

ROLE OF PUBLIC PROSECUTOR AS AN ORGAN OF JUSTICE IN INTERNATIONAL CRIMINAL PROCEEDINGS

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INTRODUCTION

The prosecutor plays a pivotal role in the international criminal justice system, he is not only a party to the proceedings but an important and significant role to play in international criminal justice. His role is not just to secure the conviction but to bring out truth to the surface including both the exculpatory as well as the inculpatory evidence.ⁱ

POWER AND INDEPENDENCE OF PROSECUTORS AND THE LIMITATIONS ON SUCH POWERS

There are a number of powers and duties of the prosecutor and here we shall focus on the independence afforded to the prosecutor as well as the limitations on such independence along with various political reasons which cause the limitation on such independence. The important Articles of the Rome Statute which are to be considered are Article 13,19,42,61,67,68,72, 73 56, 57 87; the most important Articles which are in focus are Article 53 and Article 54ⁱⁱ.

Article 53 has a significant role as it confers a responsibility on the prosecutor to make a decision as to “whether to initiate an investigation” and thereupon to decide “that there are not sufficient basis for prosecution”, this is definitely in the interest of the justice, nevertheless such decision is subject to review by the Pre-Trial Chamber Because the term “interest of justice” is not defined and it is believed that the Office of the Prosecutor(OTP) must establish the guidelines which would help to construe and infer the term “interest of Justice”. The discretion has been given to the prosecutor but there raises a question as to the extent and limit of such discretion.ⁱⁱⁱ

Article 54 of the statute confers the powers and duties of the ICC Prosecutor for the purpose of investigation and in order to surface the truth and an obligation of the prosecutor to follow the ethics and find out the exonerating evidence in order to establish the truth of the case.

In any developed legal system of the world which gives prevalence to the concept of rule of law, it is provided that the investigation, prosecution and supervision must be carried out by a specialised institution which aims to maintain a balance between the independence and responsibility along with institutional safeguards.^{iv} Article 42 (1) of the statute provides that the prosecutor shall act independently just like a distinct organ and shall not seek or act on the instructions afforded from any external source, Further Article 42(5) provides that neither the prosecutor nor shall the deputy prosecutor shall be involved in any such act which seems to interfere with its way of working or attacking upon its independence.

The limitation on this above-mentioned power of the prosecutor is a check by the security council which has the power to marginalise or cut or limit down on any investigation or prosecution, this advice of the security council is well taken by the court. The other limiting reason on the power of independence of prosecutor is the obligation on him or her to defer to national investigation^v and a part of it there are various other political reasons which are limiting the independence of prosecutor, in fact there is a quite complicated and strict disciplinary methods have been taken up by the Diplomatic conference which has kept the independence and working of the prosecutor under check and control this is because the prosecutor is a non-political organ who is not limited to a particular territory or situation or jurisdiction, but whatever activity he undertakes is capable to creating a strong and remarkable impact politically and which brings the criminals within the broad jurisdiction of the courts, so keeping this in consideration the Diplomatic conference, has taken steps to avoid any prospective political consequences which can affect the peace and security at international level.^{vi}

NOTITIA CRIMINIS (A NOTICE CONVEYED TO A PROSECUTOR THAT A CRIME IS ALLEGED TO HAVE OCCURRED)

Article 42 of the statute provides that the prosecutor shall receive the information as to the occurrence of the crime within the jurisdiction of the court, and then conduct the investigation, examination and carry on the prosecution before the court. There are three sources from where the information is received by the prosecutor^{vii} **Firstly**, by the Security council, which is considered to be the most authentic source (Article 13 (b)) thus the investigation here is not required to be authorised by pre pre-trial chamber and since the source of information is by the security council thus the problem of jurisdiction is also lessened.^{viii} **Secondly**, the information received by the prosecutor from the state party (Article 13(a) and 14, and here also no permission is required from the pre-trial chambers to investigate but nevertheless the investigation would be subject to security council deferral pursuant to Article 16. **Thirdly**, here the information is received by the prosecutor from any other leftover sources or information collected by him on his own and for investigation of which a prior permission is to be sought from the pre-trial chambers.^{ix}

Preliminary Investigation of the information received by the prosecutor

The purpose of preliminary examination is to find out as to whether there exist any reasonable grounds to start an investigation or not, so it is the duty of prosecutor to start preliminary examination no matter whatever be the source of information [(Article 15(3))^x whereas Article 53 provides that only information by state party or security council be checked before investigation however there is no conflict between the two Articles and rather they are to be read in harmony and the parameters applied to Article 15 are also applied to Article 53.^{xi}

Manner and extent of Preliminary investigation

The prosecutor may look for an additional information from the state parties, the various governmental or non-governmental organisations or from any other source which is reliable, this all is done in order to check, evaluate and assure as to the truthfulness of the information received and the seriousness involved in it and the prosecutor can even seek an additional information from any person who gave the information or any other person who is aware of the matter in question. Regarding the extent of investigation, it is provided that the prosecutor

will keep collecting the additional information until and unless he or she is satisfied and confident about the actual existence of such information.^{xii}

The Decision of the Prosecutor, subsequent to preliminary Examination whether to initiate an Investigation: Relevant Parameters.

The parameters are the various considerations which are to be kept in mind by the prosecutor before deciding to investigate and such parameters are provided in Article 53(1). **Firstly**, the prosecutor should not initiate the investigation if there is no sufficient grounds to believe that the crime exists, **Secondly**, he would not start investigation if the crime is not falling within the jurisdiction of the court **Thirdly**, if the case on the face of it seems to be inadmissible under Article 17, **Fourthly**, no investigation would be initiated if it would not serve the ends of justice. The decision of the prosecutor based on the first parameter is non-discretionary as it depends upon the rational and objective assessment of the information along with the additional information collected. The decision based on the second parameter is also non - discretionary as the jurisdiction as strictly provided under Article 5- 12 of the statute. The decision on the basis of the third parameter may be non-discretionary when the issues fall under Article 17 (1)(a)(b)(c) and full discretionary if the issues fall under Article 17 (1)(d). Further the decision based on the fourth parameter is fully discretionary.^{xiii}

Duty of the Prosecutor to convey his decisions to informants

It is the obligation on the prosecutor to convey his decision of not investigating the case to those people who had provided him the information and this is provided under Article 15(6) of the statute and also under Rule 49 of RPE, this is to prevent any danger to the safety, well being and privacy to those who provided information and even Rule 105 of RPE also made it compulsory to notify the decision to not to investigate with proper reasons thereof.^{xiv}

Duty of the Prosecutor to convey his decision to Pre-trial Chambers

It is the duty of the prosecutor to convey the Pre-Trial chambers about his decision not to initiate investigation which is also provided under Article 53(1) but this provision would apply only if the decision of the prosecutor is based solely on fully discretionary parameter under Article 53(1)(c) and here also the Pre-Trial Chambers would be entitled to review this decision

of prosecutor (Article 53(3)(b)^{xv}. Rule 105 of RPE provides that such notification by the prosecutor to Pre- trial chambers must be in writing and shall contain the reasons.

Remedies against the Decision of the Prosecutor not to initiate the Investigation

The decision of the prosecutor to not to investigate may be reviewed by the Pre-trial Chamber either on the request by the state party or by the Security Council or by the Pre-trial Chamber on its own, the Pre-Trial Chamber may review only if such decision of prosecutor is based on fully discretionary parameter no matter whatever may be the source of information (notitia criminis) [Article 53(1)(c) and Article 17(1)(d)]. According to Rule 107 RPE, judicial review can be requested by the referring state or Security Council which should be in writing and must be supported with reasons within 90 days as per Rule 105 (1) whereas on the other hand Rule 109 RPE establishes that in case of judicial review decided by the chamber on its own initiative , the chamber shall inform the prosecutor of its decision to proceed to review within 180 days following notification given under Rule 105 (4). Both Rules 107 and 109 RPE dictate further regulation on the review procedure etc. the purpose of judicial review is to prevent undue risk if in case an investigation is unduly omitted.^{xvi} According to Article 53(3)(a)-(b) , the Pre-Trial Chamber has an option that it either confirms the decision of the Prosecutor or it may ask the prosecutor to reconsider his decision as to not to investigate.

INVESTIGATION - ITS CLASSES AND THE DUTIES OF THE PROSECUTOR

When the prosecutor has decided to investigate the matter it could be by four methods that is , Firstly, it could be investigation on referral by the Security Council, Secondly on the referral by State party and here the prosecutor must immediately notify the states about it, Thirdly, Prosecutor makes a request for ‘authorisation to investigate’, along with the supported material collected by the prosecutor during the preliminary examination, this authorisation is taken from Pre-Trial Chambers. As per Article 15(3) victims are allowed to express their voice in view of the judicial decision on the request of authorisation and they can in fact make a representation to Pre- trial Chambers, however the Pre-Trial Chambers may either refuse or Grant the requested authorisation. Fourthly, is the initiation of investigation on judicial command.

The decision taken by the Pre-Trial Chamber regarding grant of authorisation under Article 15(4) is ‘without prejudice to subsequent determination by the court with regard to the jurisdiction and admissibility of the case. At this stage only a prima facie assessment might be possible on jurisdiction and the admissibility of a case, however the defence counsel can always raise the issue of jurisdiction and admissibility in the trial proceedings.’^{xvii}

Duties of the Prosecutor while conducting investigations.

It is the duty of the prosecutor to notify to the state parties as to initiating the investigation and soon the notification shall be forwarded to the source from or on whose information the investigation was sought to be initiated , it is also possible that the prosecutor would not investigate further as requested by the state party and then defer to national investigation. If there is a request by the state parties to defer to national investigation then the final decision in this case must be made by the Pre-Trial Chambers which can still authorise the prosecutor to investigate, this is to prevent any vexatious request for the state parties. But still if the investigation is deferred still the prosecutor has the liberty to carry on with the necessary investigative process to preserve the evidence.^{xviii}

The duties of the prosecutor while conducting the investigation is provided under Article 54(1). And the **first duty** is to **research the objective truth, that** is to cover all the facts and the evidence and to act as an impartial organ of justice. The Prosecutor of ICC is bound to the disclosure of the exculpatory evidence as well [(Article 67(2)].^{xix} The **second duty** is to **respect the interest of the victims and witnesses** and also to personal attention to vulnerable persons who may be a potential witness and also if such person is also the victim of a crime for instance sexual violence etc.^{xx} The **third duty** is to respect the rights arising under Article 54(1)(c).

Powers of Prosecutor while conducting investigation

The prosecutor is to perform the basic activities like collection and examination of the evidence, asking for the attendance and presence of the persons to be investigated and asking them. Rule 111 and Rule 112 RPE clearly specify such roles. Rule 111 provides that the prosecutor must make a formal record of the statement and it shall

be signed by the persons present during the questioning and such record shall contain the time, place and date when the questioning was made , further when the person questioned is a suspect the record shall note that the information of the rights under Article 55(2) was provided to him or her. Rule 112 further provides that questioning of a suspect shall be audio or video recorded according to the procedure provided.^{xxi}

Power to Conduct Investigations on the territory of a state

Article 54(2) gives the power to the prosecutor to carry on investigation on the territory of the state and the state parties are obliged to cooperate with the court in its prosecution and to cooperate with the office of the prosecutor(Article 86-102).^{xxii} Article 57(3)(d) establishes that judicial authorisation for a direct investigation on the territory of a state party may be granted which is regulated by Rule 115 according to which where a prosecutor may submit a written request to the Pre-Trial Chamber which shall invite the views from the concerned party and may hold a hearing. The authorization shall be in the form of an order, shall state the reasons and may specify the procedures to be followed for the on-site state activity, of course if the order is granted, the concerned party is bound not to hamper the on-site investigation activity of the prosecutor.

Power of the Prosecutor to seek Cooperation and Enter Agreements

It is provided in Article 54(3)(c) that it is the duty of the prosecutor to seek the cooperation from intergovernmental organisations and institutions and from the states and ask for the suitable arrangements from them.^{xxiii} Further it is also provided in Article 54(3)(d) that the prosecutor should enter into such arrangements and agreements which are not in accordance with the statute which are pertinent to provide cooperation between a state, person and intergovernmental institutions.^{xxiv}

Power of the Prosecutor to withhold confidentiality

The prosecutor can withhold the information and prevent its disclosure due to security reasons as provided by Article 54 (e) and (f). Also Article 72(5) specifically indicates some measures which can be taken to ensure confidentiality such as obtaining the information from a different source or in a different form, providing summaries or redactions or using in camera or ex parte

proceedings. Article 68(5) also entitles the prosecutor to withhold information under some conditions, when its disclosure may endanger the security of a witness.

THE RESULTING CONSEQUENCES OF INVESTIGATION

When the investigation is completed the prosecutor shall decide whether he should opt for prosecution or defer from it. If he decided not to prosecute then that shall be based on various parameters like (a) when there are not sufficient legal or factual basis to seek a warrant or summons under Article 58. the decision based on this parameter is non-discretionary since it is supposed to depend upon a rational and objective assessment of the evidentiary material collected during the investigation (b) when the case is inadmissible under Article 17, the decision based on this parameter may be non-discretionary or discretionary depending upon the specific issues of admissibility which comes into consideration. (c) or where the prosecution is not in the interest of justice, taking into account all the circumstances, including the gravity of the crime, the interest of the victims and the age or infirmity of the alleged perpetrator and his or her role in the alleged crime.^{xxv} and the decision based on this parameter is fully discretionary.^{xxvi}

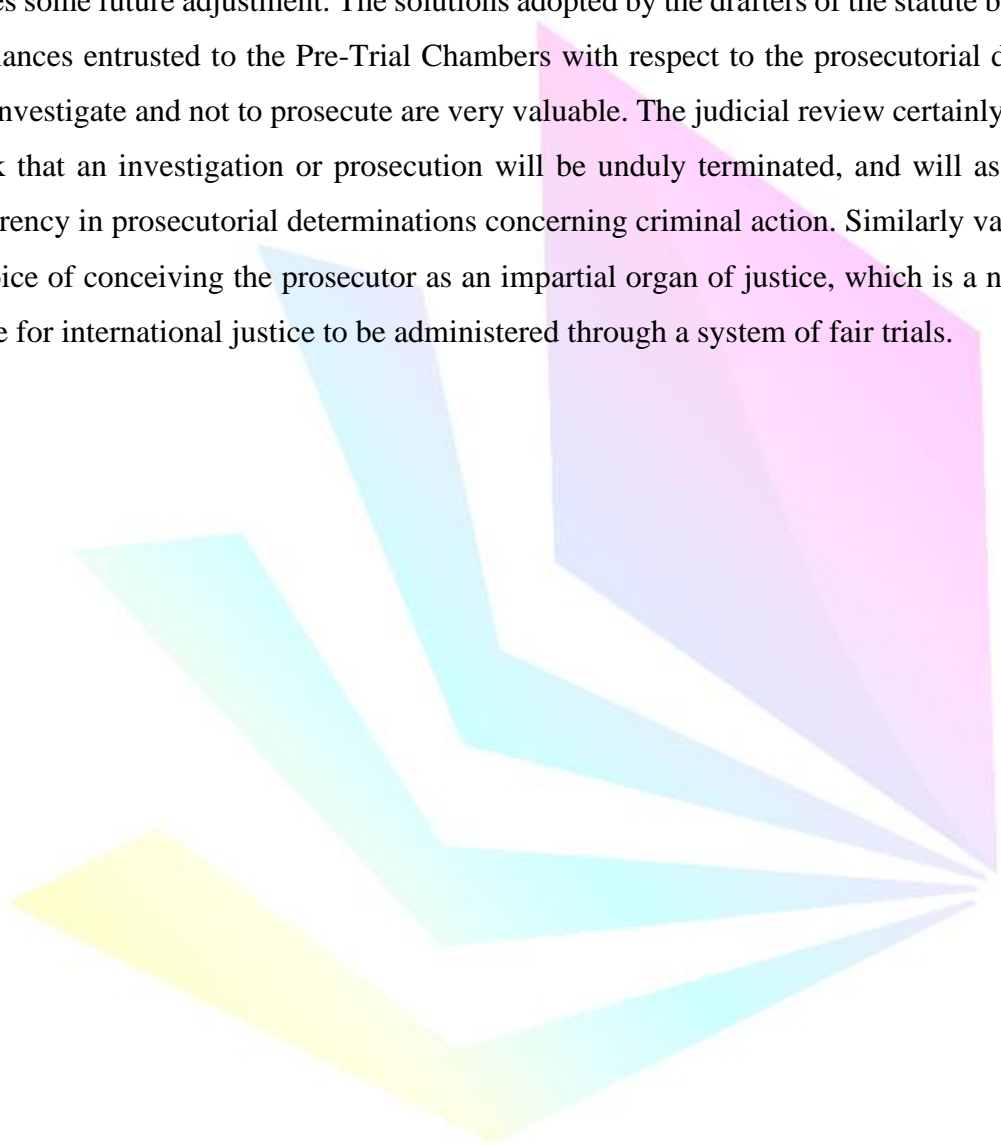
Where after the completion of investigation the prosecutor concludes that there is not a sufficient ground for prosecution then he or she shall inform the Pre-Trial Chamber which could later be reviewed by the Pre-Trial Chamber. Further if on the completion of investigation there exists the possibility of further investigation then the prosecutor shall request the Pre-Trial Chambers for the issuance of either the warrant of arrest or summons to appear.

CONCLUSION

The statutes of the ICC were drafted, paying very close attention to the principle of national sovereignty and to the political primacy of the Security Council, in such a way as to limit in a significant way the power, and thus the independence itself of the prosecutor. Notwithstanding that in spite of the complicated compromise solution adopted by the drafters of the statute, the creation of an impartial organ of justice, such as a prosecutor of the ICC, the first international

prosecuting office with a wide scope authority not limited to specific situations is a very important and unprecedented achievement for the evolution of the international community.

The obligation to defer national investigation is now provided in the statute and it has major danger for both independence and effectiveness of the prosecutorial functions and certainly deserves some future adjustment. The solutions adopted by the drafters of the statute by checks and balances entrusted to the Pre-Trial Chambers with respect to the prosecutorial decisions not to investigate and not to prosecute are very valuable. The judicial review certainly reduces the risk that an investigation or prosecution will be unduly terminated, and will assure full transparency in prosecutorial determinations concerning criminal action. Similarly valuable is the choice of conceiving the prosecutor as an impartial organ of justice, which is a necessary premise for international justice to be administered through a system of fair trials.



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ENDNOTES

ⁱ 1 Cf. Trial Chamber Decision on Communication between the Parties and their Witnesses, *Kupreskic and others* (IT-95-16-PT), 21 September 1998, at 3 para. (ii).

ⁱⁱ See Doc. PCNICC/2000/INF/3/Add.1, 12 July 2000. The Rules of Procedure and Evidence which are particularly relevant to the matter dealt with in this chapter are Rules 46-62, 81-82, 104-115, and 121-129.

ⁱⁱⁱ Rome Statute of the International Criminal Court, 17 July, 1998, A/CONF. 183/9 (entry into force 1 July 2002) [hereinafter Rome Statute], Art. 53.

^{iv} In the new civil law adversary system of Italy, the full independence of public prosecutors is safeguarded by the Consiglio Superiore della Magistratura, a self-governing body for the judiciary , which administers both judges and prosecutors: cf. A. Pizzorusso, *L'Organizzazione della Giustizia in Italia*(1990). On the specific and institutional safeguards to be provided to public prosecutors for carrying out their functions in the Criminal Justice System (2000).

^v Arts 9-10 of the Statute of ICTY and Arts 8-9 of the Statute of ICTR.

^{vi} Cf.,on this, S. Zappala, *Il Procuratore della Corte Penale Internazionale: Luci e Ombre* , 1 RDI (1999) 83-84.

^{vii} M.C. Bassiouni, ' Observations on the Structure of the (Zutphen) Consolidated Text', 13 bis *Nouvelles Etudes Pénales* (1998) 13.

^{viii} Zappala, *supra* note 12, at 55-56; H.P. Kaul, 'Towards a Permanent International Criminal Court: Some Observations of a Negotiator', 18 *HRLJ* (1997) 171.

^{ix} See Zappala, *supra* note 12 at 61.

^x Cf. UN Doc. A/CONF. 183/C.1/WGPM/L.1(18 June 1998) and UN Doc. A/CONF.183/C.1/WGPM/L.18 (25 June 1998)

^{xi} In determining whether there is a reasonable basis to proceed with an investigation under article 15, paragraph 3, the prosecutor shall consider the factors set out in article 53, paragraph 1(a) to (c).

^{xii} Rule 47 RPE also establishes some measures to be taken, when receiving a 'testimony' under Art. 15(2), in case 'the Prosecutor considers that there is a serious risk that it might not be possible for the testimony to be taken subsequently'.

^{xiii} In the original working paper of the Diplomatic Conference , "only the interest of the victims' were mentioned, and not 'the gravity of the crime', which was inserted later on during the works of the Committee of the Whole

(cf. UN Doc. A/CONF. 183/C.1/WGPM/L.1 (18 June 1998), and UN Doc. A/CONF. 183/C.1/WGPM/L.18 (25 June 1998).

^{xiv} Rule 105 also establishes that , in giving the reasons for his/her decision, the prosecutor shall have regard to the principles stated in Art. 68(1) i.e. in brief, shall avoid disclosing the details that could be dangerous to the safety of the persons.

^{xv} Cf. UN Doc. A/CONF. 183/C.1/WGPM/L.1 (18 June 1998), UN Doc. A/CONF.183/C.1/WGPM/L.18 (25 June 1998), and UN Doc. A/CONF.183/C.1/L.87 (15 July 1998).

^{xvi} England, Criminal Procedure and Investigation Act 1996, Sec 44 and for Italy , Art 409 CPP. no such judicial review is provided for in the Statutes of the ad hoc tribunals.

^{xvii} Apart from Rule 50, a general regulation on the matter of participation of victims in the proceedings is given by Rules 89-93 RPE.

^{xviii} The French proposal suggested that the prosecutor should not initiate the investigation before the term has expired.

^{xix} The initial clause of Art. 54(1)(b)) (take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the court) is a tautological and frankly useless provision.

^{xx} Cf.Art. 7(3) of the statute: ‘the term “gender” refers to the two sexes, male and female, within the context of society’.

^{xxi} The unique investigative opportunity under Art 56 is further regulated by Rule 114 RPE (as for the consultations held by the chamber with the Prosecutor and the Defendants) and sub-rule 5 of Rule 112 RPE (as for the possibility of using the procedure of audio- video - recording). It is fit to note that one more power is afforded to the prosecutor by Rule 113, which entitles the prosecutor to request the Pre-Trial Chamber to order that a suspect be given a medical, psychological, or psychiatric examination.

^{xxii} Art. 18(2) of the statute of ICTY and Art. 17(2) of the statute of ICTR are more generic on this matter. The prosecutor shall have the power to conduct on site investigations. In carrying out these tasks, the prosecutor may, as appropriate, seek the assistance of the state authorities concerned.

^{xxiii} Bergsmo and Kruger, *supra* note 4 at 724.

^{xxiv} Zappala, *supra* note 12 at 72.

^{xxv} In the statutes of the ad hoc tribunals , the regulation on the decision whether to prosecute is much simpler, Art 18 (4) of the statute of the ICTY and the article 17(4) of the Statute of ICTR established that the prosecutor , in case of decision to prosecute, shall prepare an indictment to be transmitted to a judge of trial chamber for review and confirmation. In the case of a decision of the prosecutor not to prosecute, no specific regulation is established.

^{xxvi} In the original working paper of the Diplomatic Conference, only the interests of the victims were mentioned and not the gravity of the crime, nor the circumstances concerning the alleged perpetrator, which were inserted later on during the works of the committee of the whole. (cf. UN Doc. A/CONF.183/C.1/WGPM/L.1 (18 June 1998), and A/CONF.183/C.1/WGPM/L.18 (25 June 1998).