

# Prosecutorial discretion and independence of the ICC prosecutor: concerns and challenges<sup>1</sup>

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## ABSTRACT

This article explores the investigative phases and initiation of proceedings through to the trial stage and how the ICC prosecutor exercises the discretionary powers and asserts independence.

**Keywords:** *Investigative phases. initiation of proceedings. trial stage. prosecutor exercises. Discretionary.*

## 1 INITIATION OF INVESTIGATIONS AND PROCEEDINGS BY THE ICC PROSECUTOR

Article 34(b) of the ICC Statute establishes the OTP - Office of The Prosecutor - as one of the organs of the court. Article 42(1) of the ICC Statute establishes the OTP as an independent organ. Regulation 13 RPE provides that the OTP shall be headed by an independent prosecutor who should act independently and impartially. The prosecutor is elected by secret ballot and by majority of the Assembly of State Parties (ASP).<sup>3</sup>

The ICC system provides for a broader triggering mechanism for

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<sup>3</sup> Article 42(4) of the Rome Statute

initiation of investigations into alleged violations of international criminal law and IHL – International Humanitarian Law. The OTP is ‘the first point of call when atrocities are committed hence the leading organ in fulfilling the mandate of the court to combat impunity’.<sup>4</sup> Article 42 of the ICC Statute does outline the responsibilities and duties of the prosecutor. The same provision does protect the functional independence of the OTP from external pressure and influence.<sup>5</sup> It should be noted that the independence of the OTP is not a right but rather a responsibility.<sup>6</sup> The prosecutor is therefore expected to exercise her discretion judiciously.

The Statute bestows on the prosecutor *proprio motu* powers to independently initiate investigations into any given situation within the jurisdiction of the Statute.<sup>7</sup> However this power is not absolute as the prosecutor requires authorization from the PTC – Pre-Trial Chamber - to commence a given investigation<sup>8</sup>. Ocampo asserts that the novelty of the ICC legal regime moved the court out of the ambit of the United Nations Security Council or from the whims of the States<sup>9</sup>. That unlike the international prosecutors to the “Ad hoc” tribunals to whom situations selected by politicians were referred the ICC does enjoy independence to select the situations to investigate. It is argued that the Statute ushered onto the international plane an independent actor whose mandate is to ensure that the rule of law prevails.<sup>10</sup>

Ocampo explains that the role of the PTC to judicially confirm selection of a situation for investigation was done to promote impartiality<sup>11</sup>. Judicial supervision of the prosecutor’s discretion in

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4 Scafferling C., *International Criminal Procedure*, Oxford 2012 at 149.

5 Article 42 (1) of the Rome Statute.

6 Bensouda F., ‘Challenges Related to Investigation and Prosecution of the ICC’, in (ed) Roberto Bellelli, *International Criminal Justice: Law and practice from the Rome Statute to its review*, ASHGATE, 2010 p132.

7 Article 15 Rome Statute.

8 Ocampo L.M., ‘The International Criminal Court in motion’, in Stahn C. and Sluiter G., eds, *The Emerging practice of the International Criminal Court*, MartinusNijhoff, Leiden-Boston, 2009 p 13.

9 *Ibid.*

10 *Ibid.* p14.

11 *Ibid.*

exercising *proprio motu* powers was vivid in the investigations into alleged crimes against humanity in the post-election violence in Kenya<sup>12</sup>. Some of the commentators, however, argue that prosecutorial freedom is greatly restricted under the ICC system given that it is a permanent court with permanent jurisdiction over indefinite conflicts and territories whereas the “ad hoc” and hybrid tribunals and their role in restoring and maintaining international peace and security have resulted in wide prosecutorial freedom.<sup>13</sup> It may be argued that prosecutorial independence lies in the prosecutor’s decision to prosecute or not based on the facts of the case and guided by the law whether be the case referred to her, allocated to her, assigned to her or initiated by her.

When it comes to referrals by the Security Council, the prosecutor has a duty to initiate investigations but has discretionary power to conclude, after preliminary examination that there is no reasonable basis on which to proceed.<sup>14</sup> In contrast it is argued that prosecutorial discretion under the Rome Statute is inconsistent with the functions and powers of the Security Council.<sup>15</sup> It is claimed that the prosecutor has no right to decline conducting a preliminary examination determining that she believes that there is no reasonable basis on which to proceed.<sup>16</sup> This argument is not tenable as the ICC was established outside the realm of the UN - United Nations, although both institutions may share similar aspirations of ensuring justice, peace and security. It follows that they are mutually supportive. It should also be conceded that the UNSC no longer has monopoly of dealing with conflict and post conflict situations involving mass atrocities in the post ICC era.

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12 Situation in the Republic of Kenya Case No ICC-01/09-1, Decision Assigning the Situation in the Republic of Kenya to Pre-Trial Chamber II (Nov. 6. 2009).

13 Zahar A. and Sluiter G., *International Criminal Law*, Oxford, 2008 p357.

14 Scafferling C., *supra* n2 at 152.

15 Ohlin J., ‘Peace, Security and Prosecutorial Discretion’, in C. Stahn and G. Sluiter (eds), in Stahn C. and Sluiter G., eds, *The Emerging practice of the International Criminal Court*, MartinusNijhoff, Leiden-Boston, 2009.

16 *ibid*.

## 2 SELECTION OF CASES OUT OF A SITUATION

Article 53(1) of the ICC Statute outlines the considerations for the prosecutor when selecting a situation which must meet the threshold, that is, there must be a high probability that a crime listed in Article 5 of the ICC Statute was or is being committed. The prosecutor must consider whether the situation is admissible according to Article 17 ICC Statute. The gravity of the crime must be taken into account, as well as the interests of the victims and whether or not the investigation would be in the interest of justice.<sup>17</sup> The selection of cases is very challenging but an unavoidable process as it is not practicable in terms of resources for the ICC to handle all cases.<sup>18</sup>

In instances where the prosecutor decides not to proceed with the investigation in a case referred by a state or the SC – Security Council, this can be reviewed by the referring state or the SC or by the PTC on its own motion.<sup>19</sup> Given that independent or private prosecutions are not envisaged by the Rome Statute, it follows that after review, the PTC would refer the matter to the prosecutor for reconsideration.

## 3 CONDUCT OF INVESTIGATIONS

The prosecutor is enjoined with the duty to establish the truth through conducting objective investigations.<sup>20</sup> In the same vein she is permitted to execute agreements to facilitate cooperation with the states as well as organisations. The agreements may contain confidentiality provisions not to disclose information made available by the supplier but rather to use the information only as a ‘spring board’ for obtaining new evidence<sup>21</sup>.

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17 Brubacher M., ‘Prosecutorial Discretion within the International Criminal Court’, 2 J.I.C.J (2004) 71, 76  
18 Danner A., ‘Enhancing the legitimacy and accountability of Prosecutorial discretion at the ICC’, 97 A.J.I.L (2003) 510, 520.

19 Article 53(3) ICC Statute.

20 Article 54 (1) ICC Statute.

21 ICC Prosecutor v Lubanga, AC, ICC-01/04-01/06-774 (OA6), 14 December 2006, Judgement on the

The investigative stage consists of three phases:

(I) pre-investigative phase under which the prosecutor evaluates the information immediately after it has been made available to her and determines whether or not there is a 'reasonable basis' to proceed and commences investigations or closes the investigations as the case may be.<sup>22</sup> The prosecutor is empowered to seek cooperation by requesting for information from states, the UN, governmental organizations, or any other reliable sources.<sup>23</sup> This phase is crucial as it acts as the sieving process for credible information that would merit investigation and protects the rights of individuals as it also facilitates the proper identification of the actual suspects. It follows that the prosecutor is not permitted to embark on 'fishing expeditions' to the detriment of individual rights or state sovereignty.<sup>24</sup>

(II) The investigation phase follows after the questioning of the suspect and where the prosecutor evaluates the information and determines whether or not there is a sufficient basis to proceed and commences prosecution or as the case may end the investigation.<sup>25</sup> Furthermore under this phase the prosecutor develops one or several cases out of a situation and collects both incriminating and exonerating material in respect to the individual suspect.<sup>26</sup>

(III) The prosecution phase involves the prosecutor conducting further investigations and preparing the case for the confirmation of the charges.<sup>27</sup>

#### **4 MERITS AND DEMERITS OF AN INDEPENDENT PROSECUTOR**

The concept of prosecutorial independence and discretion are

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Appeal of Mr. Thomas Lubanga Dyilo against the Decision of the PTCI entitled 'Second Decision on the Prosecution Requests and amended requests for Redactions under Rule 81', para 35.

22 Article 53 (1) ICC Statute.

23 Article 15(2) ICC Statute and Rule 104 RPE.

24 Safferling C., *International Criminal Procedure*, Oxford 2012, p 230.

25 Article 53 (2) and (3) ICC Statute and Rule 48 RPE.

26 Article 54(1) (a) ICC Statute.

27 Article 61 ICC Statute.

mutually supportive of each other. Prosecutorial discretion evolves from the need to exercise selection in the institution of criminal proceedings rather than automatically doing so thereby preventing the system from being overburdened by frivolous cases.<sup>28</sup> In the absence of prosecutorial discretion the international criminal justice system or indeed any criminal justice system 'would grind to a halt'.<sup>29</sup> The prosecutors for the "Ad hoc" tribunals are vested with powers to initiate investigations at their discretion on the basis of information received by them.<sup>30</sup> In contrast the ICC prosecutor requires authorization to initiate an investigation from the PTC. It follows that although the prosecutors for the "Ad hoc" tribunals have a limited jurisdiction *loci, temporis* and *materiae*, they enjoy wider latitude in exercising their discretion than the ICC prosecutor over whom the PTC enjoys oversight control. In *Jelisić Appeals Judgment*, Judge Wald in her partial Dissenting opinion reiterated that:

The Statute provides for an independent prosecutor as one of three coordinate branches of the tribunal... Article 19 provides that when the prosecutor has prepared an indictment, it shall be transmitted to a judge of the Trial Chamber who 'shall' confirm it if satisfied that a "prima facie" case has been established.... Nowhere in the Statute is any chamber of the ICTY - International Criminal Tribunal for the former Yugoslavia - given authority to dismiss an indictment or any count there in because it disagrees with the wisdom of the prosecutor's decision to bring the case.... Any such decision based on 'judicial economy' inevitably reflects judges' views as to which cases are 'worthy' and which are not. That, however, is the job of the prosecutor who must calibrate legal and policy considerations in making her choices on how to utilize limited resources. To recognize a parallel power in judges to accept or reject cases on extra-legal grounds invites challenges to their impartiality as exclusively definers and interpreters of the law.<sup>31</sup>

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28 Jallow H.B., 'Prosecutorial Discretion and International Criminal Justice', J.I.C.J (2005) pp 145-161 at 145.  
29 *ibid.*

30 See Articles 17 ICTR and 19 ICTY Statutes.

31 Partial Dissenting opinion of Judge Wald, Judgement, *Jelisić*, IT-95-10-A, AC, 5 July 2001 para 4.

Nevertheless the TC of the “Ad hoc” tribunals is enjoined to confirm the indictment before the commencement of proceedings; hence at that stage the prosecutor’s discretion is fettered.<sup>32</sup> It should be noted that no discretion is absolute and unfettered. The notion of prosecutorial independence is interwoven ‘with the concepts of fairness, transparency, incorruptibility, freedom from outside influences, decision making based on evidence objectively assessed, and sound public interest principles’<sup>33</sup>. It follows that the exercise of prosecutorial discretion is an indispensable element of any criminal justice system hence the justified reluctance by the courts to interfere with the exercise of prosecutorial discretion except in instances where there is outright abuse.<sup>34</sup> It should be noted that the exercise of discretion goes hand in hand with the obligation to enforce the law.

Ocampo argues that the international community should desist from resolving violent conflicts through negotiations. He calls for the enforcement of the Rome Statute as a tool to deter crime<sup>35</sup>. The implication of this supposition is that the Rome Statute is a ‘silver bullet’ that is meant to fix or resolve all the violent disputes that involve commission of mass atrocities. It is evident that as the pioneer prosecutor of the ICC he got caught up in a time warp that does not realize the limits of criminal prosecutions. It should be noted that even in national jurisdictions, several mechanisms especially in post conflict societies are employed to resolve long standing disputes.

Schabas avers that an independent prosecutor under the ICC system has not helped with the effective management of international criminal justice.<sup>36</sup> He notes that the over emphasis on prosecutorial independence has been counterproductive as there has been lack of

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32 Article 18 ICTR Statute.

33 Jalloh H.B, *supra* n26 at 154.

34 *Ibid* at p156.

35 Ocampo, *supra* n6 p18.

36 Prof Schabas, at conference entitled “Unimaginable Atrocities”: International Criminal Tribunals, Politics and Human Rights’, organized by UCD Institute of Criminology and the International Law Association-ILA held 18- 19th November 2011 at Dublin Republic of Ireland.

flexibility in viewing certain situations. The vivid example of the lack of flexibility and good judgment is in the prosecutor's handling of the LRA – Lord's Resistance Army - situation that led to the collapse of the Juba peace talks when the prosecutor insisted on not withdrawing the arrest warrants and allow for a deferral.

It has been asserted that although the prosecution gained its independence from the court during the Lubanga case, it would appear to have lost it to outside forces like the UN and states<sup>37</sup>. It is further opined that the UN in particular is reluctant to let go of its firm hold on the prosecutor while in the same vein it undermines the independence of the judges and their role as custodians of fair trial rights.<sup>38</sup>

## **5 LIMITATIONS ON PROSECUTORIAL POWERS AND THE RATIONALE**

Bassiouni points out one of the key limitations to the ICC prosecutor's powers as being the Security Council's deferral powers under Article 16 of the ICC Statute.<sup>39</sup> He posits that deferral of an investigation of a given situation would make it impossible to gather the evidence thereby compromising any future prosecution.<sup>40</sup> It may be argued that the provision envisaged the UN's role of using both the enforceable and non-enforceable measures under Chapter VII and VI of the Charter respectively. However in a situation where there is failure of the UN measures following a deferral that would be a damning indictment on the ICC as an institution. The UN lukewarm action in Rwanda before and during the genocide still lingers on.<sup>41</sup>

Ntanda-Nsereko asserts that the review of the proceedings of the

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37 Stuart H.V., 'Case comment: The ICC in trouble', J.I.C.J (2008) 6 (3) pp409-419 at 415.

38 *ibid*.

39 Bassiouni C.M., *The Legislative History of the ICC: Introduction, Analysis and Integrated Text*; International and Comparative Criminal Law Series, Transnational Publishers 2005 Vol 1 p168.

40 *ibid*.

41 Nygren Krug H., 'Genocide in Rwanda: Lessons Learned and future challenges to the UN human rights system', *Nordic Journal of International Law*, vol 67, No.2, 1998, pp 165-213.



OTP helps to check the prosecutor's exercise of their discretionary powers, protect members of the public from frivolous, mischievous, and oppressive prosecutions, and save the tribunal's time and resources.<sup>42</sup> The measures keep an overzealous prosecutor in check to avoid abuse of the legal process.

It is noted that the PTC plays a vital role that requires professional due diligence by the prosecutor. The PTC is 'akin to a defendant-friendly chamber and a watchdog for compliance with due process requirements'.<sup>43</sup> Scheffer submits that the oversight function of the PTC is essential.<sup>44</sup> He explains that "the balance was critical to require the prosecutor to meet evidential standards and thresholds for warrants of arrest and indictments while the PTC stands as the reasoned gatekeeper, ensuring that the prosecutor is not a zealot, that he or she proves reasonable or substantial grounds based on the evidence and that he or she stands on solid legal reasoning before the gate is opened by the PTC judges".<sup>45</sup>

It is reiterated that at the international level the powers of the prosecutor are enormous because he/she is in a position to prosecute even government officials and heads of states. Therefore the Rome Conference placed a system of checks and balances for the prosecutor with a view of preventing the institution of frivolous or politically motivated charges.<sup>46</sup> Cassese affirms that the triggering options of a state referral or a referral by the UNSC guarantees political control and ensures respect for state sovereignty.<sup>47</sup>

The PTC exercises control over the investigating authority of the prosecutor in order to protect state sovereignty and safeguard the rights of the individual persons involved. It is asserted that the

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42 Ntanda-Nsereko D.D., 'Prosecutorial Discretion before National Courts and International Tribunals', Guest Lecture Series of the Office of the Prosecutor (2004) 12.

43 Scheffer D., 'A review of the experiences of the Pre-Trial and Appeals Chambers of the ICC regarding the disclosure of evidence', L.J.I.L. 2008 21 (1), 151-163 at 154.

44 *Ibid* 153.

45 *ibid*.

46 Safferling C., *International Criminal Procedure*, Oxford, 2012 at 231.

47 Cassese A., *International Criminal Law*, 2nd Ed, Oxford 2008, p388.

prosecutor has a double function. Firstly as an investigator to obtain materials objectively and aid the truth finding process. Secondly, as a court room expert where he or she represents the general interest in the restoration of peace and security by filling the gap of impunity.<sup>48</sup>

## **6 COMPARISON BETWEEN POWERS OF THE PROSECUTOR OF THE ICC AND OF THE “AD HOC” TRIBUNALS**

“Ad hoc” tribunals are creatures of the Security Council exercising its mandate under Chapter VII of the UN Charter.<sup>49</sup> Schabas observes that the ICTY was established with instructions to prosecute the most senior offenders of crimes in violation of international humanitarian law and international criminal law within the court’s jurisdiction.<sup>50</sup> He points out that the OTP and the Tribunals opted to uniformly prosecute offenders across the division of the conflicts in former Yugoslavia.<sup>51</sup> However, it is avered that the “Ad hoc” tribunals were marred by several shortcomings mainly for administering justice selectively.<sup>52</sup> As noted above, selective prosecutions are inevitable due to various reasons.<sup>53</sup> The tribunals have placed a high burden on all accused who allege bias on the part of the prosecutor.<sup>54</sup> The tribunal will only rule in favour of the accused if persons with similar standing as the accused are not selected for prosecution.

It should be noted that the ICTY prosecutions were triggered pursuant to an International Fact-Finding Commissions of the Security

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48 Safferling *supra* n44 at 157.

49 The ICTY was established by the UNSC under Sec Res 827 Adopted 25 May 1993 whereas the ICTR was established by SC Res 955 1994.

50 Schabas W.A., ‘International Criminal Tribunals: A review of 2007’, *Northwestern Journal of International Human Rights*, Vol 6, Issue 3, Spring 2008 p387.

51 *ibid*.

52 Cassese A., ‘The International Criminal Court Five Years On: Andante or Moderato?’ in Stahn C. and Sluiter G., eds, *The Emerging practice of the International Criminal Court*, MartinusNijhoff, Leiden-Boston, 2009 pp21-30 at p22.

53 See, J.A. Goldston, ‘More candour about criteria: The exercise of discretion by the prosecutor of the ICC’, *JICJ*, vol 8 Issue 2, pp383-406 (2010).

54 See, Schabas W.A., ‘Victor’s Justice: Selecting “Situations” at the ICC’, 43 *J. Marshall. L. Rev* 535 (2009-2010) at 536-8.

Council hence were imposed on the OTP, whereas the Rome Statute does increase the trigger mechanism and proffers a balanced approach of investing an entire situation.<sup>55</sup> Cassese argues that the ICC's universal approach of dispensing justice would result into attainment of the ideal of international criminal justice.<sup>56</sup>

The other outstanding innovation which the OTP of the "Ad hoc" tribunals did not have is the duty the Rome Statute places on the ICC prosecutor to investigate both inculpatory and exculpatory evidence equally with a view of establishing the truth.<sup>57</sup>

Cassese summaries the differences between the ICC prosecutor and those of the "Ad hoc" tribunals as follows:

The prosecutor remains the pivotal body of the ICC. Indeed, he is the most powerful character on the scene, the person that decides absent a referral by a state or SC what situation to investigate, that is, what country to select (in this respect, he/she has of course greater powers than those accruing to the ICTY or ICTR - International Criminal Tribunal for Rwanda prosecutors, when and against whom to begin prosecutions. In short, he is endowed with all the powers enabling him to be the driving force of the ICC.<sup>58</sup>

As noted above prosecutorial discretion and independence under international criminal justice is affected by many extra-legal issues which makes the job an international prosecutor an unenviable one.

## **7 LAWS IN THE ICC SYSTEM**

Katzman is disconcerted by the fact that the OTP withheld potentially exculpatory evidence yet under the ICC Statute the defense relies on the prosecution's good faith, cooperation in obtaining evidence.<sup>59</sup>

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<sup>55</sup> Schabas W.A, *supra* n48 at p390.

<sup>56</sup> Cassese A., *supra* n50.

<sup>57</sup> *ibid.*

<sup>58</sup> *Ibid.* p25.

<sup>59</sup> Katzman, R., 'The non-disclosure of confidential exculpatory evidence and the Lubanga proceedings: How the ICC defense system affects the accused's right to a fair trial', Volume 8, Issue 1 (Fall 2009)

It is noted that the two tier defense system, that is, of the 'situation phase' and 'case phase' set up is disjointed and avails the prosecutor an opportunity to abuse her power.<sup>60</sup> The need for the accused person to defend himself in that two tier system is cumbersome and ambiguous in terms of the different standards of proof for each stage.

The ICC faces a lot of criticism over its investigative policy. Judge Sylvia Steiner in her 20 June decision was keen to note that the prosecution had adopted 'reckless' investigative techniques during the initial investigations into the Democratic Republic of the Congo situation.<sup>61</sup> The OTP's reliance on information gathering and witness sourcing by Non-Governmental Organizations and incumbent governments has put the court's credibility at stake.<sup>62</sup> In the 'absence of direct investigations, the ICC has adopted a position of willful blindness when it comes to the crimes of those political leaders with whom it has had to carry favour in order to arrest those individuals they seek to try'<sup>63</sup>. Cadman observes that in the eyes of many African commentators, there is a clear manifestation that the ICC is 'merely a European-sponsored service delivering "victor's justice" by enabling African leaders to remove political opponents.'<sup>64</sup> In other words, the reliance on state cooperation to guarantee safety and security to the ICC investigators raises questions as to whether such investigations are objective or not. Thus far the situations investigated in the Congo, Central African Republic, Uganda, Sudan do allude to this likelihood. In fact the ICC prosecutor is on record having conceded that the OTP in the Darfur situation never set foot on the ground<sup>65</sup>. The unorthodox

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Northwestern Journal of International Human Rights pp 78-101 at 78.

<sup>60</sup> *ibid.*

<sup>61</sup> ICC Prosecutor v Katanga et al, ICC-01/04-01/07, Decision on Article 54 (3) (e) Documents identified as potentially exculpatory or otherwise material to the Defence's preparation for the confirmation Hearing, 20 June 2008, para 56.

<sup>62</sup> Cadman T., 'The International Criminal Court's many flaws can't simply be glossed over', The Guardian, Thursday 28 June 2012 [www.guardian.co.uk](http://www.guardian.co.uk).

<sup>63</sup> *ibid.*

<sup>64</sup> *ibid.*

<sup>65</sup> Bensouda F., 'The ICC Statute- An insider's perspective on a Sui Generis system for global justice', N.C.J INT' LL & COM REG. Vol XXXVI [2011] pp 277-285.

methods adopted were extremely risky in terms of the likelihood of manipulation and concealment of the truth over the conflict in Darfur.

It is propounded that under international criminal proceedings it is much easier for the prosecution to gather incriminating evidence than it would be for the defense to collect exculpatory material.<sup>66</sup> It is in that vein that the ICC Statute under Article 54 (1)(a) and (f) seeks to recompense the drawback of the defense by compelling the ICC prosecutor to investigate incriminating and exonerating circumstances alike and disclose all evidence to the defense that appears relevant to both, the defense or the prosecution case.<sup>67</sup> But given the obligation of confidentiality which is likely to conflict with the duty of disclosure this out right burden on the prosecutor seems to be flawed.

The requirement for the conduct of criminal investigations during an ongoing conflict needless to mention may imperil the victims, witnesses and other sources of information. The Rome Conference sought for the prosecutor to implement what the Permanent International Fact Finding Commission<sup>68</sup> has thus failed to do under the Geneva Conventions regime. The Commission was established in 1991 to investigate grave breaches or other violations of IHL. However, the findings are not made public at the behest of the parties.<sup>69</sup> Such is an arena the ICC prosecutor is meant to conduct investigations. It is evident that this was never thought through as the situations in the DRC and Darfur, Sudan have shown. It follows that Article 54(3) (e) of the Statute provides for the execution of confidentiality agreements for the effective protection of the individuals who provide sensitive information; however, the agreements are only solely for the purpose of generating new evidence. In respect to the DRC situation, it is contended that the OTP should have first investigated and independently verified the alleged information without having hastily

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66 Swoboda S., 'The ICC Disclosure regime: A defense perspective,' *Criminal Law Forum* 2008 pp 449-472 at 450.

67 *ibid.*

68 Article 90 API establishes the Commission.

69 Article 90 (5) *ibid.*

executed agreements of confidentiality with the information givers.<sup>70</sup>

It is pointed out that disclosure matters make the work of the PTC and TC cumbersome yet to outcomes are not agreeable to the parties.<sup>71</sup> It is further asserted that matters of disclosure continue even after confirmation of the charge the implication being that the entire procedure of disclosure before the PTC is superfluous and a waste of valuable resources.<sup>72</sup> Although the procedures are well intentioned, there are a lot of interests and human rights considerations placed on the prosecutor in respect to the accused, witnesses, victims, states, organisations and yet they are crammed in one process which complicates the work of the ICC prosecutor.

## **8 CONCLUSION**

In light of the legal and other practical challenges faced by the ICC prosecutor, it is an enormous task to exercise her discretion in comparison with the prosecutors of the “Ad hoc” tribunals. Although no discretion unfetters the legal measures under which the prosecutor’s discretion was placed make the exercise of the mandate very challenging. The seemingly conflicting legal obligations the prosecutor faces do affect how she has to comply with the Statute without placing one obligation over another and at the same time safe guarding her discretion as an organ of the court.

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<sup>70</sup> Swoboda S., *supra* n 67 at 470.

<sup>71</sup> Stuart H.V., ‘Case Comment: The ICC in trouble’, *Journal of International Criminal Justice*, 2008, 6(3) pp 409-417 at 410.

<sup>72</sup> *ibid.*

## **DISCRICIONARIEDADE PERSECUTORIA E A INDEPENDÊNCIA DO PROCURADOR DO TRIBUNAL PENAL INTERNACIONAL: PREOCUPAÇÕES E DESAFIOS**

### **RESUMO**

*Este artigo explora as fases investigatórias e o início dos procedimentos através da fase de julgamento e como o procurador do tribunal penal internacional executa os seus poderes discricionários e afirma sua independência.*

**Palavras-chave:** *Fases investigativas. Inicialização de processos. Fases do julgamento. Exercícios da promotoria. Discricionariedade.*

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