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PROCEDURAL DISCRETION OF THE PROSECUTOR IN THE INTERNATIONAL CRIMINAL COURT AS A POSSIBLE OBSTACLE FOR THE EXERCISING OF RIGHT TO ACCESS TO JUSTICE

On 17 July 1998, the international community reached an historic milestone when 120 States adopted the Rome Statute, the legal basis for establishing the permanent International Criminal Court (hereinafter – the ICC or the Court). The Rome Statute entered into force on 1 July 2002 after ratification by 60 countries [1, p. 1]. The ICC is the first permanent, treaty-based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of international concern [2, p. 1]. As to its organizational structure, the ICC is composed of four organs: the Presidency, the Chambers, the Office of the Prosecutor and the Registry.

Article 42 of the Rome Statute provides for the Office of the Prosecutor as a separate organ of the ICC [3]. The Prosecutor operates in personal and substantive independence of both the Court and States Parties to the ICC Statute [4, p. 517].

Before an investigation can begin, the Office of the Prosecutor conducts a preliminary examination to decide whether there is enough information on crimes of sufficient gravity, providing a reasonable basis to open an investigation [5]. A preliminary examination of a situation may be initiated at the request of a State Party to the Rome Statute, or at the request of the United Nations Security Council acting under Chapter VII of the United Nations Charter, or by the Prosecutor *proprio motu*. It means that alleged victims of crimes or non-governmental organizations acting on their behalf have no right to refer a case to a Court, but the Prosecutor may make use of the information and allegations they might submit as ‘relevant information received from reliable source’ [6, p. 407]. Consequently, for alleged victims the right of the Prosecutor to initiate the inquiry *proprio motu* is the only mechanism to seek protection and justice for the harm they have suffered by the commission of an international crime.

Article 53 (1) of the Rome Statute provides that in the mentioned cases the Prosecutor shall commence the investigation unless he or she concludes that there is no reasonable basis to do so [4, p. 523]. No reasonable basis exists if, at this point, (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 inadmissible, 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 [3].

A decision of the Prosecutor not to proceed is essentially a discretionary decision that needs to balance interests and to prioritize the overall limited resources of time and personnel. The Statute allocates this power to both the Prosecutor and the

Pre-Trial Chamber. It should be noticed that the Pre-Trial Chambers, each of which is composed of either 1 or 3 judges, resolve all issues which arise before the trial phase begins. Their role is essentially to supervise how the Office of the Prosecutor carries out its investigatory and prosecutorial activities and to guarantee the rights of suspects, victims and witnesses during the investigatory phase [2, p. 10].

Under article 53 (3) (a) at the request of the State making a referral under article 14 or the Security Council under article 13, paragraph (b), the Pre-Trial Chamber may review a decision of the Prosecutor under paragraph 1 or 2 not to proceed and may request the Prosecutor to reconsider that decision. And article 53 (3) (b) gives the Pre-Trial Chamber the possibility to review, on its own initiative, a decision of the Prosecutor not to proceed if it is based solely on paragraph 1 (c) or 2 (c) [3].

The following conclusions can be made on the basis of the mentioned provisions: firstly, any review of the Prosecutor's decision not to commence or not to proceed with an investigation because of lack of substantial basis, lack of jurisdiction or inadmissibility can take place only at the request of the State making a referral or the United Nations Security Council, but not by the initiative of the Pre-Trial Chamber; secondly, if the inquiry is initiated *proprio motu* by the Prosecutor, the Pre-Trial Chamber need to authorize the commencement of the investigation, but if, after the preliminary examination, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information (article 15 (6) of the Rome Statute). Therefore, if a preliminary examination of a situation is initiated at the request of a State Party to the Rome Statute or the United Nations Security Council, these subjects are entitled to submit a request to the Pre-Trial Chamber in order to make the latter to review a decision of the Prosecutor not to proceed with an investigation. But if a preliminary examination is initiated by the Prosecutor *proprio motu*, similar decision of the Prosecutor can be neither reviewed, nor appealed and it is not subject to a judicial control of the ICC Chambers. It means that alleged victims or other persons concerned relying on the procedural independence of the Prosecutor with regard to initiating of a proceeding has no legal mechanism to appeal the Prosecutor's decision not to proceed with an investigation, which creates an obstacle for further progress of the case and, as a result, for the protection of their rights directly before the Court.

Moreover, according to the provisions of article 53 (1) (a) of the Rome Statute, one of the grounds not to proceed with an investigation is the lack of reasonable basis to believe that a crime within the jurisdiction of the Court. There are four limits of international criminal jurisdiction: subject-matter (*ratione materiae*), personal (*ratione personae*), temporal (*ratione temporis*) and territorial (*ratione loci*) jurisdiction. They play important role during preliminary examination, which is divided into four phases. Each phase leads to the submission of a report from the Office of the Prosecutor to the Prosecutor, who is entitled to decide whether the information available provides a reasonable basis for an investigation.

According to paragraphs 5-6 of the ICC Policy Paper on Preliminary Examinations, during a stage of preliminary examination the Prosecutor shall consider: jurisdiction (temporal, material, and either territorial or personal jurisdiction); admissibility (complementarity and gravity); and the interests of

justice [7, p. 2]. Jurisdiction relates to whether a crime within the jurisdiction of the Court has been, or is being, committed.

Under paragraph 39 of the ICC Policy Paper, for the purpose of assessing subject-matter jurisdiction, the Office considers, on the basis of available information, the relevant underlying facts and factors relating to the crimes that appear to fall within the jurisdiction of the Court; contextual circumstances; alleged perpetrators, including the *de jure* and *de facto* role of the individual, group or institution and their link with the alleged crimes, and the mental element, to the extent discernable at this stage [7, p. 9-10]. For instance, in Report on Preliminary Examination Activities (2015) concerning situation in Honduras it is stated that the Office could not find a reasonable basis to believe that the alleged acts were committed as part of an «attack directed against a civilian population» under article 7(1) of the Statute. Therefore, the Office does not consider that such acts amount to crimes against humanity under the Statute and will not assess the other contextual elements of crimes against humanity. Accordingly, the Prosecutor lacks a reasonable basis to proceed with an investigation and has decided to close this preliminary examination (paragraph 279, 289). Based on the mentioned, the logical question should be raised with regards to the relevance of the Prosecutor's decision on the commission of alleged crimes taking into account the facts that the prosecutor is a non-judicial organ and that this decision is made not collectively by the Office but by one prosecutor alone.

Summarizing all the mentioned, I would like to conclude that mechanism of preliminary examination and its closure should be reviewed either by envisaging the possibility to appeal the Prosecutor's decision not to proceed with an investigation if a proceedings was initiated by him or her *proprio motu* or by reducing the prosecutorial discretion to decide on the matters of material jurisdiction, which should be an exclusive mandate of judicial organs.

References:

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