PRIORITISATION OF SITUATIONS AND CASES UNDER THE INTERNATIONAL CRIMINAL COURT

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ABSTRACT

The main objective of the International Criminal Court is to end impunity for perpetrators of crimes concerning the international community as a whole. The temporal, personal, territorial and subject matter jurisdiction of the court lays out the mandate within which it can try situations and cases. As a single court which works on the concept of complementarity, it cannot pursue all situations. Therefore, selection and prioritization of situations becomes a necessary evil. The prosecutor enjoys discretion in selecting situations as well as cases within situations. Lack of transparency has led the Prosecutor to face criticism for his selection policy. The selection policy in the initial years centered on the African continent and high level perpetrators which was seen as biased by many. Since then the court has worked to improve its approach to selection by defining criteria and bringing in parameters which set guidelines for the same. An attempt has been made in this paper to analyse the 2016 guidelines on prioritization of cases by the prosecutor by bringing out the positives as well as the negatives of the policy.

Keywords: situation, case, prioritization, selection, sufficient gravity, gravity threshold, Prosecutor, interest of justice, impartiality, admissibility, jurisdiction.

INTRODUCTION

International Criminal Court is a permanent court unlike its predecessors. This means it is not an organ of the United Nations but rather is an independent institution having a working

relation with the United Nations. Rome Statute, which is a multilateral treaty, is the principal instrument that governs the International Criminal Court (ICC). The Office of the Prosecutor (OTP) is a separate and independent organ of the Court. OTP's mandate is to receive and analyse information on situations or alleged crimes within the jurisdiction of the International Criminal Court, to determine whether there is reasonable basis to initiate investigation. There are three ways in which the ICC's trigger mechanism works. The Prosecutor can receive a situation from a State who is party to the Rome Statute regarding one or more crimes falling within the jurisdiction of the court.[i] These are called state referrals and the crimes under the mandate of the court are genocide, crimes against humanity, war crimes and the crime of aggression.[ii] Apart from state referrals, initiation of investigation can be made at the request of the Security Council acting under chapter VII of the United Nations Charter.[iii] Apart from these two methods, the Prosecutor has been granted the power to initiate *proprio motu* investigations. This is one of the most treasured features of the Court as it gives the prosecutor the independence to select situations and cases to investigate. This provision infuses a lot of faith as well as responsibility on the OTP and truly brings out its independent character. Initiation of investigations by this mode can be done on the basis of information received regarding crimes falling within the jurisdiction of the court.[iv] As per the provisions of the Rome Statute, the Prosecutor needs to consider a few points. Firstly, reasonable basis should be provided by the information to believe the commission of a crime within ICC's jurisdiction.[v] Secondly, since the ICC follows the principle of complementarity, it is for the Prosecutor to consider whether issues of admissibility have been taken care of i.e. whether the case is being investigated or prosecuted by a state having jurisdiction over it.[vi] Thirdly, gravity of the crime and victims' interests are also to be considered.[vii] These provisions act as guiding principles for the Prosecutor in order to reach a decision with regards to opening preliminary investigation.

THE STAGES OF SITUATION AND CASE SELECTION AND FACTORS TO BE CONSIDERED

In order to start the entire process of prosecution, the court needs to select situation and cases. This is the primary aim of an investigation. The identification of potential situations and cases is a selective process because the OTP cannot prosecute all possible situations and also all possible cases within a situation. The biggest problem in selecting situations for preliminary examination is with regards to increasing number of situations and insufficient resources. More open situations allow for fewer cases within each situation, which results in reduced impact of the court in the situation country.[viii] Thus it becomes all the more important to choose the situation as well as its cases wisely in order to have the maximum impact.

The process of investigation involves selection at two stages- the first being the selection of situations, followed by the selection of cases in the selected situation. Situation selection is the process of ascertaining a certain period of time and place where the investigation will be conducted. Situation selection starts with either of the trigger mechanisms mentioned above i.e. a Security Council referral, a State Party referral or investigation *proprio motu*. Once a situation is selected, formal investigation begins. The opening of an investigation marks the conclusion of the situation selection process. This is the stage where the OTP narrows down on incidents and persons, i.e., cases. In this phase the Prosecutor chooses cases from the situation by identifying the suspected persons who have allegedly committed the crimes under the Court's jurisdiction.[ix] Thus the focus of this stage is on the most responsible persons and the nature of crimes committed by them.

OTP Regulation 33 states that the OTP shall collect information and evidence "in order to identify the most serious crimes committed within the situation."[x] In order to decide the admissibility of a situation, the prosecutor needs to make a decision on matters of complementarity as well as the issue of gravity. Complementarity refers to the concept of not opening an investigation in a situation if it is being investigated or prosecuted by a national jurisdiction, provided it is genuine. Thus the primary responsibility of bringing perpetrators to justice rests with the states, provided they do so genuinely without trying to shield the accused.

Another important aspect of admissibility is gravity of crimes. The word "gravity" has been used in many provisions of the Rome Statute. The Statute requires that the Court shall determine a case inadmissible where the case does not have sufficient gravity to justify further

action by the Court.[xi] The Rome Statute however does not define gravity nor does it provide any criteria to assess the same. What can be understood by reading Article 17 (1) (d) is that the degree of gravity required to justify the Court's further action is called the "gravity threshold". Therefore this concept plays an important role in the process of situation as well as case selection.[xii]

Assessment of gravity is made at both the stages i.e. selection of situation as well as cases. While making an assessment of gravity, the OTP's policy has been to analyse the scale, nature, manner of commission of the crimes, and their impact. This includes both quantitative and qualitative factors. Furthermore, the Prosecutor also takes into account policy-related factors while assessing the nature of the crimes, e.g. "sexual or gender-based crimes with reference to the policy paper on the same; crimes committed against children; crimes that result in the destruction of cultural property; and large scale environmental damage".[xiii]

DEGREE OF ASSESSMENT AT BOTH THE STAGES

OTP is required to make similar assessments on issue of gravity at both the stages of the process. However, assessments become more specific as investigations narrow down on cases. Also, the evidentiary threshold gradually rises, starting with the "reasonable basis to proceed" in Article 53(1) and leading to the "substantial grounds" for confirmation of charges in Article 61.

If we look at the past practice of the court, it will be noted that a dual gravity threshold has been formulated. A set of different criteria is used for assessing gravity of a case and that of a situation. While more importance is given to crimes and victim's perspective for ascertaining gravity of a case, suspect's rank or position has been taken into account while assessing gravity of a situation. This difference apparently relates to the difference in the stages of the two processes. Situation selection is the stage where the Prosecutor assesses the possibility of a case, and the required level of proof is relatively low because the Prosecutor is supposed to have only publicly available information at this stage. In contrast, the selection of a case is based on investigation and essentially leads to an actual arrest of the suspect. In comparison to

situation selection, case selection is more overtly selective. Because a number of cases could be identified within any given situation, prioritization becomes necessary. Lack of guidelines have led to prosecutorial discretion in selecting cases. However, the legal thresholds become higher. Because investigation results in charges against an individual, the OTP is required to present a case that is adequately supported by evidence. Therefore, the availability of evidence also plays greater role in the selection of cases.

ANALYSIS OF POLICY PAPER ON CASE SELECTION AND PRIORITISATION OF 2016

In the past, the OTP has been criticized for its lack of transparency in selecting cases. Much criticism was received by the African states for alleged bias of the prosecutor against them. With an aim to end the questions on it credibility and independence, in 2016, the OTP produced a Policy Paper on Case Selection and Prioritisation bringing out in clear terms the criteria for determining the selection of cases. The paper brings out the general principles as well as legal criteria that guides the OTP's selection of situations and cases. It goes further to provide a broad range of factual criteria for case selection and prioritisation.

POSITIVES OF THE DOCUMENT

A perusal of the policy brings out that case selection depends on the assessment of three parameters: the gravity of crimes, degree of responsibility of the alleged perpetrators and the charges. Amongst these, gravity is said to be the predominant criterion. Hence, case selection is focused on the factual analysis of the criminal incidents and the potential suspects. Prioritisation of cases also covers additional strategic and operational concerns, which focus on the feasibility of the potential investigations and prosecutions.[xiv] Few distinguished features of the paper which are of value are as follows:

1. ***Addition of a Case Selection Document***

The paper mentions the development of "case selection document" for the purposes of identifying potential cases. This document has to be based on the conclusions of preliminary examination. The office is required to develop provisional case hypotheses as the investigation progresses. The document shall be useful in selecting cases in a given situation as well as across situations. The office is also under obligation to update the document as per the availability of information and evidence.[xv]

The policy paper reiterates that case selection requires the application of a more focused test than the situation stage. Hence more importance has been given to case selection in the policy.

2. Focusing on the Gravity Criterion

As far as gravity criterion is concerned, the factors that guide the Office include both quantitative and qualitative considerations, relating to the scale, nature, manner of commission and impact of the crimes.

The factors on which scale of the crimes is to be assessed are "the number of direct and indirect victims, the extent of the damage caused by the crimes, in particular the bodily or psychological harm caused to the victims and their families, and their geographical or temporal spread".[xvi] Thus this parameter covers the largeness of the scale of the crime.

The nature of the crimes corresponds to the precise facts of each offence such as "killings, rapes, other sexual or gender-based crimes, crimes committed against or affecting children, persecution, or the imposition of conditions of life on a group calculated to bring about its destruction".[xvii] This point is self explanatory in terms of the kinds of crimes committed.

The assessment of the manner of commission of the crimes involves "the means employed to execute the crime, the extent to which the crimes were systematic or resulted from a plan or organised policy or otherwise resulted from the abuse of power or official capacity, the existence of elements of particular cruelty, including the vulnerability of the victims, any motives involving discrimination held by the direct perpetrators of the crimes, the use of rape and other sexual or gender-based violence or crimes committed by means of, or resulting in, the destruction of the environment or of protected objects".[xviii] The focus here is on the method

of crime commission which refers to the level of brutality or the organized system of committing the said crime.

The impact of the crimes has to be assessed with regards to "the increased vulnerability of victims, the terror subsequently instilled, or the social, economic and environmental damage inflicted on the affected communities."[xix] Thus the impact has to be studied by analyzing the total effect on the victims and their community.

3. Persons Most Responsible

The second aspect which requires review is the persons committing the said crimes. The Office is required to conduct its investigations and bring charges against those persons who appear to be the most responsible for the identified crimes. In the initial years, focus was only on the leaders or the high level perpetrators. However a change in the strategy is visible as the paper mentions that "most responsible" may involve mid to high level perpetrators. In certain cases, low level perpetrators may also be prosecuted where their conduct seems grave or notorious.[xx] This is a major improvement in the strategy considering the fact that prosecution of high level perpetrators has been very difficult in practice as they have been able to distance themselves from the crimes. This has been the reason for failure of various cases at the ICC.

4. With Regards to Charges

The office while framing charges has to consider "crimes that have been traditionally under-prosecuted, such as crimes against or affecting children as well as rape and other sexual and gender-based crimes".[xxi] ICC has been criticized for not bringing up charges that define the criminality in a given situation. Special focus on gender based or sexual offences in the policy proves that the prosecutor is keen on bringing charges that have been left out.

5. Prioritization Criteria and Acknowledgement of Constraints

The paper provides an in detail prirotisation criteria. For the first time, practical realities faced by the Office in its work are taken in to account such as the number of cases the Office can investigate and prosecute during a given period with the limited resources available to it. The addition of the practical aspect is a point of improvement in the policy of the prosecutor.

The strategic criteria include "the impact of investigations and prosecutions on the victims of the crimes and affected communities", "the impact of investigations and prosecutions on ongoing criminality and/or their contribution to the prevention of crimes". Apart from these, the paper also mentions certain "operational criteria" which can be used for deciding whether to prioritise a situation for investigation or not, such as "international cooperation and juridical assistance to support the Office's activities", "the Office's capacity to effectively conduct the necessary investigations within a reasonable period of time", and "the potential to secure the appearance of suspects before the Court".[xxii]

The Prosecutor's Policy Paper forthrightly acknowledges that the reality of its limited powers will sometimes shape the work of the Court. The document says that the Prosecutor will consider "the ability of the Office to pursue cases involving opposing parties to a conflict in parallel or on a sequential basis," the availability of evidence and the degree of cooperation, the resources of the office, security challenges faced by investigators and witnesses, and the likelihood of getting an accused to The Hague. Thus in clear terms the office acknowledges the constraints on its powers.[xxiii]

6. Expansion of Impact

The paper endorses a broadened conception of cooperation with national prosecutors. As mentioned earlier, the Court's jurisdiction is complementary to states. The first ICC Prosecutor, Luis Moreno Ocampo, devised the notion of positive complementarity, which meant that the ICC would actively look for ways to encourage state prosecutions. In this new Policy Paper, Fatou Bensouda has taken the idea one step further as she committed the Office to cooperating with state authorities even when they are pursuing non-atrocity crimes.[xxiv]

The paper mentions about "providing assistance to States, upon request, with respect to conduct which constitutes a serious crime under national law, such as the illegal exploitation of natural resources, arms trafficking, human trafficking, terrorism, financial crimes, land grabbing or the destruction of the environment."

The second way in which the Policy Paper seeks to increase the Court's impact is by expanding the gravity criteria. Policy says that the OTP "will give particular consideration to prosecuting

Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land." This provision does not create new crimes or announce a change in the types of crimes that the Office will prosecute. Rather, it expands the types of cases that the ICC will choose to prosecute within a given situation.[xxv]

NEGATIVES OF THE DOCUMENT

Though case selection has been described in detail, the policy remains silent on the issue of the selection of situations. Since identifying situations for investigation is a vital preface to case selection, it is important to have a clearer policy on how situations are selected. It is true that the Court has no control over situations referred to it by the United Nations Security Council or by states parties; however, by having the option to act *proprio motu*, the Prosecutor is able to contribute to the situations before the Court. It is therefore important for the Prosecutor to consider supplementing this policy paper with one that covers, at least, the selection of situations by the Prosecutor *proprio motu*.[xxvi]

One of the general principles listed in the OTP policy paper is 'impartiality'. In this regard, the OTP mentions that it will examine allegations against all groups or parties in a particular situation. However, the policy explains that the OTP will not seek to create an appearance of parity and also that impartiality does not mean 'equivalence of blame.'[xxvii]The policy states that cases will be selected when they meet the substantive selection criteria. However, beyond stating how it views impartiality, the OTP does not clearly answer the concerns raised about victors' justice and the OTP's practice to date. By doing this, the OTP misses on giving greater clarity on how its practice will reflect equitable justice that is not driven by 'the victor's justice.'[xxviii] This will be all the more crucial in state referrals as on one hand the cooperation and assistance of states would be required and on the other hand the objective of impartiality would press the prosecutor to bring cases not only against the rebellious factions but even the government forces.

CONCLUSION

After the analysis of the entire topic it becomes clear that though both the stages require the analysis of similar parameters, yet the level of assessment varies. Situation selection is the stage where the Prosecutor assesses the possibility of a case, and the required level of proof is relatively low. In contrast, the selection of a case is based on investigation and essentially leads to an actual arrest of the suspect. In comparison to situation selection, case selection is more overtly selective. The issue of lack of transparency in the criteria of selecting cases seems to have been solved by this policy paper as it sets out a detailed version of the factors to be considered. It clearly provides the standards by which the Prosecutor will select cases, manage priorities, and most importantly manage expectations and dispel notions of bias. However, it fails to bring out a clear policy with regards to selection of situations and therefore does little to address concerns about current operations. What is to be appreciated however is the expansion of impact that has been envisioned in this policy paper. Also acceptance of practical constraints and their implications has been another major achievement of this policy.

The policy is thus a broad framework that commits the Prosecutor to general guiding principles. Ultimately, as with all policies, the test is not just what the policy commits the Prosecutor and the office to doing, but rather *what* they do and *how*.

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