

# The *proprio motu* power of the ICC Prosecutor: the reason some states have refused to ratify the Rome Statute

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**Abstract**—Amongst various issues tabled by non-signatories or countries that haven't ratified the Rome Statute on their non-compliance is the power given to the prosecutor. Countries like Malaysia, India and the United States are still yet to ratify the Rome Statute. This paper seeks to outline the powers of the prosecutor with the intention of justifying these powers vis-à-vis comprehending the claims of countries that are member States of the United Nations but who are all yet to ratify the Rome statute.

**Keywords**—International Criminal Court, Prosecutor, Rome Statute, Proprio Motu

## I. INTRODUCTION

THE establishment of the International Criminal Court is one most important things that has happened in this century. By ratifying the Rome Statute (the treaty that created International Criminal Court) a State agrees that it has the duty to investigate and prosecute the crimes included in the Rome Statute, namely genocide, war crimes, crimes against humanity (and crime of aggression which will be activated by 2017). It also agrees that should it fail to do so, the ICC may open an investigation, if the situation fulfills all mandatory requirements. The Rome Statute gives the ICC jurisdiction over these crimes when states fail to act [1].

It is stated in the 6th paragraph of the preamble of the Rome Statute that it is the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes. This concept is called the principle of complementarity in the Rome statute, whereby it is mandatory on states to suppress crimes under the statute, whilst the Court would be called in only as a last option. Complementarity is a principle that represents the idea that States, rather than the International Criminal Court (ICC), will have priority in proceeding with cases within their jurisdiction [2]. This principle means that the Court will assist, but not supersede, national jurisdiction. National courts will continue to have priority in investigating and prosecuting crimes committed within their jurisdictions,

but the International Criminal Court will act when national courts are 'unable or unwilling' to perform their duties [3].

The United States of America have many legislations enacted reminding itself of the importance of protecting its citizens from being charged before the International Criminal Court. Just a month after the International Criminal Court (ICC) started its operations in July 2002, the US President signed the American Service Members' Protection Act (ASPA), which limits U.S. government support and assistance to the ICC. This Act also restricts certain military assistance to many countries that have ratified the Rome Statute establishing the ICC. It also regulates U.S. participation in United Nations (U.N.) peacekeeping missions and authorizes the President to use "all means necessary and appropriate to bring about the release" of certain U.S. and allied persons who may be detained or tried by the ICC [3]. This is all in the name of an independent prosecutor in the International Criminal Court.

## II. THE *PROPRIO MOTU* POWER OF THE PROSECUTOR

The *proprio motu* power of the prosecutor is one of the most controversial in the discourse of the states that have refused to ratify the Rome Statute. It can be found in Article 15 of the Rome Statute. It has six paragraphs each related to the other and it discusses how the prosecutor can initiate investigations. Article 15(1) provides that the Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court. Article 15(2) relates to the process of the preliminary examinations and the means of getting more information. Article 15(3) provides that if the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. The fourth paragraph provides that if the Pre-Trial Chamber, upon examination of the prosecutor's request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

Article 15 clearly shows that the *proprio motu* power of the prosecutor is highly unlikely the type that can be easily abused by the prosecutor. The reason clearly is that the Pre-Trial

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Chamber has a right to revoke the prosecutor's *proprio motu* power if there is no reasonable basis to proceed with an investigation, and if the case appears not to fall within the jurisdiction of the Court.

Another check on the prosecutor's power to initiate an investigation is the provisions of Article 16, which give the Security Council the right to defer an investigation. Article 16 provides that no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

From the provisions of Article 16, it can be seen that the Security Council does not require any reason to defer an investigation or prosecution before the ICC. They can just decide anytime that they want when an investigation or prosecution must be halted.

### III. THE PROBLEM WITH ARTICLE 54(3)(E) OF THE ROME STATUTE

The Assembly of States agreed at the onset of the creation of the ICC that trials before the court would be conducted in accordance with the highest international standards for fair trials [4]. The problem with the provisions of Article 54(3)(e) is that it will ordinarily clash with the defendant's right to a fair trial. In this instance the prosecutor may be said to have some form of *proprio motu* instinct of the necessity of withholding documents in order to protect informants.

In the Lubanga's case, the Trial Chamber had no choice but to delay the start of the trial because of the Prosecutor's decision to not disclose documents that could exculpate the defendant and this is as a result of the power granted to the prosecutor in Article 54(3)(e) of the Rome Statute. The Chamber also stayed the trial after the Prosecutor failed to obey the order that he should disclose the identity of an intermediary who had contacted witnesses on the Prosecutor's behalf. The Prosecutor had obtained the documents from third parties, including the United Nations. Article 54(3)(e) provides thus:

'The Prosecutor may agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents.'

As a result of the confidentiality agreements, the Prosecutor was unable to disclose more than 200 documents that contained potentially exculpatory information, including "evidence indicating that (Lubanga) suffered from a mental condition;" information that he may have acted under duress, compulsion, or in self-defense; and information that he had insufficient command over people who committed the crimes with which he was charged [5].

In the Trial Chamber's decision to stay Mr. Lubanga's trial it held that

(i) The disclosure of exculpatory evidence is a fundamental

aspect of a defendant's right to a fair trial;

(ii) The Prosecutor had incorrectly used Article 54(3)(e) such that a significant body of exculpatory materials that would otherwise have been disclosed was withheld; and

(iii) The Trial Chamber was prevented from determining whether the Prosecutor had violated Mr. Lubanga's right to a fair trial because the Trial Chamber had been unable to inspect the materials on account of the confidentiality agreements. The Trial Chamber concluded that under these circumstances "the trial process [had] been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial" and ordered Mr. Lubanga's release. The Trial Chamber did, however, give leave to the Prosecutor to appeal its judgment and stayed its order to release Mr. Lubanga pending the appeal [5].

The Appeals Chamber agreed with the Trial Chamber that Mr. Lubanga's right to a fair trial would be violated if the Prosecutor could withhold potentially exculpatory documents obtained pursuant to Article 54(3)(e). The Appeals Chamber did not order the Prosecutor to disclose the exculpatory documents to the defendant, however, but held that the Prosecutor should disclose the documents to the Trial Chamber so that it could determine whether the documents would need to be provided to the defense. If the Trial Chamber determined that disclosure was required, the Prosecutor would have to seek the consent of the information providers to disclose the documents. If the Prosecutor could not obtain the requisite consents, the Chamber could decide what measures should be taken to preserve a fair trial without the disclosure of the relevant documents. Since the Prosecutor had disclosed some of the potentially exculpatory documents to the Trial Chamber while the appeal was pending, and the information providers had indicated a new found willingness to allow some of the information contained in the documents to be shared with the defense, the Appeals Chamber, over the objection of one judge, reversed the order to release Mr. Lubanga. By November 2008, the Prosecutor was able to disclose all of the potentially exculpatory documents to the defense, and the Trial Chamber lifted its stay [5].

### IV. OTHER POWERS OF THE PROSECUTOR IN THE ROME STATUTE

Article 42 of the Rome Statute provides for the Office of the Prosecutor as an organ of the Court. A Prosecutor elected by the Assembly of States heads this office but the Prosecutor operates in personal and substantive independence of both the Court and the States parties. Some countries did not accept the notion of an independent prosecutor at the Rome Conference. The anti-independent prosecutor group which included the US and China governments amongst others; wanted to grant the power to set investigations and prosecutions in motion to states and the Security Council only; while another group of countries advocated for an independent prosecutor capable of initiating *proprio motu* investigations and prosecutions. In the end they had to make a compromise.

The Prosecutor was granted the power to investigate and prosecute as an independent and impartial body [6].

Article 9 of the Rome Statute provides that Amendments to the Elements of Crimes may be proposed by any State Party; the judges acting by an absolute majority and also by the Prosecutor. A similar provision can also be found in Article 51 that allows the prosecutor to propose an amendment to the Court's Rules of Procedure and Evidence.

Article 53(1) of the Statute addresses the initiation of an investigation. If the Prosecutor is satisfied that there is a reasonable basis to believe that the case is within the jurisdiction of the Court and is or would be admissible under Article 17 of the Statute, he must determine whether, taking into account the gravity of the crime and the interests of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice. Most of the non-member states to the Rome Statute believe that this is a form of infringement on the principle of sovereignty. What if a party State is convinced that they are willing to prosecute but the Office of the Prosecutor decides otherwise?

Article 53(2) addresses the initiation of a prosecution. It indicates that, upon investigation, the Prosecutor may conclude that there is not sufficient basis to proceed because it 'is not in the interests of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrators, and his or her role in the alleged crime'. This is indeed a daunting task to be determined by one person. This is where the Pre-Trial Chamber comes in as a check on the prosecutor's decision to prosecute or not.

#### V. OBJECTIONS TO AN INDEPENDENT PROSECUTOR: INDIA, US AND CHINA

The ICC has 122 Member States and they are called the Assembly Of States. These 122 Member States have ratified the Rome Statute. The United Nations has 193 Member States and two observers states. 71 Member States of the United Nations have not ratified the Rome Statute.

Most of these states, especially the 41 of them haven't even signed the Rome Statute Treaty at all; have amongst other things complained about the power given to the prosecutor. India, United States of America and China are part of these countries. The reason these countries are very important is because they are members of the United Nations Security Council (except India who isn't a member presently but who has been a member of the UN Security Council for 7 terms which is a total of 14 years and has only recently finished a term in 2012) [7].

Like its other counterparts who have not ratified the Rome Statute, India has a problem with the triggering power given to the prosecutor of the ICC. The argument by India is that this power of the prosecutor ridicules their established position that state consent should be a requirement to investigation and prosecution in all cases. The position of an independent prosecutor does not seem right considering that prosecutors in most national jurisdictions have to prosecute only whom the

State wishes to punish and allow immunity on whom they favour. In any case, the ICC Statute does not charge or prosecute states such as India as a whole to its court; it only picks individuals that are committing crimes within the jurisdiction of the court. With regards to waiting for a state's consent, which is the case in most countries, it will be a case of justice delayed is justice denied [8].

For instance, if people that are dying in an armed conflict zone have to wait for the approval of their government before a situation can be investigated by the ICC in such a case where the court obviously has jurisdiction (especially where the country is unwilling or unable to do anything) then, it is highly doubted that they will stop dying soon. The triggering power of the prosecutor in itself is not an authorization to commence a prosecution; it is just a power that allows the prosecutor to look into what is going on in an area of which some information received about (preliminary examinations). A prosecution starting with a full-fledged investigation can only kickoff if the Pre-Trial Chamber says so and not just if the prosecutor thinks so. This position can be seen in Article 15(4) of the Rome Statute which states that if the Pre-Trial Chamber after examining the request and the supporting material provided by the prosecutor considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case [7], [8].

India would also have preferred that there was no inherent jurisdiction for the ICC but only an ICC jurisdiction that a State declares upon itself and this jurisdiction will only be limited to a particular conduct or to conduct committed during a particular period of time. There is an absence of such a provision in the Rome Statute but rather of an inherent jurisdiction that spooks India out and it is seen as representing an encroachment on the consent of states, and thus a threat to sovereignty [8].

The United States on the other hand foresees that the power of the Prosecutor could be used to bring charges against American citizens especially their present and past president(s). This is the first imminent fear that lies at the heart of the American government [2].

Stakeholders in the US government express concern that the ICC will be able to second-guess a valid resolution by U.S. prosecutors to terminate an investigation or decline to prosecute a person. They contend that it is not uncommon for ill-disposed countries to depict U.S. foreign policy decisions as criminal and that the ICC may end up providing a forum for such charges. However, it is only hoped that the prosecutor does not accommodate such groundless charges and if it so happens, then the Pre-Trial Chamber will stop such a circumstance from proceeding into a proper trial before the court [2].

The Chinese government also holds the opinion that the proprio motu power of the Prosecutor under Article 15 of the

Rome Statute may make it impossible for the ICC to concentrate on dealing with the most serious crimes, and may make the Court open to political influence so that it ends up unable to act in a manner that is independent and fair. Despite the Chinese Government's attitude to the ICC of a non-ratification status, there is widespread discussion amongst Chinese jurists, and most of them have condemned the government's position [9], [10].

## VI. CONCLUSION

As long as there is a provision that allows the Pre-Trial Chamber to check on the power of the prosecutor in initiating an investigation, the prosecutor of the ICC cannot be said to be totally independent.

At the end of the day the UN's Security Council still wins whether there is an independent prosecutor that instigates an investigation or a dependent prosecutor that can't. The Security Council can stay or defer the investigation of a situation for a year whether it was referred by the State or initiated by prosecutor and a lot can happen within a year. Things that can later make a once viable situation to become inadmissible before the ICC. Another reason why the Security Council still wins despite the existence of an independent prosecutor is mainly because three of the Security Council out of the five permanent members (USA, China, Russia) are yet to ratify the Rome Statute. So, they have total immunity from the powers of an independent prosecutor.

In similar light, the ICC cannot be said to be necessarily independent of the United Nations, because the UN Security Council can stay the proceedings before the court at anytime. One may rightly say then that the fear of an independent prosecutor is not as pressing as the power that the Security Council has over the ICC. The ICC should insist that for the deferral power of the Security Council to be valid and enforced, all members of the Security Council have to ratify the Rome Statute and stop using excuses such as the independence of a prosecutor for their non-compliance with the Rome Statute. The Rome Statute is not perfect. There are a lot of loopholes and unanswered questions but that is why there is an Assembly of States who has the mandate to meet regularly in order to revise and update the Rome Statute such as the type that took place in Kampala, Uganda from 31 May to 11 June 2010.

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