

A Critical Examination of the Procedure for Instituting Criminal Proceedings Before the International Criminal Court

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Abstract

In order to maintain world peace and security, the International Criminal Court was established deriving its sanctity through the famous Rome Statute, which in itself makes provision for the ways and manners upon which criminal proceedings can be instituted before the said Criminal Court. There are three different methods to do this, which are; through a referral by a State Party, through a referral by the Security Council of the U.N. and through the I.C.C. Prosecutor acting on his or her volition. This article found and revealed that, upon a critical examination of the methods referred to above, there are challenges bedeviling the triggering mechanisms of instituting proceedings before the Court. This work accordingly proffered suggestions upon an examination of the above mentioned commencement procedures.

Keywords: State referrals, self-referral, power, political proclivities, propriomotu authority

Introduction

The institution of criminal proceedings before the International Criminal Court is usually referred to as the “triggering mechanisms” which would allow the Court to have jurisdiction to handle the case. It is imperative to state that, this triggering mechanisms can bring a case to Court, through three different ways which are by:

1. Referral by a state;
2. Referral by the Security Council acting under a Chapter VII of United Nations Charter
3. The institution of an investigation through the I.C.C. prosecutor who acts on his own will¹.

It is to be understood that the issues about these methods of filing a criminal case before the International Court of Justice was part of the discussions in the famous Rome Convention which ultimately gave birth to the Rome Statute. The three methods were adopted by the State Parties.² This work is intended to critically examine the procedure for instituting criminal proceedings before the International Criminal Court in accordance with the Rome Statute and to see whether this process has enhanced the prosecution of cases before this international body or not.³ The various methods of instituting the cases before the court are necessary to be examined first before taking a position on their importance.

Referral by a State Party

It is important to state that any state party to the Rome Statute may request the office of the prosecutor to carry out an investigation about a crime allegedly committed. This means that what is known as referral by a State Party is when a State Party files a complaint to the prosecutor of the International Court of Justice.⁴

A State that is not a party to the statute can also decide to accept the jurisdiction of the I.C.C. as it concerns the crime committed within its territory or by one of its nationals, and once this situation is present, then such a State can file a request to the office of the prosecutor to investigate the crime involved.⁵ A close scrutiny of the Rome Statute will reveal that, it is clear that a State may decide to refer a request to the prosecutor of the I.C.C. by virtue of the provision of Article 14 of the Rome Statute.⁶ Who then is a State Party? This question is to enable such person or entity to have the opportunity to trigger off a criminal proceeding automatically? The answer to this poser is that a state party refers to such entity/country that has signed the Rome Statute before the 31st day of December, 2000 and equally, it includes states which ratified, approved or accepted the bindingness of the statute or which has agreed as at 31st day of December 2000 that she is bound by the Statute.⁷

The State Party which can be said to have accepted the jurisdiction of the Court is one that has agreed to the Court's jurisdiction on the crimes mentioned in the Rome Statute⁸ such as genocide, crimes against humanity and

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³ Heidi Bucheister; The International Court of Criminal Overview, Accessed on the internet at [www.beyondintractability.org/essay/international criminal court](http://www.beyondintractability.org/essay/international%20criminal%20court) as at 12/8/2015, P.5

⁴ Wikipedia, [http://en.wikipedia.org/wiki/international criminal court](http://en.wikipedia.org/wiki/international%20criminal%20court) accessed on 12/8/2015 by 11.30pm

⁵ Article 13 of the Rome statute of International Criminal Court

⁶ Understanding the International Criminal Court accessed at [www.ICC.CPI.int/iccdocs/ publications/ uicceng.pdf](http://www.ICC.CPI.int/iccdocs/publications/uicceng.pdf), on 13/8/2015

⁷ Ibid

⁸ Article 14 of the Rome Statute of the international criminal court

⁹ See article 12 (5) of the Rome statute of international criminal court

¹⁰ Article 12 (1) of the Rome statute of international criminal court

aggression and war crimes generally, and the referral we have talked about must be in writing, properly prepared.¹ Once the matter, as presented to the prosecutor, has merit, then the Court would invoke its jurisdiction in hearing the case². It can therefore be said without doubt that for the purpose of invoking the jurisdiction of the International Court of Justice, the steps to be taken are as follows;

- (i) The State sending the referral must have either been a party to the Rome Convention as recognized or the State must have agreed to be bound by the decision of the Court, meaning that it accepts the general jurisdiction of the Court as it relates to the crimes enumerated in Article 12(1) of the Rome Statute.
- (ii) The State Party refers a particular case under the Statute to the Court which ignites the jurisdiction of the Court.
- (iii) The Court now exercising its jurisdiction with a view to hear same and decide the case one way or the other.³

It is pertinent to appreciate the fact that Uganda became the first State Party referral to trigger-off the jurisdiction of the I.C.C as it concerns a matter which occurred on a State Party's own territory when it lodged a complaint against the Lord's Resistance Army (LRA)⁴ which said petition was filed at the office of the Prosecutor of the Court. This referral was inevitable because the Ugandan President, Museveni as at that time, was all out to stop the attack and horrifying circumstance dealt upon the indigenes/populace of both the Northern and Western parts of Uganda which civil war took up to about twenty-one years, and the LRA maintained deaf ears to international outcries and alternatives to stop the carnages were no longer available in the circumstance.⁵

Also, President Joseph Kabila of the Democratic Republic of Congo decided to file a "request" before the Prosecutor of the ICC on or about the 3rd day of March, 2004. This was a request filed because of the intolerable crimes committed within his country's territory⁶. Furthermore, the Central African Republic equally filed a request which was submitted to the ICC prosecutor about the 22nd day of December, 2004 which involved crimes committed since 1st day of July 2002 within the country.⁷

Critically examined, it is important to note that, in the draft of the Rome Statute, and in the Rome Statute itself, we did not come across a provision which will enable a State Party to report to the ICC, by filing a "self-referral". It was said that the ICC prosecutor himself has a close working relationship with the State Parties to the Rome Statute and that it was as a result of this relationship that he has the opportunity to convince the State Parties to bring the first set of three referrals to him in the form of "self-referrals"⁸. The criticism against this self-referral is that it does not fit in under the law, especially, Article 14 of the Rome Statute and Rule 45 of the Rules of Procedure and Evidence of the Rome Statute read in conjunction with Article 42 (1) of the same Statute.

The aforementioned position is taken because, if the self-referral is allowed to remain, then states may not be willing to take their responsibility to prosecute crimes before the I.C.C., even on the face of the preamble to the Rome Statute which specifically shows the responsibility of state parties. The question is; how about the duty imposed by Article 14 of the Rome Statute which has to do with international human rights law enabling such matters to be sent to the United Nations?. The practice of self-referral for which the ICC is currently invoking its jurisdiction is therefore risky, unnecessary and would rather add more dangerous burden to the success of the ICC.⁹

It is therefore pertinent to state that the Prosecutor should allow referrals to be sent to him naturally as envisaged by law and not to seek for State referrals which are apparently illegal and not part of the law.¹⁰ The prosecutor ought to reject the above mentioned referrals by sending them back to those States which can now follow the law to present a referral.¹¹ The ICC prosecutor can even enlighten the States by writing a letter to accompany the returned referral explaining the position to be followed legally to such State Parties; because the patterns followed by the self-referrals under scrutiny was that the Prosecutor was asked to investigate alleged

¹ Rule 45 of the International Criminal Court Rules of procedure and evidence.

² See Article 13 of the Rome Statute of International Criminal Court.

³ Michael. P. Scharf & Patrick Dowd, "No way out" The question of unilateral withdrawals or Referral to the ICC and other Human Rights (Winter 2009) 9 (2) Chicago Journal of International Law, pp 576-579

⁴ See I.C.C, Press Release, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the I.C., I.C.C 2004 0129-44-En (Jan 2004), Accessed at <http://www.icc.cpi.int/pressrelease/details&id=1681-en.html>. on 13/8/2015

⁵ Payam Akhavan, The Lord's Resistance Army Case; Uganda's Submission of the First State Referral to the International Criminal Court (2005) American Journal of International Law, p. 403 at p.410

⁶ See also the I.C.C Press release titled; Prosecutor Receives Referral of the situation in the Democratic Republic of Congo, I.C.C. OTP - 2004 0419-50-En of 19th April, 2004. Accessed at [http://www.icc.cpi.int/press/press release/19.html](http://www.icc.cpi.int/press/press%20release/19.html), accessed on 13/8/2015

⁷ See the I.C.C Press release; "Prosecutor Receives Referral Concerning Central African Republic, I.C.C – OTP-20050107-86- En of 7th of January, 2005. Accessed at <http://www.ic-cpi-int/press/pressrelease/87.htm>: on 13/8/2015

⁸ Luis Moreno-Ocampo; "The International Criminal Court, seeking Global Justice, Address at the case Western Reserve University School of Law (Frederick. K. Cox. International Law Centre lecture in Global Reform (16/10/2007) accessed at <http://www.law.case.edu/centres/cox/webcast.asp? = 20071016 ^ type =WMY> on 13/8/2015

⁹ Antonio Cassese, "Is the I.C.C still having Teething problems"? (2006) 4 Journal of International Criminal; 936

¹⁰ Ibid

¹¹ Ibid

crimes perpetrated by the “rebels” who are opposed to the government in power.¹

Withdrawal of Referrals

It is important to note that because of the discussion about the responsibility of State Parties to request for investigation by way of referral, it is necessary to discuss also, how referrals can be withdrawn. Therefore, the withdrawal of a referral, means the singular or unilateral decision of the State Party to withdraw a referral from the jurisdiction of the Court. As a result of the current practice which allows self-referral to take place, so much controversies have been recorded to have been caused by this practice. There are instances where state party may be allowed to withdraw referral. This situations can arise where:

- (1) There is a newly elected democratic government in place different from the government which sent the self-referral.
- (2) There is now a new government who has successfully overthrown the old regime or
- (3) There is a succession which has successfully taken place.²

The Rome Statute did not make provision as to the right of a State Party to withdraw the referral at all by a careful reading of the contents of the said law.³ Therefore, a critical analysis of this issue is with all due respect, in favour of not allowing a state party to withdraw the referral already sent. It can therefore be said, quite frankly, that once a referral has been sent in accordance with the Rome Statute and the Court has already become seised of jurisdiction, then it is the ICC that can determine the outcome of the referral whether positively or negatively.⁴ It is of utmost concern that if the state withdrawal of referral is allowed, there is likely to be terrible losses of the Court's credibility especially as impunity may be encouraged to the detriment of the Court's credibility, more so when a lot of human, capital and material resources must have been involved in the process of preparing for the prosecution of the case.⁵

There is the need in our view not to set a bad precedent by way of withdrawal of referrals. The whole essence of creating the International Criminal Court is to set the standards to punish the offenders of this high magnitude of crime, regardless of the person whether of low or high personality. The withdrawal method if allowed would certainly be abused by way of compromising and compounding a high level of crime which will make mockery of the integrity of the International Criminal Court which has other problems it is battling with.⁶

The Security Council Referral

This is the second means upon which criminal proceedings can be initiated and instituted before the International Criminal Court. This is quite different from the state party referral in that the Statute of Rome failed to provide elaborate provision as it concerns the Security Council referral to the ICC. Accordingly, a close look at the Rome Statute will reveal that the referral power of the Security Council is governed by the provision of Article 13 (b) of the said statute.

It is in line with this provision of the law that the Security Council decided to refer the dastardly killings and crimes of wanton destruction which took place in Darfur, Republic of Sudan, especially after the adoption of Resolution 1593 of the Year 2005 which gave legal backing to the referral by the United Nations.⁷ Further, upon a critical examination of the powers of the Security Council to send a referral as mentioned above, *visa-a-vis* its resolution before referrals are sent to ICC, most especially about the Darfu crisis based on Resolution 1593; it is humbly submitted that the idea of universal justice is illusive. To buttress this point, how can one imagine that the major military super powers, such as Russia, United States, China, Israel and other notable countries are not State Parties to the Rome Statute?⁸

There are heavy criticisms against the ICC for displaying selective justice as those non state parties cannot be punished. This implies that the weaker states are easily punished, whereas, the powerful states do not subject themselves to the jurisdiction of the Court. Therefore the integrity of ICC in the eyes of the international members of the public and the ICC jurisdiction appears to be compromised through the international power political proclivities.⁹

¹ Ibid

² Michael P. Scharf and Patrick Dowd Op.cit p. 582

³ There exist no direct express right for a State Party to withdraw its referral. The Rome Statute is completely silent on this issue

⁴ See Articles 21, 61 (4), 121 (6), 124, and 127 of the Rome Statute

⁵ Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs. US) (Jurisdiction of the Court and Admissibility of the Application) 1984 I.C.J Rep. 398. See also the case concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon vs. Nigeria, Preliminary Objections, (1998) I.C.J 273 of 11/6/98. See also the Vienna Convention on the Law of Treaties, 1969 Art 56 of the Vienna Convention including Articles 1 (9) & (b), 26, 31, 32 & 44

⁶ Integrity of ICC is the basis of the foundation of the court and its jurisdiction

⁷ The fact remains that without appropriate resolution to this effect, the Security Council cannot utilize the provision of Article 13 (6) of the Rome Statute

⁸ Luigi Condorelli, and Annalisa Ciampi, “Comments on the Security Council Referral of the situation in Darfur to the I.C.C (2005) 3 Journal of International Criminal Justice, P. 592

⁹ Hans Kochier, “Global Justice or Global revenge?” The I.C.C and politicization of international criminal Justice, lecture delivered at the

To show the weakness of the Security Council as far as the referral is concerned, it can be seen that the criticisms are important because since the Year 2002 which was the period when the Rome Statute came into the force, only two states were referred to the ICC by the Security Council and they are; (1) Darfur (Sudan) and (2) Libya, but ironically, until, now, the Security Council has failed to report Israel to the ICC over its occupation of Palestine, including the international war crimes¹ which ferociously took place in Somalia, Iraq and Afghanistan, and other countries, such as where they were alleged to have committed many international crimes among which are crimes against humanity,² and war crimes.

Further, the permanent members of the Security Council can use their powers to veto any Resolution of the Security Council where they have any political interest against referring any country/state to the International Criminal Court. The three permanent members who are not even members of the ICC can always dictate to the Security Council and stop it from acting or carrying out certain duties. Instructively, the United States have been found to have always used its veto power against the interest of other permanent members of the United Nations. The U.S. usually protects its Allies and its military personnel from being tried by the ICC which is very much unfortunate.³ Therefore international justice seems to have common feature with international power politics which seems always to be led by the U.S. whose leaders and officers can be rightly said to enjoy prosecution immunity.

Also a critical examination of the Security Council resolution seems to run foul of international justice because that same resolution exempted officials and the personnel's of the "States outside Sudan which is not a party to the Rome Statute" from being prosecuted as a result of referral sent and that culpability or otherwise of those officers/personnel's if the court or tribunal was set up by that state.⁴ The analysis above has shown the level of inconsistency of the Security Council in its Resolutions, actions and inactions especially with respect to the political agenda mentioned above. Further, it is the general principle of International Law that no State or intergovernmental group/body including the United Nations Security Council can say that it is above the law in its application.⁵

The Security Council Deferral

The irony of the problems we seem to see is that the International Criminal Court faces a lot of challenges in terms of prosecution of cases before it; especially in the area of "deferral" order which the United Nations Security Council has power under the Rome Statute and this law allows the Security Council to suspend or defer any investigation or prosecution which has commenced, or is about to commence for at least, twelve calendar months which is renewable for further terms after the completion of the deferring order for twelve months. However the Security Council is allowed to take this action only and only if the deferring order is necessary for international peace and security.⁶

The further step to take if the Security Council is to act pursuant to the Statute of Rome as it concerns its power is to order "deferral"; is to make sure that a resolution is passed to this effect. This resolution can be adopted pursuant to the United Nations Charter⁷ and once this resolution is passed, the I.C.C can no longer proceed with the matter that has been deferred.⁸ The consequences of the deferral, legally as can be seen, amounts to stoppage of the investigation or prosecution which may not commence again or which investigation or prosecution already set in motion at that stage where it got to is grinded to a halt temporarily or permanently at times.⁹

Now critically examined, the Rome Statute did not limit the number of times the order of deferral can be made. This means the deferral order can be made several times by way of renewal which may lead to uncertainty. However, the order will come to an end for prosecution or investigation to resume. This circumstance is likely to lead to destroying the basis of the balance of interests which Article 16 of the Rome Statute seeks to protect. There also exists the possibility that the Security Council may allow the deferral to lapse after 12 months, allow trial of an accused to commence and thereafter take a Resolution which will equally allow another deferral Resolution to emerge by way of renewal of the early one made.¹⁰ The terms of Article 16 did not bar the Security

Khartoum friendship Hall Khartoum, Sudan of 6/4/2009 p.2

¹ Ibid at p.4

² Ibid at pp 4 – 5

³ The unfortunate thing here is that the United States of America which has constituted themselves to world police and who complains about other countries behavior in terms of non - compliance with international obligations is always guilty of not subjecting itself of the jurisdictions of international court as a state party and that is the position of U.S in the I.C.C and I.C.J

⁴ See paragraph 6 of the Resolution of the United Nations Security Council resolution No 1593

⁵ Ibid

⁶ See Article 16 of the Statute of Rome

⁷ Chapter vii of the U.N. Charter. See also Article 16 of Rome statute

⁸ Ibid

⁹ There may exist investigation without prosecution but there cannot be prosecution without investigation. The Rome statute did not define what investigation and prosecution

¹⁰ Morten Bergsmo, and JelenaPejic; Article 16, Deferral of Investigation or Prosecution "in Otto Triffterer (ed), cit at p. 604

Council from renewing the referral order.

It is part of the findings of this work that the authority of ICC in terms of international criminal justice is undermined and that there exists the policy of double standards. This paper has taken this position because Article 16 of the Rome Statute, especially, as it can be seen in its preamble is contradictory to the operative paragraph 6 of the Resolution which allows, citizens, or personnel or officers from non-state parties to the Rome Statute, such as the U.S. and some of its Allies to “be subject to the exclusive jurisdiction” of the domestic courts or tribunals set up to investigate and or try such cases.¹ It can therefore be said that what the Security Council instrument called “Resolution 1593” ought to be declared illegal, null and void and of no effect, because paragraph 6 of the said Resolution ought not to have granted immunity to non-states parties, citizens, official, or personnel.²

With what we have discussed, it is important also to note that what is meant by the resolution of “recalling” as indicated in Article 16 of the Rome Statute as far as the preamble is concerned, is inconsistent with the decision as could be found under the running paragraph 6 of the Security Council Resolution. Thus, there is no need to allow unnecessary accusing fingers to smear the good image the ICC in trying to build for itself on the face of several other crisis of confidence bedeviling it.³

A good example of the problem which we stated above has caused, could be seen vividly when we recall the case of President Al-Bashir of Sudan; where the ICC prosecutor, trying to show that he is working, caused a lot of international debate and argument when he requested for a warrant of arrest from the International Court of Justice. Immediately, this circumstance arose, international politics crept in because the government of Libya, Russia, Sudan, China, African Union (AU) and the Arab States canvassed argument against the arrest by relying on Article 16 which should give the Security Council the opportunity to defer the process of arrest as commenced by the ICC upon the demand by the ICC Prosecutor.⁴ No wonder it became difficult for the ICC Prosecutor to easily arrest the suspects name in the referral.

From the issue of Sudan and the legal position as discussed in this work, two prominent questions stands out in two folds;

- (i) Does the Rome Statute which appear to be in issue, allow the United Nations Security Council to apply for a request to defer the investigation or prosecution or attempted prosecution in a situation where the “Security Council” itself initiated the process of the complaint/referral which the ICC is looking into?⁵
- (ii) Does it mean the circumstances and situation as presently constituted has reached a stage where the Security Council can pass a resolution that the ICC should defer in going ahead with the referral sent to the ICC?⁶

According to David Scheffer, those who drafted the Rome Treaty did not intend the applicability of Article 16 when an investigation or prosecution had already commenced, or in a circumstance where the United Nation Security Council was the one that made the referral to the ICC.⁷ It is not in doubt that David Scheffer’s contention on this issue is well taken and seems persuasive. However, a proper analysis of Article 16 does not support the contention that the Security Council cannot request for the deferral of ICC prosecution of a criminal case just because the Security Council sent the referral.⁸

Further, a closer look at Article 16 does not suggest any intention on the part of the drafters of the Statute; on the ground that, the said Article will be applicable only before investigation is commenced. If there should be time limit, the law would have specifically mentioned it.⁹ This is because, whatever is not part of a statute cannot be read into it, to give it another meaning even when the drafters of the law comes out to say that they forgot to plainly mention it.¹⁰ In addition, if it is allowed that the Security Council cannot apply for deferral against a matter referred to, then the resultant problem is that world peace may seems threatened as the Security Council may be discouraged form directly complaining by way of referral to the ICC. The position will be, “don’t complain because even when you want peace by suspending your complain, you may not get it” Article 16 could not have been drafted in favour of discouraging world peace.

Therefore there should be a middle course, and it is that extra-ordinary situation, that Article 16 intends to

¹ Ibid

² Ibid . p. 10

³ Ibid

⁴ Ibid

⁵ This is a very serious question because, the Security Council can no longer be said to be neutral when they are the complainant in this matter. It could have been otherwise if the referral was by other persons certainly this is an issue of confidence

⁶ This is the United Nation Security Council own referral, that is being sought to be deferred from being investigated/prosecuted through a resolution of the same Security Council

⁷ David Scheffer, “the Security Council struggle over Darfur and international justice, JURIST, 2018/2008 Accessed at <http://jurist.law.pitt.edu/forumy/2008/08/security-councils-struggle-over-darfur>. Ph.p on 15/08/2015

⁸ It should be understood that David Scheffer is likely to take the position he took because he led the United States delegation during the negotiation for the Rome Statute

⁹ Article 13(b) read together with Article 16 of the Rome Statute

¹⁰ Article 16 of the Rome Statute

cure, by making provisions for “deferment of referral”. The statute thus intends that Article 16 should be invoked especially where the non-usage may lead to disruption of world peace and security. Thus the prosecution of leaders of various countries such as Al-Basher and others who are alleged to have committed various crimes triable by the ICC indicates the relevance of this provision. Further, it is also intended to bring to the notice of powerful rulers and their cohorts that they will be accountable for their actions and in actions while in government. Thus, the use of suspension of deferral seems illogical and in itself is not only against World peace but an undermining of the ICC integrity and possibility of success.¹

The Institution of Proceedings by the Prosecutor of ICC

From the above critical analysis as to the institution of criminal proceedings before the ICC, we have only discussed two out of three methods. The institution of proceedings by the prosecutor of ICC is the third means² which will also be necessary to critically examined in order to do justice to this work. The power of the Prosecutor to perform this role is covered by the Rome Statute, which provides that;³ “the court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provision of this statute if.....(b) the prosecutor has initiated an investigation in respect of such a crime in accordance with Article 15”

It is important to note that, since Article 13 of the Rome Statute has mentioned on its own, the provisions of Article 15, it is better to look at the provision of the said Article 15, side by side with Article 13 and also to critically examine them. The provision of Article 15 is as follows;

1. The prosecutor may initiate investigations *priopriomotu* on the basis of information on crimes within the jurisdiction of the court.
2. The prosecutor shall analyze the seriousness of the information received. For this purpose, he or she may seek additional information from states, organs of the United Nations, inter-governmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the court.
3. If the prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial chambers a request for authorization of an investigation together with any supporting material collected. Victims may make representations to the Pre-Trial chamber, in accordance with the Rules of procedure and Evidence.
4. If the Pre-Trial Chamber upon examination of the 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.
5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the prosecutor based on new facts or evidence regarding the same situation.
6. If, after the preliminary examination referral to in paragraphs 1 and 2, the prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

What Articles 13 and 15 are saying is that the Prosecutor has enormous power to trigger of the proceedings before the ICC as if he is an interested party notwithstanding that he is the prosecutor before the Court. The ICC Prosecutor upon receiving information about crimes initiate investigation and place all the material facts before the Court, in a Pre-Trial Chamber with an attempt to commence prosecution. The power of the Prosecutor in this regard is very high because he can determine to prosecute the case by triggering off the mechanisms and he can also decide not to trigger of the mechanisms.

When the prosecutor has made up his or her mind that there is reasonable grounds to commence an investigation with respect to a State Party referral or an investigation which he the Prosecutor initiated on his own by virtue of Articles 13(c) and 15 of Rome Statute, then the Prosecutor will serve notice of pending investigation on all the State Parties and also on any non-state parties⁴ who may have interest in the subject matter of the crime by virtue of the provision of Articles 18 of the Rome Statute.⁵

There is likelihood that any state party may wish that the Prosecutor should not go ahead with the investigation or prosecution on the basis that the state is already handling the case. This can be done by the state filing a motion before the ICC in a Pre-Trial Chamber. This must be done within a month upon being served with a Notice of Pending Case. The basis for the filling of this Motion is through the provision of Article 18(2)

¹ Ibid

² This is also referred to as the “*priopriomotu Authority of the prosecution*”

³ Article 13 of the Rome Statute

⁴ Article 18(1) of the Rome statute

⁵ Article 18 of the Rome statute

of the Rome Statute. It is left for the ICC to determine its jurisdiction and acceptance of a case.¹ The power of the Prosecutor as already stated is enormous as he has freedom on whether to prosecute or not. It is only when the jurisdiction of ICC is established, that prosecutor can only proceed.

Conclusion

In conclusion, we have seen that, the quest to achieve global justice is not a straight forward one as it has lots of obstacles. The mechanisms to trigger-off commencement of prosecution before the International Court of Justice is also complex and technical in nature. We have shown that both the State Party Referral, the Security Council Referral and the Prosecutor Sponsored Referral are the three basic means upon which criminal prosecution can be commenced before the I.C.C. and by a critical examination of these methods, we have noticed some of the inadequacies creating the bottle-neck for a successful commencement of prosecution of cases before the I.C.C.

Recommendations

It is accordingly recommended that the International Criminal Court should have jurisdiction and the Prosecutor should be given power to trigger-off investigation against nationals, officers and personnel of any country in the world. The situation should not be that at the commencement of investigation against officers of a state, the state in question would be at liberty to withdraw its membership as a party to the Rome Convention, upon which the Rome Statute establish the ICC until this is done, there may not be sustained peace in the world. Everybody must be forced to accept the jurisdiction of the Court and automatic State Party. It is further recommended that the power of the Security Council which can order for a stay of investigation as to a crime before the ICC should be removed. This is because the superpowers and their allies use same to achieve international politics negatively against world peace but politically in their Favour.

A country or state party whose nationals or officers are under investigation can escape justice through the use of the Resolution of the Security Council ordering a stay of further proceedings in the matter.² It is recommended also that the ICC prosecutor should not be allowed to seek for State referrals because it is not in accordance with the law. There should be an amendment to the Rome Statute by stipulating therein that the Prosecutor should not interfere directly or indirectly with “State referral” processes as to allegation and crimes and there should be no “self-referral”. This will give credibility to the triggering mechanisms of instituting criminal prosecution before the ICC. It is further recommended that the issues of withdrawal or non-withdrawal of State Party referral should be specifically provided for. It is further recommended that there should be no room for “withdrawal of a State Party referral”.³

Additionally, it is recommended that Articles 13, 14 and 15 and all other related Articles which gave enough power to the Prosecutor be deleted and replaced with the power of individuals to send a referral to the ICC Prosecutor. This would make sense in removing the position of the Prosecutor from worst to good position because it is absurd that a Prosecutor is also a complainant in a case he is prosecuting. How can he be an accuser as well as “a prosecutor” in the same case? In view of this paper, this practice is “uncivilized” and against fair hearing, which is a human right issue and has been adequately internationalized.⁴

¹ Article 19(1), 19 (2) and 19(3) of the Rome Statute

² We have seen that a superpower such as the U.S can use the court to advance its political agenda. This is a form of privilege indirectly granted to the states whose leaders and personnel enjoy *de-facto* immunity against prosecution. The use of “security council deferral” under Article 16 of the Rome statute ought to be deleted entirely

³ This is because a criminal case of that magnitude in most instances usually involves death, maiming serious attacks and destructions that leaves permanent scares. Before any state party send a referral, it should allow proper investigation of her own and be convinced that there are enough justifiable reasons to send in a referral to I.C.C

⁴ If that is the case, then the judges of I.C.C should equally be allowed to send to the prosecutor, a referral that can be called “I.C.C judges referral” since the prosecutor is also sending referrals to himself and also prosecuting same.