

States That Did Not Pass the Preliminary Examinations of the OTP

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Abstract—The referred situation of a State passing all the required criteria for a preliminary examination happens when the Office of the Prosecutor (OTP) of the ICC comes to a safe assumption and conclusion that there is a reasonable belief that crimes under the jurisdiction of the Rome Statute have been committed and that the situation is likely be admissible before the Court. Whilst, the process of a preliminary examination of a particular situation may take a few months; at other times it can take several years. Although, many may perceive preliminary examinations to be a political stall, it would seem that the OTP does actually have problems gaining the cooperation of some of the State governments that have their situations being examined by the ICC. This paper would look into the framework of preliminary examinations as carried out by the OTP according to the provisions of the Rome Statute; the expectations required from the States that are being examined and then have them juxtaposed with the decision of the OTP on the situations of Republic of Korea (South Korea), Registered Vessels Of Comoros, Greece And Cambodia; and Palestine.

Keywords— Office of the Prosecutor, International Criminal Court, Rome Statute, Preliminary Examinations, Comoros, Republic of Korea, Palestine

I. INTRODUCTION

It is very easy for a preliminary examination to be mistaken as an investigation but a preliminary examination is actually the activities of the Office of the Prosecutor (OTP) carried out to determine whether a situation, brought to the attention of the OTP, meets the legal criteria as provided by the Rome Statute to instigate an investigation by the International Criminal Court (ICC). It is just a process of determining whether a full-blown investigation would be a waste of time and resources of the OTP or not. If a country passes the preliminary examination, it is then that an investigation may be commenced by the OTP. [1]

The Preliminary Examination Activities Report of 2014 has two countries that have just recently been dropped from the responsibility of the Office of the Prosecutor. The Prosecutor has come to the safe assumption and conclusion that it would not be reasonable for its office to commence on

an investigation for the situations as referred of the Union of Comoros and the Republic of South Korea. Earlier in another Preliminary Examination Activities Report, the preliminary examination process into the situation of the State of Palestine was concluded with the decision of the OTP to not commence with investigations as well. [2] [3]

The preliminary examination of a situation is the process of determining whether the OTP can move ahead to start an investigation. Preliminary examinations may go on for years depending on the availability of evidence and the cooperation of the States involved. [4]

The Prosecutor would commence on a preliminary investigation by her own initiation with the aid of information received from individuals or groups, intergovernmental or non-governmental organisations. The second type of initiation or referral is the referral from a State Party and the third type is the one made by the United Nations Security Council. The fourth type of initiation or referral is a declaration made according to the provisions of Article 12(3) of the Rome Statute by a non-member State accepting the jurisdiction of the Court. [5], [4]

Once a situation is thus identified, Article 53(1) (a)-(c) of the Rome Statute establishes the legal framework for a preliminary examination. In order to determine whether there is a reasonable basis to proceed with an investigation into the situation the Prosecutor shall consider: jurisdiction (temporal, either territorial or personal, and material); admissibility (complementarity and gravity); and the interests of justice. [2], [5].

Article 53 provides that in deciding whether to initiate an investigation, 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;*

(b) *The case is or would be admissible under article 17; and*

(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.*

It is from this Article 53 of the Rome Statute that the OTP decides on which State has passed the preliminary examination and which State hasn't before commencing on a full investigation.

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II. STAGES OF PRELIMINARY EXAMINATIONS

In a quick summary, the OTP looks into 3 major factors to determine whether a State has passed a preliminary examination or not. If the OTP is satisfied that all the criteria have successfully been met, then it commences on a full investigation. The 3 factors are the jurisdiction, admissibility and the interests of justice. [5]

Jurisdiction, which is the first hurdle, has 3 subsets. The first type of jurisdiction looked into is called temporal jurisdiction. Temporal jurisdiction is concerned with when ICC's jurisdiction can commence and also to measure the timeframe of the conflict that falls within the Court's jurisdiction in a particular situation and this is done by checking the date of ratification of a State Party or the date of entry into force for an acceding State or the date specified in a Security Council referral or the date of when a declaration was lodged by a non-member State pursuant to Article 12(3)). [5]

The second type of jurisdiction to be explored is the territorial or personal jurisdiction. It entails determining whether a crime has been or is being committed on the territory or by a national of a State Party or a State not Party that has lodged a declaration accepting the jurisdiction of the Court, or in the case of a situation that arises from a non-Party State who is referred by the Security Council. [2], [5]

The third type of jurisdiction is the material jurisdiction, which looks into the type of crimes committed as stated in the referral or communication as received by the OTP. For this type of jurisdiction, the OTP would determine whether the referred crimes fall under the crimes recognized by the Rome Statute, which include the crime of genocide; crimes against humanity; war crimes and aggression pursuant to Article 5 of the Rome Statute. [5], [6]

The second factor or hurdle is admissibility and it is divided into two subsets, which are complementarity and gravity. The Rome Statute did not give a specific definition of complementarity but its meaning can be deduced from its provisions. Essentially, it means that the court may assume jurisdiction only when national legal systems are unable or unwilling to exercise jurisdiction. It is concerned with whether a national court is already prosecuting a situation or not. If a national proceeding is going on; then the ICC would not have jurisdiction and in most cases the prosecutor would as a result of a genuine national proceeding discontinue with a preliminary examinations. In the words of Keller et al, "*the principle of complementarity operates to ensure that ICC jurisdiction may be exercised only when a state party is either unable or unwilling to prosecute crimes domestically. The key question with regard to complementarity is whether there are any ongoing national investigations.*"[7]

When looking into the gravity criterion, the following are considered (a) the scale of the crimes (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). [1], [5], [6], [8]

The interests of justice criterion is such an encompassing criterion because it can invalidate all the earlier criteria and their subsets even if a situation fulfilled all the earlier mentioned criteria plus the interest of justice can only be analyzed if all the other subsets under jurisdiction and admissibility have been met. The OTP in its Policy Paper provided that "*the concept of the interests of justice should not be perceived to embrace all issues related to peace and security... (but that) "In light of the mandate of the Office and the object and purpose of the Statute, 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.*" [5]

It can be assumed from the above statement that the interests of justice criteria is concerned with efforts that are being made by the national authorities to reconcile the conflict through peace process and other amnesty-related agreements; and the opinion of the victims regarding a peace process but with a caveat that interests of justice should not be perceived to embrace all issues related to peace and security. In the long run, it is left to the discretion of the Prosecutor and the Pre-Trial Chamber to determine if investigating a situation would be against the interests of justice.

III. PALESTINE

In January 2009, the Palestine National Authority (PNA) made a declaration under article 12(3) of the Rome Statute asking the ICC to take jurisdiction over their situation. [9]

The first order of clarification was presented by PNA with regards to whether Palestine qualifies as a State for the purposes of the provisions of article 12(3). The OTP as a result allowed the presentation of oral and written arguments made by representatives of PNA, Arab League Secretariat and some other NGOs to determine whether ICC had jurisdiction. The OTP also organised a bi-Annual Roundtable in October 2010 to listen to further discussions as presented by experts and various stake holders. [10], [11], [12]

The preliminary examination as earlier mentioned has specific steps that are carried out by the OTP as stipulated in the provisions of the Rome Statute. The first step that is considered by the OTP is whether the ICC has jurisdiction. [5]

When the OTP is determining whether ICC has jurisdiction, it would normally not bother itself with whether a situation happened in a sovereign State or not but the situation in Palestine makes an interesting case and an exception in the determining of ICC's jurisdiction. The provisions of Rome Statute did not bestow upon the OTP the power of determining

whether an entity is a State or not. By virtue of Article 125 of the Rome statute, the Rome Statute is open to accession to all States but the instrument of accession has to be deposited with the Secretary-General of the United Nations. This is to determine whether the applicant is a State or not since the United Nations does not recognise some governments as sovereign States.[10]

The first person that has the onus of determining what a State embodies is the UN Secretary-General. When the UN Secretary-General is unsure, he seeks the guidance and relies on the directives of the UN General Assembly. By virtue of Article 112(2)(g) of the Rome Statute, the Assembly of State Parties of the Rome Statute can also decide on the meaning of a State. [10]

What becomes unclear is whether the Assembly of State Parties to the Rome Statute can determine by themselves that Palestine is a State without having any recourse to the decisions of the UN Secretary-General or the UN General Assembly.

In the OTP Preliminary Examinations Activities Report of 2013, the OTP stated that they do not have any authority to define a State. Nonetheless, the OTP observed that though over 130 governments recognise Palestine as a State and UN bodies such as UNESCO also gave this recognition; the lack of the cooperation from the United Nation at that time was basically what tied the hands of the OTP from commencing on a full investigation. [10]

To rectify this problem, in September 2011, Palestine had submitted an application for admission into the United Nations as a Member State in accordance with Article 4(2) of the United Nations Charter. In April 2012, while Palestine's application was still pending, the OTP decided to close the preliminary examination of the situation in Palestine. The OTP came to the conclusion that its Office could not continue with the preliminary examinations because it had not been determined whether Palestine is a State or not and that the ICC needed to have its dealings with a State in the exercise of their jurisdiction over crimes committed in any region. [10]

As a result of the Palestine's application of September 2011 to become a member State; in November 2012, the UN General Assembly adopted a Resolution (67/19) to accord to Palestine a "non-member observer State" status. The only other "non-member observer State" is the Holy See (Vatican City). As at the time Palestine made a declaration in 2009 accepting the jurisdiction of ICC, it was an observer entity. The OTP observed that with this new status, Palestine can make a new declaration to become a member of the Rome Statute. Interestingly, the OTP however contended that the alleged crimes committed pursuant to the 2009 declaration do not fall under the jurisdiction of the ICC because as at that time Palestine had the "observer entity" status. [13]

In September 2014, the Prosecutor of the ICC released a statement contending that only Palestine or the UN Security Council can trigger the court's jurisdiction for Palestinian situation but this is not entirely conclusive as the Prosecutor of

the ICC also has the power to initiate a preliminary examination. It was not until after two years following its newly acquired status of 'non-member observer State' that Palestine decided to make a fresh declaration. Different sources had it that some countries had threatened to stop giving Palestine aid if they accepted ICC's jurisdiction. [7]

So, the Government of the State of Palestine made a declaration on the 31st of December 2014 accepting the jurisdiction of the Court starting from June 2014 and the OTP has since commenced on a fresh preliminary examinations. [18]

IV. REPUBLIC OF KOREA

South Korea or Republic of Korea ratified the Rome Statute in November 2002. Since the ending of 2010, the OTP had been receiving communications with regards to the bombing of an area in the republic of Korea called the Yeonpyeong Island and this bombing was said to have been carried out by the North Korean armed forces. The OTP subsequently as a result of these communications commenced on a Preliminary Examination in December 2010. [9] [3]

The bombing of the Yeonpyeong Island brought about the death of four people and caused injury to another 66 people. Apart from this incident, the OTP is also looking into a warship owned by South Korea that was sunk by North Korea or Democratic Republic of Korea, which brought about the death of 46 persons. The OTP has been seeking additional information from North Korean and South Korea in relation to the incident but the North Korean Government has been slow in responding and in giving assistance to the OTP. Ever since the Korean War ended in 1953, and there was a division into North and South Korea, the two countries were under the obligation to respect the Northern Limit Line which was restated in The Basic Agreement between South and North Korea in 1991 and a Protocol to the Agreement in 1992. [3] [10]

North Korea denied sinking the South Korean warship and in relation to this warship called Cheonan, the OTP gave the decision that it was not a war crime to attack military objects or to cause the death of enemy military forces. With regards to the bombing of the Yeonpyeong Island, the OTP came to the conclusion that the killing of the South Korean Marines did not involve a war crime as well but that because two civilians also died, their death may come under the war crime of intentional targeting of civilian persons or excessive incidental death, injury or damage to civilian persons and objects. These crimes can be found in Articles 8(2) (b) (i), 8 (2) (b) (ii) and 8 (2) (b) (iv) of the Rome Statute respectively. [10]

Citing an ICTY case, the Prosecutor v. Tadic, [14] OTP contended that an armed conflict is said to exist when the armed forces of two different countries or more are plunged into violence. As a result, the OTP came to the conclusion that the conflict between South and North Korea is an international armed conflict.[9], [10]

The OTP in its 2014 report, however, gave a broader analysis of the situation in South Korea and stated in its analysis thus:

“...while the DPRK could have anticipated a likely civilian impact from its attack, it does not appear that a reasonably well informed person in the circumstances of the actual perpetrator would have expected such civilian impact to be very high. The civilian population on the island (1,361) was concentrated in one area near the island’s main port; this population does not appear to have been the intended object of the attack . . . The size of the island and its civilian areas meant that many of the shells that missed their targets would fall in uninhabited areas of the island or in the surrounding waters (rather than on civilian areas) – in fact, of the 230 shells fired, 50 landed in the surrounding waters and approximately 30 fell on civilian objects.” [2]

As a result, the OTP concluded that from the evidence they had gathered, the Government of South Korea was unable to prove that North Korea was intentionally and specifically targeting civilian population and civilian objects and as result of this lack of substantial evidence, the OTP decided to close the preliminary examinations into the situation. [2]

V. THE REGISTERED VESSELS OF COMOROS, GREECE AND CAMBODIA

Since January 2009, Israel established a naval blockage and this blockage was imposed in order to restrict the flow of food and travel into Gaza. A movement called the Free Gaza Movement was put together to break down the blockage. Subsequently, the Free Gaza Movement acquired an eight-boat flotilla, which comprised of 700 passengers from approximately 40 countries. This flotilla was put together with the intention of delivering aid to Gaza. [10]

The OTP received a referral in May 2013 from the government of the Union of Comoros. This referral stated that in May 2010, Israel troops stopped a humanitarian aid flotilla that was going to Gaza. That flotilla was made up eight vessels and three of them were registered to State parties. So, ordinarily the ICC should have jurisdiction over the crimes committed on the three vessels, which were registered to Comoros, Cambodia and Greece. The Prosecutor contended that the ICC can exercise jurisdiction over the conduct of the citizens of non-party States such as Israel if it can be found that they committed crimes on the territory, vessels or air crafts registered to the State party. [10], [15]

The OTP, however, later found that *“it does not appear that the conduct of the IDF during the flotilla incident was committed as part of widespread or systematic attack, or constituted in itself a widespread or systematic attack, directed against a civilian population.”* [2] As a result of this finding, the OTP decided that there was no reasonable basis to believe that crimes against humanity under Article 7 of the Statute were committed within the referred situation.

The OTP further contended in paragraphs 263 & 264 of the 2014 Report on Preliminary Examinations Activities that:

“The parameters of the Office’s assessment were determined by the limited scope of the situation referred, namely a confined series of events that occurred primarily on 31 May 2010. By virtue of article 12(2)(a) of the Statute, the Court’s territorial jurisdiction was further limited to events occurring on three vessels in the flotilla and did not extend to any events that occurred after passengers were taken off those vessels. As such, the potential case(s) that could be pursued is inherently limited to an event encompassing a small number of victims of the alleged ICC crimes, with limited countervailing qualitative considerations. Although the interception of the flotilla took place in the context of the Israel-Hamas conflict, the Court does not have jurisdiction over other alleged crimes committed in this context, nor in the broader context of any conflict between Israel and Palestine. While the situation with regard to the civilian population in Gaza is a matter of international concern, this issue must be distinguished from the present assessment, which is limited to evaluating the gravity of the alleged crimes committed by Israeli forces on board the vessels over which the Court has jurisdiction during the interception of the flotilla.” [2]

As a result of the aforementioned reason of the situation not having such gravity required to commence on an investigation, the OTP came to the conclusion that flotilla incident is a case that is not likely to justify further action by the ICC because ordinarily, ICC would only proceed to prosecute war crimes that were committed as part of a plan or policy or as part of a large-scale commission of such crimes [16] and in the case of crimes against humanity; only when such crimes against humanity were acts committed intentionally as part of a widespread or systematic attack directed against any civilian population. [17]

VI. CONCLUSION

The criteria of jurisdiction, admissibility and interests of justice were created to ensure the safeguard of the rule of law and to ensure that the ICC does not unnecessarily trample upon the sovereignty of any given State.

The situation of Palestine did not pass the preliminary examinations that was triggered by it in its 2009 Declaration because at that time, it only had an “observer entity” status but soon its status got upgraded to a “non-member observer State” and as a result, the new declaration made in December 2014 is now being examined by the OTP starting from January 2015. The Palestinian situation is the first referral where the OTP had to determine whether its Office could investigate a referral coming from a situation that occurred in a region that is not recognized by the UN as a sovereign State. From the decision of the OTP, it is clear that the ICC would not investigate a situation coming from an “observer entity” no matter how grave the crimes being committed were.

The decision of the OTP not to continue with preliminary examinations with the situations of South Korea and Comoros shows that gravity is such an important component of every crime committed and if the crimes committed are not of a widespread attack spreading across a reasonable amount of time or part of a plan or policy with a large scale commission

or acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group; then the OTP would close such a preliminary examination and refuse to open a full investigation.

Another thing that this decision of the OTP shows is that the gravity criteria actually rears its head from the jurisdiction stage (subject matter jurisdiction) and every State or entity making a referral has to determine by itself beforehand whether the situation that is being referred actually has the type of gravity expected of any of such crimes in accordance to the provisions of the Rome Statute.

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