the peak of violence in 2002-2003	In May 2007 (since 01/07/02)
04	Darfur (Sudan)	It's not a state party	March 2005(SC)	13-b	-War crimes -C.against humanity. -genocide.	Conflict between Sudanese gov, militia janjaweed and resistance front	In June 2005 (since 01/07/02)
05	Kenya	March 2005	December 2007 (PM)	15	-Crimes against humanity.	Post-election violence in Kenya in 2007-2008	In March 2010 (01/06/2005 until 26/11/09)
06	Libya	It's not a state party	February 2011(SC)	13-b	-War crimes -C.against humanity.	Conflict between gov forces and different organized armed	In March 2011 (since 15/02)
07	Cote d'ivoire	February 2013	April 2003(PM)	15	-Crimes against humanity.	Post-election violence in Cote d'ivoire in 2010-2011	In October 2011 (since 28/11/10)
08	Mali	August 2000	July 2012(SR)	13-a	-War crimes	The emergence of a rebellion and coup d'Etat by military junta	In January 2013 (since jan 2012)
09	Central African II	October 2001	February 2014(SR)	13-a	-War crimes -C.against humanity.	Renewed violence starting in 2012 in CAR	In September 2014 (since Aug 2012)
10	Georgia	September 2003	August 2008(PM)	15	-War crimes -C.against humanity.	armed conflict in Georgia(01/07 to 10/10/08)	In January 2016 (since 01/07 until 10/10/08)
11	Burundi	September 2004	April 2016(PM)	15	-C.against humanity.	Elimination opponents for third term presidential in Burundi	October 2017 (since 26/04/15 until 26/10/17)



12	Bangladesh/ Myanmar	Bangladesh is a party since 23march 2010	September 2018(SR)	12/2	-C.against humanity.	Deportation from Myanmar to Bangladesh and perscution committed against the Rohingya population 2016-2017	November 2019 (since 09/10/16)
13	Afghanistan	February 2003	2006(PM)	15	-War crimes -C.against humanity.	Armed conflict in Afgh and crimes committed by Taliban, ANSF, ANP, CIA, US armed forces**	March 2020 (since 01/05/03)
14	PalestineII	January 2015	January 2015(SR)	12/3	-War crimes	Attack by israeli armed in palestine	March 2021 (since 13/06/14)
<p><b>Key</b>*LRA= the lord's resistance army . *NA= the national authorities . **ANSF=afghan national security forces. **ANP=afghan national police. **CIA=central intelligence agency.</p>							

It is worth mentioning that the Prosecutor has completed the cases of Nigeria and Ukraine, which witnessed crimes against humanity and war crimes, and issued on 11 December 2020 the decision to initiate the investigation, the same for the case of the Philippines. On 14 June 2021, a decision was issued to initiate an investigation of crimes against humanity waiting for permission from the Pre-Trial Chamber. Preliminary examinations have been ongoing in Colombia since June 2004. As for the situation in Darfur, it is the first referred by the United Nations Security Council to the International Criminal Court and the first investigation of the Court on the territory of a country that is not a party to the Rome Statute<sup>1</sup>.

**Second - Preliminary examinations completed without investigation:**

There are five cases that were dealt with by the Prosecutor Office until 31/07/2021, in which it started preliminary examinations that ended with its closure for institutional legal reasons<sup>2</sup> and we will enumerate these cases according to the following table:

**Table 2- Preliminary examinations completed without investigation.**

<sup>1</sup> - Note: Any country that has ratified the Rome Statute before its entry into force, The validity of that begins from 01/07/2002 or after, according to the case.

<sup>2</sup> - ICC. Preliminary examinations. [En ligne] <https://www.icc-cpi.int/pages/pe.aspx>(accessed 12/07/2021).



N	Situation	Ratified the Rome statute	Preliminary examination opened	Legal basis	Conditions not satisfied				Closed	
					Pre-conditions to jurisdiction	Jurisdiction	Admissibility			Interests of justice
							Complementarity	Gravity		
01	Honduras	01/09/2002	18/11/2010	15		▲				28/10/2015
02	South Korea	13/11/2002	06/12/2010	15		▲				23/07/2014
03	Comoros	01/11/2006	14/05/2013	12/2				▲		29/11/2017
04	Iraq/UK	Iraq is not a state party	13/05/2014	15				▲		09/12/2020
05	Gabon	01/07/2002	29/09/2016	12/3		▲				21/09/2018

These are the cases that the Public Prosecutor was subjected to by opening the preliminary examinations, which eventually led to a decision not to conduct the investigation, due to the lack of a reasonable basis for conviction by the Prosecutor. However, the possibility of reviving the preliminary examinations remains available under Articles 15/5-6 and 53/4 whenever new information becomes available, such as the case of Palestine where it was closed and then reopened so that an investigation was finally reached in this regard, and the Pre-Trial Chamber granted permission on 03/03/2021 after new information became available unlike the case of Iraq / Britain, which ended in closure for the second time.

## 2.2. Criticisms of the Prosecutor’s Work During Preliminary Examinations:

The conduct of the preliminary examinations by the Prosecutor has not escaped numerous criticisms, both by researchers, organizations and even by states, through several aspects :

### First - the deadlines for the preliminary examinations:

- Failure to set the statute for specific deadlines for the initial examinations stage, which is evident in some cases where the period is longer and sometimes unreasonable, such as the situation in Afghanistan<sup>1</sup> and Colombia<sup>2</sup>.

<sup>1</sup> - Afghanistan’s Situation under investigation, ICC,online:<https://www.icc-cpi.int/afghanistan> (12/07/2021).

<sup>2</sup> - Colombia’s situation under Preliminary-exam , ICC, online:<https://www.icc-cpi.int/colombia> (12/07/2021).



-The existence of open deadlines makes the preliminary examinations a means of monitoring the internal environment of countries and may constitute a tool of pressure and a threat to them<sup>1</sup>.

- Failure to set deadlines for the completion of preliminary examinations would lead to prolonging procedures, which might deviate the Public Prosecutor Office from its legal path, thus threatening the principle of effectiveness and affecting the credibility of the court.

-The existence of cases referred by states in which the Public Prosecutor Office took a long time during the pre-investigation stage, despite the fact that the means of cooperation between the referring state and the court are available, not to mention the absence of a request for permission to conduct the investigation.

-The procedure prolonging time would expose witnesses and evidence to perdition, and this means a loss of their rights and thus lead to a loss of confidence in the fairness of the court.

### **Second - Divisions of preliminary examinations:**

- The Public Prosecutor Office's placement of the four stages within the pre-investigation stage has met with a widespread criticism, some considering it as a means of prolonging time and others considering the preliminary examinations stage as a creation by the Prosecutor that does not have a legal framework of its own<sup>2</sup>.

-The sequence established by the Public Prosecutor Office during the preliminary examinations stage lacks flexibility, this is in case the prosecutor finds it difficult to find a solution to a stage such as jurisdiction, for example, this will prevent him from moving to the next stage and then returning to it.

**Third - the discretionary power of the Prosecutor :-**Most of the cases and information received by the Public Prosecutor's Office are rejected as a result of the abuse of discretionary power exercised by the Public Prosecutor, thus threatening human rights<sup>3</sup>.

-The limited scope of judicial review compared to the discretionary power enjoyed by the Prosecutor during preliminary examinations<sup>4</sup>.

-During the initial examination stage, the prosecutor evaded oversight and rejected what he wanted from the cases.

-This authority has procedural consequences, as Rule 105 of the Rules of Procedure and Evidence obliges the Prosecutor to inform the referring State or the Security Council in case if he decides not to initiate an investigation, as well as the Pre-Trial Chamber if he bases his

<sup>1</sup> - Amoulgam, AZE Kerté. op.Cit. p. 197.

<sup>2</sup> - Ibid. p. 197.

<sup>3</sup> - Carsten, Stahn. Damned If You Do, Damned If You Don't: Challenges and Critiques of ICC Preliminary Examinations . 2017. Available at SSRN: <http://dx.doi.org/10.2139/ssrn.2945466>.

<sup>4</sup> - Ibid. p. 14.





decision on the interests of justice. Here, the problem arises in the absence of notification, the possibility of evaluation by the Pre-Trial Chamber becomes absent<sup>1</sup>.

### **Conclusion:**

The practical practice of the Public Prosecutor Office resulted in a procedural revolution in the preliminary examinations through diligence in issuing the political paper of 2013 and subsequent reports, in addition to dividing this stage into four sub-stages in order to create greater organization and control, taking into account the three foundations of independence, integrity and objectivity to enhance confidence in the office, despite that we are still seeing problems related to delays in completing preliminary examinations and controversial decisions.

The Public Prosecutor, with all the powers that he enjoys, is in fact between a rock and a hard place, as the notable problems and criticism he faces are due to a lack of human and material resources and the difficult situation in some areas experiencing tensions and conflicts, in addition to the pressures he is exposed to, which have reached the point of issuing threats publicly and sanctions against the Prosecutor, "Fatou Bensouda" by the US Trump administration. Therefore, his success in his mission related to the preliminary examinations requires the introduction of amendments to the Rome Statute and the pattern of selecting the judges of the International Criminal Court, provided that they are highly qualified in the field. It depends on expanding the circle of cooperation of the international community with it so that the Public Prosecutor Office can speed up the pace of work and move from one case to another in a reasonable time, and in order to guarantee the rights of victims and confront criminals.

**-Recommendations:** Through our study and analysis of the present topic, we reached the following set of recommendations:

-Determining the duration of the preliminary examinations at three years for stabilized cases, and continuing to work with the open deadlines for cases experiencing instability.

-Adjusting the terminology more precisely as the term the interests of justice and not leaving it to rubbery interpretations.

-Encouraging international cooperation with the International Criminal Court and expanding the number of its adherents, while reminding that the Court is a mechanism for redress and addressing criminals and very serious crimes and not as a means of revenge.

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