The Legal Framework and the criteria of the Preliminary Examination of the cases raised before the International Criminal Court

- A descriptive analytic study –

الإطار القانوني والمعياري لإجراءات الفحص المبدئي للدعاوى القضائية المتداولة أمام للمحكمة الجنائية الدولية

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Abstract :

Preliminary examinations are an essential part of the procedures followed before the International Criminal Court, which are undertaken by the Office of the Prosecutor, that has an independence ,for filtering out crimes and selecting the most dangerous to deter it's perpetrators and Consecrate international criminal justice. however, is subject to a specific framework of the Rome Statute by Initiation of an investigation . this article frames the action of the Prosecutor from the opening of an investigation by establishing a number of criteria , which allows the Prosecutor to refuse to open an investigation even if most criteria are present. It therefore constitutes the bastion of the discretionary power of the Prosecutor, For the sake of justice and away from any aligning, despite the pressures he is exposed to, which calls for the concerted international community in supporting the work of the Court.

Key words : Preliminary examination- International Criminal justice .

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Introduction

The Permanent International Criminal Court (ICC) (or the Court) is an important entity in the world that came after the experience of temporary courts and many attempts through the interaction of the international community to establish it in order to address the most serious crimes. It includes several offices, most notably the Office of the Prosecutor(or OTP)which conducts many activities, including preliminary examination, one of its strongest main activities, besides investigation and prosecution, as a pre-investigation stage; it is a preliminary filtering process carried out by the Prosecutor through his wielding awesome power (proprio-motu power), based on the referral of a case from a state party as mentioned in the treaty of Rome; based on a referral by the United Nations Security Councillor by a declaration made by a Non-party State to the system in order to determine whether there is a reasonable basis for proceeding an investigation taking into account the criteria set out by the Rome Statute [(1)].

The term preliminary examination was used once in the Rome Statute under Article 15/6 related to the automatic referral of the Prosecutor, which works in conjunction with Article 53, so there was not enough information about it and its importance was not widely appreciated. Even scientific research focused on investigation and trials, while actual practice has proven the value of preliminary examinations in being the most likely stage to deter international crimes and raise sensitive issues that reach the extent of overlapping law and policy. For this reason, the Prosecutor's Office has attached great importance to them by dividing them into organizational sub-stages and issued in 2013 the general document of the policy on preliminary examinations including clarifications that can be used, in addition to the development of jurisprudence in this regard, which aims to remove confusion and ambiguity on some issues, In light of the reluctance of some countries to join the Court as a result of their fear of the Prosecutor's abuse of his powers This prompts us to ask the question about the extent to which the Public Prosecutor is able to expand his discretionary authority to initiate or refuse preliminary examinations?

Through this study, we will shed light on the preliminary examinations as practiced by the Prosecutor. We will deal with the subject in two sections; the first includes the legal nature of the office of the Prosecutor conduct regarding preliminary examinations, and the second deals with the criteria adopted during the preliminary examination.

The preliminary examinations are subject to legal rules set by the statute of the court and related laws which should be respected by the prosecutor and take into account the availability of the necessary conditions for conducting them.

Firstly: The Legal Nature of the OTP Conduct Regarding Preliminary Examinations

The Office of the Prosecutor at the International Criminal Court has the discretion to conduct preliminary examinations whenever it receives information or reports from the commission of crimes within the jurisdiction of the Court (2), to determine whether there is a reasonable basis to proceed a preliminary investigation or not. The situation is different when the referral is made by a State Party to the Rome Statute or by the United Nations Security Council, where it is required to conduct preliminary examinations.

1. The Prosecutor's Authority to initiate Preliminary Examinations

The issue of granting the Prosecutor the proprio-motu power to open preliminary investigations raised sharp controversies during the Rome Conference (3), because the project proposed by the International Law Commission of the United Nations, which included this power, was between support and opposition. It was supported by states as well as non-governmental organizations and the academic world for two reasons: the first of which is weakening the authority of the Security Council, and the second is the protection of human rights (4). At the same time, it has been opposed by some States, such as the United States of America and Russia (5), under the pretext of fearing that the Prosecutor will abuse his powers and use them as a weapon against for the sovereignty of States as a result of his politicization or his imprudence(6) .

Negotiations eventually resulted in granting the Prosecutor the proprio-motu power to initiate preliminary examinations, based on what he receives of information regarding crimes (7), without the need to wait for a referral from the Security Council or from the State Party to the Rome Statute, in order to strengthen the foundations of justice and encourage judicial initiatives, not limited to.

Accordingly, the Rome Statute gave the Prosecutor the proprio-motu power to initiate investigations and established, in this regard, a legal framework regulating he exercise in accordance with the provisions of Articles 15 and 53 thereof (8), which denote complete freedom to initiate or end investigations or decline them whenever he receives information about committed crimes, whether from countries, governmental and non-governmental organizations, individuals, or received through various media outlets, as the provisions of Article 15 (9) did not specify the sources of information, but left them as examples, including but not limited to.

It is worth to say that the Prosecutor has resorted to using his proprio-motu power to open investigations, including the cases of Kenya in 2010 (10), Côte d'Ivoire in 2011 (11) and Georgia in 2015 (12). It should be noted that this prerogative of the Office of the Prosecutor is subject to certain rules and standards that guarantee the effectiveness of the Court's work. In addition to its right to conduct preliminary

examinations on its own initiative, the statute of the court empowered other parties to refer cases to it concerning the most serious crimes (13) .

2. Obligation to Adhere to Preliminary Examinations

Article 13/a and b, as well as Article 14/1, gave the Security Council and the States Parties to the Rome statute the possibility of referring to the Prosecutor a case in which it appears that one or more crimes identified under this statute have been committed. However, the difference between these referrals about the Prosecutor's initiative is that the latter is obliged to make preliminary examinations immediately upon receipt of the case pursuant to the provisions of Article 53/2 which states: " The Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article 13, paragraph (b), of his or her conclusion and the reasons for the conclusion." (14) It is understood by means of a contrario reasoning that the Prosecutor is required to carry out preliminary examinations whenever he receives referrals from the Security Council or from a State Party about committing a related crime and to take a decision regarding it, either by initiating the investigation or not needing to do so, according to the conclusion reached regarding the existence of a reasonable basis for prosecution.

Nevertheless, if the Prosecutor is obligated to conduct preliminary examinations in accordance with this context, he retains some freedom to lead the conduct of preliminary investigations such as requesting additional information or expanding the scope of the examination in terms of time, place and persons as needed (15).

It should be noted that the notifications from a Non-Party State to the Office of the Prosecutor pursuant to Article 12/3 do not give them the same degree that the States Parties enjoy, as they do not automatically lead to the opening of the investigation, but rather these notifications take the nature of the information provided to the Prosecutor to act on his own initiative towards them regarding conducting preliminary examinations (16).

In summary of the above, the Prosecutor, despite being empowered with proprio-motu power, in fact he preferred to work more on referrals received from the Security Council and the States Parties (17). Regardless of the type of referral, it does not represent an obligation on the Prosecutor to initiate criminal proceedings, but rather it is to inform the Prosecutor of a situation to conduct preliminary examinations based on the case and its source, in accordance with the criteria set out by the Statute of the International Criminal Court(18) .

Secondly: The Criteria Adopted During the Preliminary Examination

The Prosecutor shall, during the preliminary examination and with reference to the received information, ensure that there is a reasonable basis to proceed the investigation. In this regard, Article 53/1 of Rome statute (19), Rules 48 and 104 in

roles of procedure and evidence [20] and Clause 29 of OTP regulations [21] have regulated the conditions necessary for the admissibility of the case in the light of the rules of jurisdiction and admissibility. The matter does not stop there, but he rather must ensure that the investigation serves the interests of justice [22].

1. Adherence to the Jurisdiction and Admissibility Rules:

Upon receiving a case, either by referral or by intervening under its own proprio-motu power, the Office of the Prosecutor considers two important elements of the Court's jurisdiction in the case in question, as well as the rules of complementarity and gravity.

1.1. The Legal Jurisdiction:

The judges are very interested in the question of jurisdiction for its value and this relates to whether the crime falls within the jurisdiction of the International Criminal Court, whether it has been or is being committed [23]. The Statute of the Court has organized provisions related to jurisdiction pursuant to Article 53/1-(a) [24] as a basic rule for the Prosecutor to begin with during the course of preliminary examinations, to determine that there is a reasonable basis to believe that the crime falls within the jurisdiction of the Court before making the decision to initiate an investigation [25].

The annual report issued by the Office of the Prosecutor for the year 2020 [26] confirmed that the rule of jurisdiction is limited to four aspects, including temporal jurisdiction [27], substantive jurisdiction, territorial jurisdiction and personal jurisdiction ,Article 12/2-3- [28].

1.1.1. Temporal jurisdiction:

The demand that the entry into force of the court's jurisdiction over crimes takes place after the entry into force of the Rome Statute, that is, after July 1st, 2002, thus enforcing the principle of non-retroactivity of laws. As for the states that acceded later, its jurisdiction over these states is exercised after 60 days have passed from the date of ratification pursuant to the provisions of Article 126 [29]. Otherwise, the jurisdiction is established after referral by the Security Council or based on the declaration issued by the Non-party state.

1.1.2. Substantive jurisdiction:

The jurisdiction of the International Criminal Court is limited to the crimes listed in the Rome Statute and contained exclusively in Article 5 to include the crime of genocide, crimes against humanity, war crimes and the crime of aggression [30].

1.1.3. Territorial jurisdiction:

The International Criminal Court has jurisdiction over crimes that were committed on the territory of the State Party or the state making the declaration,

regardless of the nationality of the offender, according to Article 12/2 and 12/3 (31). This includes ships and aircrafts as well. As for crimes committed in international waters and the Antarctic continent or against the common heritage of humanity, the jurisdiction of the court is determined based on the nationality of the offender(32) .

1.1.4. Personal jurisdiction:

It means the perpetration of the criminal act by a subject of the State Party or the state making the declaration, pursuant to Article 12/2 and 12/3 (33).

This is true in cases where the Prosecutor takes the personal initiative to conduct the preliminary examinations at his discretion, or where the referral is from the State party, since the referral made by the Security Council may include Non-Party States to the Rome Statute.

By applying the rules of jurisdiction in practice, we find an example of the case of Georgia, which committed war crimes and crimes against humanity in the territory of South Ossetia between the period from July 01 to October 10th, 2008, knowing that Georgia ratified the treaty at first on September 5th, 2003 and that the South Ossetian region is affiliated to it and does not enjoy full sovereignty (34). In this regard, the Office of the Prosecutor used its proprio-motu power to open a preliminary examination on its own on August 14th, 2008 (35) especially since the available information in its hands affirm the existence of temporal, substantive and territorial jurisdiction, and contributed to the judge's conviction that there was a reasonable basis to initiate the investigation.

The Pre-Trial Chamber expanded its jurisprudence regarding the issue of jurisdiction. In the case of Bangladesh and Myanmar, the Prosecutor requested on July 4th, 2019 to open an investigation of the crimes and violations committed against the Rohingya minority since October 9th 2016, especially the large-scale displacement and violence by the government of Myanmar, which did not ratify the Rome Statute. Despite this, the judges of the Pre-Trial Chamber opted for the jurisdiction of the Court on the grounds that the crimes are cross-border and that Bangladesh, which is a party to the Rome Statute, was greatly affected by this crisis. Thus, we find that the application of some provisions of the Statute may affect Non-party states when the effects of the crime extend to the territory of a State Party (36).

It should be noted that the wave of closing the preliminary examinations without reaching a decision to open the investigation affected several cases, including South Korea in 2014 (37), Honduras in 2015 (38) and Gabon in 2018 (39).

Needless to say, the jurisdiction of the International Criminal Court could be suspended if the Security Council, under Chapter VII of the United Nations Charter, used its powers by deferring the commencement of an investigation in accordance with Article 16 (40).

1.2. The Admissibility Criterion:

After completing the jurisdiction assessment and pursuant to the provisions of Articles 17/1 and 53/1 of the Court Statute, the Prosecutor shall move to evaluate the admissibility criterion with its two elements, complementarity and gravity .

1.2.1. The Complementarity Element:

This principle has been stipulated in the preamble of the Rome Statute and Articles 1 and 17 thereof, from which it is concluded that the International Criminal Justice is complementary to the National proceeding according to certain conditions. In other words, the exercise of jurisdiction is ordinarily for the benefit of the National proceedings and is exceptionally conveyed to the International Criminal Court when the Internal Judicial System is unable or has no serious desire (41) to investigate and prosecute crimes that fall within the jurisdiction of the Court, as they both work in a complementary manner in order to address impunity and deter criminals. The principle of complementarity is an essential point in the Statute.

The mechanism by which this principle operates is based on the respect for the sovereignty of states, given that the exercise of jurisdiction is a form of sovereignty. Therefore, priority has been given to the national judicial systems to detain the perpetrators of the most serious crimes affecting the international community, although the reality has resulted in cases where the States Parties called for the intervention of the International Court, such as Congo, Uganda, and Central Africa (42). Consequently, we find that the government has willingly waived its jurisdiction in favour of the International Criminal Court.

The Court may intervene as a result of the inaction of the concerned government, which is witnessed in the case of South Ossetia, where the Georgian government was mandated to investigate in 2014 about crimes against humanity and war crimes committed against the territory of South Ossetia between the first of July and the tenth of November 2008. The judges of the International Criminal Court noted the apparent delay in completing the investigation procedures by the Georgian government, which prompted them to give permission to the Court's Prosecutor to conduct investigations (43).

The judges of the Pre-Trial Chamber expanded the concept of the principle of complementarity in the case of Saif Al-Islam Gaddafi. As the latter benefited from the 2015 Amnesty Law issued by the Government of Libya; based on this, he argued that the case brought against him by the Criminal Court regarding crimes within its jurisdiction was inadmissible, which was rejected by the judges of the Court, who concluded in their decision that the amnesty issued pursuant to 2015/6 law does not apply to Saif al-Islam al-Gaddafi, as amnesty decisions for crimes against humanity do not comply with internationally recognized human rights standards (44).

Accordingly, the purpose of the principle of complementarity is to encourage states to exercise their jurisdiction in the application of International Criminal Law, especially since the Prosecutor has embraced the principle of positive complementarity; in his view, the preliminary examination is not just a prelude to an investigation, but rather a stimulus to the national proceedings as well (45). To succeed in this regard, the International Criminal Court must enjoy credibility, legitimacy and impartiality in its judicial processes [(46)] .

1.2.2. The Element of Gravity:

It is the second element of the admissibility criterion as stated in the fourth preambular paragraph and Articles 1, 5 and 17/1 of the Rome Statute. It about the most serious crimes that have devastating effects on humanity. According to Article 104/1 [(47)], in order to determine the admissibility of a case before the Court, the Prosecutor shall, under the provisions of Article 53/1 [(48)], justify the gravity and seriousness of the case in the light of the information available, so that to decide whether or not it meets the criterion of gravity, because a case that is of an insufficient degree of seriousness is inadmissible[(49)] .

The jurisprudence of the Pre-Trial Chamber in its assessment of the element of gravity in the case of Georgia concluded that considering the crimes in terms of quantity, type, nature and their impact on the victims of South Ossetia from the use of brutal means, the killing of 51 to 113 people, the destruction of 500 homes and the displacement of 13,400 to 18,500 person; all this reflects the gravity of the crime and makes the case admissible for examination (50).

The Office of the Prosecutor has established auxiliary indicators to assess the level of gravity, given four criteria combined to include: - The degree of the crime (in view of the number of victims and the physical and psychological damage).

- The nature of the crime (the type of crime such as murder, rape, persecution).

- The behaviour that constitutes the crime (the method by which it was carried out, such as planning and methodology).

- The impact of the crime (human, social and economic damages resulting from it [(51)].

The authors of the Statute attributed the reason for limiting the crimes to the most serious of them alone to not burdening the Court, because this costs time as well as human and material resources that would deviate the work of the Court from the endeavour for which it was founded. Therefore, the Prosecutor resorted to the element of gravity to exclude some cases that the national proceedings may adjudicate[(52)] .

As a result, the Comoros case against Israel (53) and the case of Iraq against Britain (54)were rejected on the grounds that the element of gravity did not rise to the level that would make the case fall within the jurisdiction of the Court.

Based on the foregoing, a case will not be accepted before the International Criminal Court unless it meets the threshold of gravity required in accordance with the approved criteria based on two basic approaches that focus on the crimes themselves and the victims on the one hand, and on the roles of the suspects on the other (55).

2. Taking into Consideration the Interests of Justice:

They represent the most complex point in the Rome Treaty and are stipulated in Article 53/1-c of the Rome Statute. After evaluating jurisdiction and admissibility during the preliminary examination stage, the Prosecutor shall assess the criterion of interests of justice. It shall be noted that it is understood from the content of Article 53/1 (56) that the availability of the two preceding elements, constituting thus the Prosecutor's conviction that there is a reasonable basis, will open the way for permission to investigate the case, unless it turns out that there are substantial reasons indicating that this would not serve the interests of justice. Although the idea was referred to in the Rome Statute and the guidance papers issued by the International Criminal Court, the term had an elastic nature that prevented the definition of a precise concept. Therefore, the prosecutor evaluates the interests of justice, taking into account the gravity of the crime, the interests of the victims, the age and status of the offender to whom the criminal act is attributed and his role in the crime (57).

It shall be noted that there have been several attempts to gradually establish a definition of the interests of justice through jurisprudence efforts. In the Georgia case, the Prosecutor concluded that opening an investigation into war crimes and crimes against humanity committed in the territory of South Ossetia by the Georgian government does not contradict with the interests of justice in view of the number of victims, their interests and the incidence and seriousness of the crime. The judges of the Pre-Trial Chamber supported the Prosecutor's position as they did not see substantial or exceptional reasons to believe that an investigation would not serve the interests of justice (58).

However, in the case of Afghanistan, the Pre-Trial Chamber initially refused to grant permission to the Prosecutor to begin the investigation, despite the fact that the number of victims reached approximately 699 Afghans. Their decision was based on the fact that the time elapsed between the alleged crime and the request during the preliminary examination stage from 2005 to 2015 is considered as a long period, which reduces the opportunity and the probability of continued availability of relevant evidence, suspects and witnesses, in addition to the failure to make any request to preserve evidence, not to mention that the conditions in Afghanistan,

punctuated by political instability, make the prospects for the success of the investigation very limited and will result in a lack of justice for the victims and their aspirations and create hostility towards the Court and its credibility; and this contradicts with the interests of justice [(59)] .

Subsequently, Professor **Kai Ambos** criticized the decision taken by the Pre-Trial Chamber, which based its refusal on the interests of justice, regardless of the gravity of the crime and the interests of the victims, as this reveals a problematic decision-making [(60)], noting that the Prosecutor, through his actual practice, did not refuse to initiate the investigation based on the criterion of the interests of justice, but rather focused on the element of admissibility [(61).]

To summarize, specifically pursuant to Article 53/1 [(62),] the Prosecutor shall consider questions of jurisdiction, admissibility and interests of justice when deciding to initiate an investigation by independently evaluating and analysing all available information, considering all reports and opinions conveyed to him, including any observation by the Competent National Authorities concerning any relevant investigation and prosecution at the national level [(63)].

Conclusion:

Preliminary examinations are one of the general policy tools of the OTP, as it is the first step of many steps that must be taken before an accused appears in the court, and it is the gate to investigation. Although they lack clarity, they are legally complicated and politically controversial despite attempts to fill the gap gradually through the jurisprudence reflected in the procedural aspects of conducting preliminary examinations to a large extent.

In view of the large number of cases received by the Prosecutor, he succeeded in the cases of Kenya, Cote d'Ivoire, Georgia, Afghanistan and Palestine to pass the preliminary examination stage and has been an investigation opened for justice despite the threats that he receives, his selections is limited to those related to international crimes and it is necessary to respect the standards adopted during the preliminary examinations and the oversight exercised by the Pre-Trial Chamber on the basis of independence, impartiality and objectivity in order to gain the trust of the international community to expand cooperation and ensure that impunity for criminals is addressed .

Recommendations:

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

- Prevent any country from using individual sanctions against the ICC for self-interest and obstruction of justice.

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

-Encouraging international cooperation with the International Criminal Court and enhance the independence of the Prosecutor's Office.

Margins:

[1] **ICC.** *The Rome Statute of the international criminal court.* the Hague : s.n., 2011.

[2] Statute of Rome, Article 5 of the Rome Statute defines crimes within the jurisdiction of the Court, as it stipulates: "...a- the crime of genocide. b- crimes against humanity. c- war crimes. d- the crime of aggression." -Statute of Rome of the Internation.

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[5] The United States and Russia are not States Parties to the Rome Statute of the International Criminal Court.

[6] **ELAHRAMI, AMRE YAHIA.** *The case before the International Criminal Court "A comparative study between the International Criminal Court and national law.* s.l. : Center for Arab Studies for Publishing and Distribution, 2019. p. 235.

[7] **ICC.** *the Rome Statute,Ibid, Art 15/1 & 2.* p. 11.

[8] **Ibid.** pp. 11-33.

[9] Ibid. p. 11.

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[13] Rome Statute, Ibid, Art 13b & 14. pp. p11-12 .

[14] Rome Statute, op.Cit. p. 11.

[15] **Amoulgam, AZE.** op Cit. p. 179.

[16] **Ibid.** p. 179.

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[19] Statute of Rome, op.Cit. p. 33.

[20] **ICC.** *Rules of Procedure and Evidence.* 2. s.l. : The International Criminal Court, 2013. pp. p 46,76.

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[24] Staute of Rome, op.Cit. p. 33.

[25] **ICC-OTP.** *Policy paper on case selection and prioritisation-para 26.* 15/09/2016.

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[27] The abrogation of Article 124 of the Rome Statute was adopted by the Assembly of States Parties at its fourteenth session in The Hague..

[28] Rome Statute, supra note 3. p. 11.

[29] Ibid. p. 77.

[30] Ibid. p. 3.

[31] Ibid . p. 10.

[32] **MAHMOUD, YOUCEF.** *Pre-trial phase in the international criminal case.* Egypt : National Center for Legal Publications, 2020. p. 37.

[33] Statute of Rome,op.Cit. p. 10.

[34] The territory of South Ossetia is non-membership of the United Nations and not recognized by the international community with the exception of Russia - R. Nollez-Goldbach, supra note10, at 3, para8..

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[48] Statute of Rome, op.Cit. p. 33.

[49] **ELAHRAMI, AMRE YAHIA.** Ibid. p. 88.

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[51] **ICC-OTP.** Policy Paper on Preliminary Examination, op.Cit. pp. 15-16.

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