Abstract

This article aims to highlight on the most important successive phases at the preliminary examination stage (hereinafter "PS") which is part of the International Criminal Court's action (hereinafter "ICC") in the course of establishing the standard of proof of "reasonable basis to proceed" required under the Rome Statute to make a determination whether a situation warrants an investigation. We will rely on what have been revealed by the OTP's prosecutorial strategy and its policy documents, and the previous judicial precedents of the ICC.

Keywords: Preliminary examination stage, Reasonable basis to proceed, Initial review, Jurisdiction examination, Admissibility examination, Interests of justice, Reasonable grounds

Introduction

The preliminary examination is a stage that must be played out by the prosecutor in order to decide whether there is "a reasonable basis" to proceed with an investigation or is not. Also, it's the first stage in the ICC's proceedings taken in all situations whenever the prosecutor receives one of the following:

1. a referral from a State Party or the Security Council; or
2. information on crimes obtained pursuant to article (15), or
3. a referral by a state that lodged a declaration pursuant to article (12.3) of the Statute accepting the exercise of jurisdiction by the Court (1).

So, when observing in between the lines of the Rome statute, one can find that the drafters of the Rome statute established consecutive various phases that would be fulfilled under articles (15), 53 (1)(a-c) of the Rome Statute, and rule (48) of the ICC Rules of Procedure and Evidence, in order to determine whether a situation meets the evidentiary threshold of reasonable basis to proceed with an investigation at the preliminary examination stage (2).

The policy of these consecutive phases is consistent with the purpose of the statute which is definitely the prevention of serious crimes of concern to the international community through ending impunity. In addition, the procedural practice of the OTP has indicated that to establish the threshold of reasonable basis to proceed with an investigation at the preliminary examination stage, there must be consecutively different steps to make a determination as to whether there is, or is not, a reasonable basis to proceed with an investigation (3).

My paper will establish the definition of the word reasonable basis and show the various phases that shape or establish the statutory threshold that must be met to trigger the powers of the Prosecutor to proceed with an investigation regarding a situation received, taking into account the most important nuances between each phase. Also, it will shed the light on two terms used in the Rome Statute, "reasonable basis" and "reasonable grounds to believe", each of which is different in meaning and purpose.

FIRST: The Meaning of Reasonable Basis to Proceed:

The "reasonable basis" threshold is found in Articles 15(3) and 53(1) of the statute. It has been defined by the Pre-Trial Chamber into the situation in the Republic of Kenya that "the requisite standard of proof of 'reasonable basis' at the preliminary examination stage is of "a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court 'has been or is being committed'" (4)."

In other words, before the OPT brought any criminal charges against any suspect, the prosecutor must possess enough facts or evidence that would lead a reasonable person to believe that the situation meets the criteria established in the Rome Statute to proceed or to initiate further investigations in the relevant situation.

Also, for the Prosecutor to satisfy the standard of proof set out in articles 15(3), and 53(1) of the statute at the Preliminary examination stage, he or she may seek to gather facts or evidence such as information from States, organs of the united nations, intergovernmental or nongovernmental organizations, or other reliable sources that he or she deems appropriate, documentary evidence, and may receive written or oral testimony if available at this stage (5).

Although this is the lower standard of proof in the Rome Statute, the standard has special importance. Situations received by the OTP may be constituted by hundreds of accidents or facts. Thus, the OTP needs to examine all communications or referrals to prepare them for choosing
the cases and suspects that may be prosecuted before the court in the future proceedings.

SECOND: How can Reasonable Basis to Proceed be Satisfied?

Procedural practice of the OTP and judicial documents of the ICC give a clue to the answer to the above-mentioned question. Judicial documents demonstrate that in order to establish the threshold of reasonable basis at the PS, the OTP must satisfy the factors set out in article 53(1). Also, the procedural practice of the OTP detects that the process at this stage, "the PS", consists of four consecutive phases. The first phase of these four phases is the initial review - followed by the prosecutor for a certain purpose -, and the other three phases are the factors provided for in article 53(1), (a) jurisdiction examination, (b) admissibility examination and (c) the interest of justice examination. I will explain these integrated phases in both procedural practice of the OTP and judicial documents of the ICC.

First Phase: Initial Review Phase.

When the prosecutor receives a communication, information, or a referral with regard to alleged crimes that may fall within the jurisdiction of the court, he or she needs to test and verify the information received to identify its nature. Also, OTP documents show very clearly that for analyzing the communications and information that may be sent to the court, the prosecutor at the start of the assessment of the situation steps an initial review to determine whether the situation received warrants further analysis.

Therefore, it should be noted that, at this phase -the Initial Review Phase- the prosecutor has only communication(s) or a referral, and there is a need to go further more to ascertain that the information is suitable and appropriate for examination.

So, when the prosecutor receives any communication, information, or referral, he or she must do the following: (a) evaluate and identify the information made available to him or her on the basis of information on potential crimes within the jurisdiction of the court, (b) analyze the seriousness of information received, and (c) filter out information on crimes that are outside the jurisdiction of the Court (6). This Initial process, therefore, is meant to prepare the relevant situation to test the factors set out in article 53(1) (a)-(c) and to prevent the court from pursuing frivolous proceedings or cases.

Second Phase: Jurisdiction Examination Phase.

In all situations, the Prosecutor or the Court should test whether the information, communications, or referrals received provide "a reasonable basis to believe that a crime falls within the jurisdiction of the court [and] has been or is being committed (7)."

Further, It is worth asking "what are the jurisdictional requisites under the statute that must be taken in order to be concluded that there is a reasonable basis to believe that the crime fall within the jurisdiction of the court?". In other words, "what are the main steps at the preliminary examination stage that must be satisfied in order to establish the threshold of reasonable basis to proceed concerning the jurisdictional test?".

The Pre-Trial Chamber of the ICC answered this question in the case of "the situation in the Republic of Kenya". It ruled that "the Chamber considers that for a crime to fall within the jurisdiction of the Court, it has to satisfy the following conditions:"

1. it must fall within the type of crimes pointed out in article 5 and defined in articles 6, 7, and 8 of the Statute (jurisdiction ratiocini materiæ);
2. it must meet the temporal requirements referred to in article 11 of the Statute (jurisdiction ratiocine temporalis), (Date of entry into force of the Statute, namely 1 July 2002 onwards, date of entry into force for an adhering State, date identified in a Security Council referral, or in a declaration lodged pursuant to article 12 (3)); and
3. it must meet one of the two alternative requirements as found in article 12 of the Statute (jurisdiction ratiocini loci or ratiocini personæ). This requirement entails that: (a) the crime occurs on the territory of a State Party to the Statute, or (b) the crime takes place on the territory of a state which has lodged a declaration as a result of article 12(3) of the Statute, or (c) the crime has been or is being perpetrated by a national of any such State (8).

Thus, reaching a determination that there is a "reasonable basis to proceed" in respect to the jurisdiction requirements provided for in article 53(1)(a) of the Statute, requires a many-sided initial examination consisting of three different facets: (1) subject-matter jurisdiction, (2) jurisdiction over persons, or territorial jurisdiction, and lastly (3) temporal jurisdiction (9).

Third Phase: Admissibility Examination Phase.

If we look to the Pre-Trial Chamber II (PTC) decision pursuant to article (15) of the Rome Statute on the authorization of an investigation into the situation in the Republic of Kenya, the PTC emphasized that "such an examination must be distinguished from that of jurisdiction (10)." Also, Article (53)(1)(b) of the Rome Statute shows that the admissibility of a situation test comes after the jurisdiction phase.

In this regard, the prosecutor must conduct an initial admissibility examination in order to show whether the "Evidentiary Threshold of Reasonable Basis" is met for the sake of initiation an investigation. Also, jurisprudence demonstrates that "an analysis of admissibility during the article (53.1) stage should in principle be related to admissibility of a situation, not to admissibility of a certain case."

Furthermore, in order to achieve the evidentiary threshold of reasonable basis at the situation phase, admissibility
should be assessed taking into account the following requirements:

1. evaluate or consider two legal requirements: (a) the principle of complementarity (article 17(1)(a)-(c) of the statute); and (b) the gravity threshold (article 17(1)(d) of the statute) (11).

2. conduct an assessment containing certain legal parameters to define a "potential case". These parameters include that the prosecutor must submit the following: (a) a list of groups of suspects involved; and (b) the category of crimes that may fall within the jurisdiction of the court (12).

These parameters are preliminary in nature, and may change at a later stage depending on the development of investigation.

Thus, in this Phase - admissibility of a situation phase - the analysis of the admissibility threshold must be fulfilled, but it is not necessary that at the stage of the preliminary examination to be done with regard to a concrete case.

Rather, the admissibility test should be assessed against the backdrop of a potential case that would arise from investigating the situation, along with the principle of complementarity and gravity threshold, for the purpose of establishing the evidentiary threshold of "reasonable basis to proceed" with an investigation (13).

- **Complementarity Test during the Preliminary Examination:**

  The principle of complementarity grants the power and competence to a subsidiary body when the main body fails or deliberately neglects to exercise its primary jurisdiction (14).

  The complementarity test mainly entails that there must be an examination of the existence or absence of relevant national proceedings regarding the groups of persons and the crimes allegedly committed during the incidents, both are likely to be the object of the OTP's investigations (15).

  The existence of relevant national proceedings entails either that (1) there are ongoing investigations or prosecutions by a State which has jurisdiction over it, or (2) there have been investigations in the past, and the State having jurisdiction has decided not to prosecute the person concerned, or (3) the concerned persons have been brought to justice by their original states.

  Either case requires an assessment of the unwillingness and inability on the part of the relevant State(s) having jurisdiction, to make a determination as to whether or not the case is admissible (16) (17).

  In the context of the absence of national proceedings or inaction by the relevant state, there is no need, therefore, to look at the question of unwillingness and inability on the part of a State having jurisdiction. So, if the OTP reveals that the relevant State is not investigating or prosecuting, or has not done so, the case would be admissible before the court (18).

- **Gravity Threshold Test under Article 17(1)(d) during the Preliminary Examination Phase:**

  The ICC Statute indicates that the second requirement it must be considered with regard to the admissibility assessment within the context of a situation under article 53(1)(b) of the Statute is not only an examination regarding the existence or absence of national proceedings, but also one which involves gravity (19).

  To this end, article 17(1)(c) of the Statute states, "[...] the Court shall determine that a case is inadmissible where: [...] (d) the case is not of sufficient gravity to justify further action by the Court."

  Therefore, in light of determining whether the case is, or is not of sufficient gravity to justify further action by the Court, the Prosecutor may consider the following:

  1. Consider the threshold of gravity in light of the potential case(s) that would likely arise from an investigation of the situation (20).

  2. Consider the facets set out in regulation 29(2) of the Regulations of the Office of the Prosecutor including the scale, nature, manner of commission of the crimes, and their impact. Also, evaluate both quantitative and qualitative considerations concerning the gravity of the crimes allegedly committed in the situation (21).

**Fourth phase: Interests of justice Examination Phase.**

Article 53(1)(c) of the Statute provides that the final requirement examined by the Prosecutor is whether "taking into account the gravity of the crime and the interests of victim, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."

Furthermore, the OTP documents reveals that the tests of jurisdiction and admissibility are positive requirements that must be satisfied by the prosecutor, while the interests of justice is clearly different and optional (22). In other words, when conducting the preliminary examination stage, the prosecutor does not have conclude -in examining the situation- that the investigation is in the interests of justice. But, jurisdiction and admissibility examinations should be satisfied in order to initiate the investigation.

Also, the Statute does not require the prosecutor to present reasons or supporting materials to demonstrate that pursuing the situation is in the interests of justice.

A conclusion that pursuing an investigation would not be in the interests of justice is subject to a review by the Pre Trial Chamber, and the prosecutor must support his or her conclusion with evidence or other supporting materials showing that there are substantial reasons to believe that an investigation would not be in the interests of justice. Therefore, if the PTC refuses to accept that the situation is not in the interests of justice, then an investigation would be opened and proceeded (23).

*So, after presenting the most important steps to decide whether or not there is a reasonable basis to proceed,*
The "interests of justice" test needs only be viewed where there are positive determinations that have been made on both jurisdiction and admissibility. Moreover, the ICC Statute indicates that the evidentiary threshold required to determine that the investigation would not serve the interests of justice is different from that required in the jurisdiction and admissibility test. Each one of the latter needs only an evidentiary threshold of reasonable basis to proceed with an investigation, but substantial reasons should be met in order to convince the Pre-Trial Chamber that the investigation would not serve the interests of justice. So, the prosecutor -at the interests of justice phase- shall support the court with sufficient evidence to establish substantial reasons to believe that the investigation would not serve the interests of justice.

In addition, the OTP documents shows that the interests of justice phase is "exceptional in its nature" and the prosecutor will clearly "in extraordinary circumstances conclude that the investigation would not serve the interests of justice" (25).

**Procedural Nuance Between Referrals and the Prosecutor's own initiative at the preliminary examination stage.**

If we look at articles (15) and (53.1) of the Rome Statute, we will notice that there are some procedural differences between "the initiation of an investigation proprio motu by the prosecutor dictated by articles (13.3) and (15) (hereinafter 'communications'"), and the initiation of an investigation upon a referral of a situation dictated by articles (13.1, 13.2, and 12.3) (hereinafter 'referrals').

When a communication is received by the prosecutor, he or she shall not seek to initiate an investigation unless he or she first concludes that there is a reasonable basis to proceed. If the prosecutor wants "proprio motu" to commence an investigation, he or she shall -after concluding that there is a reasonable basis submit to the Pre-Trial Chamber a request for authorization of an investigation "proprio motu authority subject to approval by the Pre-Trial Chamber (26).

On the other hand, if a referral is received by the prosecutor, Article (53.1) requires that he or she shall initiate an investigation unless he or she determines that there is no reasonable basis to proceed under the Statute. This means that the prosecutor initiates the investigation. If he or she concludes that there is a reasonable basis to proceed, this affirmative determination does not subject to the Pre-Trial Chamber's Review. However, if he or she determines that there is no reasonable basis to proceed, the Pre-Trial Chamber shall review his or her determination not to proceed(27).

Regardless of the procedural differences between referrals and communications, it is important to bear in mind that at the Preliminary examination stage, the test is the same whether it is a referral or a communication. Thus, the prosecutor endeavors to satisfy the requirements of this early stage which is a reasonable basis to proceed whenever a situation is received(28) (29).

**Reasonable Basis to believe vs. Reasonable grounds to believe:**

when looking deeply at the Rome statute, one can observe that the closest standard of proof to the word "reasonable basis" set out in articles 53(l)(a), 15(3), and rule 48 of the Rules, is "reasonable grounds" which is the evidentiary threshold required at the arrest of warrant stage set out in article 58(1)(a) of the Statute.

The reasonable basis standard is devoted only to the preliminary examination stage, and it has a different goal from that required at the warrant of arrest stage. The main purpose of this lower standard -reasonable basis - "which is to prevent the Court from proceeding with unwarranted, frivolous, or politically motivated investigations that could have a negative effect on its credibility" (30).

In contrast, the evidentiary threshold of "reasonable grounds to believe" is wider than the reasonable basis standard in both purpose and object. In this regard, the "reasonable grounds" standard is required to prove the criminal responsibility of an individual, which is not the purpose of the reasonable basis threshold at the preliminary examination stage (31)(32).

Moreover, the powers of the prosecutor at the preliminary stage are not as wide in scope as his or her powers at the warrant of arrest stage. This means that, in order to be able to require a warrant of arrest from the court, the prosecutor must provide evidence and supporting materials other than those that are already existed at the preliminary examination stage.

So, in evaluating each standard of proof relied on-by the court- in different stages of the ICC’s trails concerning these two different thresholds - "reasonable basis", and "reasonable grounds" - the evidence used for proof in each stage must change whether concerning the number of evidences or even regarding their value in proof "the Probative Value" (33).

At the preliminary stage, only supporting materials are required to determine whether the relevant situation deserves further investigation and inquiry. On the other hand, at the warrant of arrest stage, the prosecutor must extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate...
incriminating and exonerating circumstances equally (34) (35).

Finally, the prosecutor or the court may decide one of the following at the preliminary examination stage:

1. Initiate an investigation, to gather evidence and legal facts to issue a warrant of arrest against a specific individual;

2. Close the investigation for lack of evidence that would lead to believe that there is no reasonable basis to proceed with an investigation.

The latter can be reviewed if the prosecutor or the court receives another communication that would lead it to re-instate the investigation(35).

References.

2. Policy paper on Preliminary Examination, Issued by the OTP in November 2013, at Paras. 1, 5, and 12.
4. Ibid, at Paras. 34, and 35.
6. Update on Communications Received by the Office of the Prosecutor of the ICC, 10 February 2006, at Page. 2.
11. Ibid, at Paras. 52, and 55.
16. Article 17(1)(a)-(c) of the Rome Statute.
20. Ibid, at Para. 58.
23. See, Article 35, paragraph 1 (c) of the Rome Statute.
27. Ibid, at Para. 1 (A).
29. See also, articles 13 (a, b, c), 14, 15, 53 of the Rome Statute and Rule 48 of the ICC Rules of Procedure and Evidence.
33. Ibid, Page. 1.