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Notes and Reflections

THE PROSECUTOR IN INTERNATIONAL CRIMINAL JUSTICE[1]

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Justice is an indispensable ingredient in the process of national reconciliation. It is essential for the restoration of peaceful and normal relations among people who have had to live under a reign of terror. It also breaks cycles of violence, hatred and extra-judicial retribution. Thus, peace and justice go hand in hand.

Antonio Cassese, former President of the ICTY

The duties and powers of the Prosecutor in international criminal justice to some extent can be nominally equated to the Prosecutor at a domestic level. However, there are substantial and methodological difference. The challenges posed in the investigation and prosecution of large-scale crimes and massive criminal violations committed years ago in a sovereign foreign country are unique. Thus, it is both remarkable and surprising that the legal tools of investigation available to the international Prosecutor have produced results that one can observe and quantify. Although challenges still remain, the work of the Prosecutor in international criminal justice is a considerable achievement in the fight against impunity for serious violations of Human Rights and International Humanitarian Law.

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1. Introduction

The theme "the Prosecutor in international criminal justice" is part of the "international criminal justice" project that aims to bring together researchers, experiences and methodologies that can be found in International Relations and International Law.

Some people know the duties, powers and functions of the Ministério Público (MP) [3] at a national level, though few have a good understanding of what the Prosecutor in international criminal justice entails. The very name of the position causes some confusion due to its similarities with near national equivalents (the attorney of justice, the justice promoter, the public prosecutor, the deputy prosecutor, the prosecutor of the Public Prosecutor's Office, General Prosecutor). In today's world, the magistrate usually refers to the exercise of judicial power, and has the ability and prerogative to judge according to the constitutional rules and laws created by the legislature. The notion of *magistracy*, which in some places includes judges and prosecutors, is unknown as such in countries that have adopted common law, which extend these constitutional guarantees only to their judges, and where the word *magistrate* has a different meaning. The Portuguese magistrates (judges and prosecutors) enjoy the constitutional guarantees of life tenure.

2. The national constitutional framework

Knowing the duties, powers and functions of the MP in the national framework can help to better understand the institutional identity of the Prosecutor in international criminal justice.

All organisation and jurisdiction of the MP is the remit of the Assembly of the Republic. Article 163 of the Constitution states the

> *"Assembly of the Republic, with regard to other entities, is responsible for... electing in accordance with the proportional representation system... members of the High Prosecutorial Council".*

Article 165 establishes that:

> *"1. It is the sole responsibility of the Assembly of the Republic to legislate on the following matters, unless it authorises the Government to do so: ...*
>
> *p) organisation and jurisdiction of the courts and Ministério Público as well as the status of the corresponding judges and prosecutors and non-judicial bodies for alternative dispute resolution."*

[3] The Ministério Público is the constitutional organ empowered to start investigations on criminal violations and institutes criminal proceedings before criminal courts. The term equates, more or less, to the French Ministere Public and the English State Prosecutor's Office, Chief Prosecutor's Office or Attorney General.0

In the terms of Article 219 (1):

> *The Ministério Público represents the State and safeguards the interests prescribed by law, takes part in the enforcement of the criminal policy as defined by the sovereign bodies, carries out the prosecution according to the principle of legality, and defends democratic legality.*

Article 219 (2) also confers that the MP's has its "own statute" and "autonomy".

Article 219 (4) states that

> *"officials of the Ministério Público shall be accountable judicial officers, shall form part of and be subject to a hierarchy and shall not be transferred, suspended, retired or removed from office except in cases provided for by law".*

Article 219 (5) establishes that

> *"[t]he appointment, assignment, transfer and promotion of officials of the Ministério Público and the exercise of discipline over them shall be the responsibility of the State General Prosecutor's Office".*

On the other hand, Article 220 of the Constitution states that

> *"[T]he State General Prosecutor's Office shall be the highest authority of the Ministério Público"*

and that:

> *State General Prosecutor's Office shall be presided over by the State Public Prosecutor and shall contain the High Prosecutorial Council, which shall include members elected by the Assembly of the Republic and members whom the public prosecutors shall elect from among their number.*

These constitutional provisions derive some fundamental rules and principles that sustain the operation of the MP. They are the principles of autonomy, independence and legality of prosecution.

Article 2 (2) of the MP's Statute[4] provides that

> *"the autonomy of the public prossecutors is characterised by it being bound by legality and objectivity criteria and by the exclusive submission of public prosecutors to the directives, orders and instructions laid down by the [Statute]".*

In fact, the MP enjoys autonomy not only in relation to central, regional and local authorities, but also in relation to the judiciary. Firstly, the autonomy of the MP means that it takes no orders or instruction from central, regional and local authorities, nor can they influence its governance or administration. Secondly, the autonomy of the MP means that officials are organic and functionally separated from the judiciary, giving the MP a prerogative of stability identical to that of judges.

Thus, the MP is a constitutional body of justice organised as an independent procedural body in two ways: in terms of independence from political power in the exercise of prosecution and in terms of being separated from, and parallel to, the judiciary.[5]

Consequently, the MP is autonomous in the exercise of its duties, powers[6] and functions. This principle is based on the idea that no crime should go unpunished and, therefore, that the MP is legally obliged to act.

The principle of legality of criminal prosecution is reflected in the obligation of the MP to prosecute, provided that it has been informed of the crime and there are no obstacles preventing it from acting. This principle has a democratic character and meets the requirements of social defence in that it subjects the public body's actions to law. Thus, the action is imposed on the State not as a mere power, but as an obligation to carry out one of its essential purposes, which is to maintain and reintegrate the legal system. Therefore, the MP has the duty to prosecute without being led by political criteria of opportunity or social utility.

Prosecution is thus the most important function of the MP.[7] Moreover, the gradual democratisation of criminal proceedings has imposed the accusatorial principle that places the MP in a position of near monopoly in the exercise of prosecution.

As mentioned earlier, the State General Prosecutor's Office is the highest authority of the Ministério Público, which is organically and functionally independent. The independence of the MP lies in an organisational-institutional framework through which interference, dependences or limitations regarding other state powers such as the President, the Assembly of the Republic and the Government are neutralised.

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4 Approved by Law no. 47/86 of 15 October, republished in Law no. 60/98 of 27 August, and changed by Laws 42/2005 of 29 August, 67/2007 of 31 December, 52/2008 of 28 August, 37/2009 of 20 July, 55-A/2010 of 31 December and 9/2011 of 12 April.

5 This view is reaffirmed in several parts of Criminal Procedure Law when stating the principle of objectivity (Article 53), by applying to magistrates of the MP the provisions concerning impediments, refusals and excuses of judges (Article 54), when making it compulsory for the MP to investigate *à charge* and *à décharge* (Article 262), by exempting the MP from the rules on the conduct of lawyers and defenders (Article 326), and recognising the right to appeal in the sole interest of the accused (Article 401).

6 Article 3 of the MP Statute specifies its duties and Paragraph 3 states that "in the exercise of its duties, the Ministério Público is aided by justice officers and criminal police bodies, and has access to advisory services".

7 The magistrate is a speaking law, and the law is a silent magistrate (Cicero).

Moreover, Article 219 (4) of the Constitution states that

> *"Ministério Público agents are accountable and subject to hierarchy".*

Hierarchical subordination means that MP[8] agents receive orders and instruction from the State General Prosecutor's Office, which seems to contradict the MP's principle of independence. It is necessary to note that the independence that characterises the structure and functioning of the MP, which every MP agent benefits from, is a functional independence that has to be seen in light of the MP's unity and indivisibility.

Indeed, the agents that comprise the MP are under the aegis of a single higher body, the State General Prosecutor's Office,[9] to the extent that the MP appears as a single institution, with the division being essentially functional. Thus, the principle of unity has an administrative character. The organisation of the MP into various sectors only intends to establish a rational division of labour; however, all agents in the different sectors are guided by the same principles and goals, thus constituting a single institutional body.

The indivisibility of the MP is a direct consequence of its unity. Thus, a MP agent can be replaced by another without any practical implications, since acts are regarded as practised by the MP and not by a single individual. The entity that is present in all cases is the MP, albeit through a given agent. The term "representative of the Ministério Público",[10] therefore, is not technically correct when referring to MP agents.

This principle allows MP agents to be replaced by another during cases. However, the replacement cannot be made arbitrarily: it has to be done in line with terms provided by law (in case of promotion, transfer, suspension, dismissal, retirement, death, etc.), without constituting or implying any procedural change. Incidentally, Article 4 of the Statute envisages that

> *"agents of the Ministério Público can be replaced according to the provisions of this law".*

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8 Article 8 (Agents) of the MP Statute states:
1 — The agents of the MP are:
a) The General Prosecutor;
b) The Deputy General Prosecutor;
c) The Assistant General Prosecutors;
d) The Prosecutors;
e) The Assistant Prosecutors.

9 Article 7 (Organs) of the MP Statute
The bodies of the MP are:
a) The State General Prosecutor's Office;
b) The District General Prosecutor's Offices;
c) The State Prosecutor's Offices.

10 Article 4 (Representation) of the MP Statute:
1 — The MP is represented before the courts:
a) In the Supreme Court of Justice, the Constitutional Court, the Supreme Administrative Court, the Supreme Military Court and in the Court of Auditors, by the State General Prosecutor;
b) In High Courts and the Central Administrative Court, by Assistant General Prosecutors;
c) In Courts of First Instance, by prosecutors and Assistant Prosecutors.

Thus, the principle of functional independence means that MP agents act independently in the exercise of their duties. They base their conduct on law and personal conviction, and may refuse to comply with illegal directives, orders and instructions on the grounds of them being a serious violation of their legal conscience. Accordingly, the hierarchical subordination of MP agents exists only at an administrative level, not functionally.

In short, the autonomy of the MP is characterised by its links to legality and objectivity criteria and by the exclusive subjection of agents of the MP to directives, orders and instructions provided by law.

3. The international institutional framework

Introducing and reviewing the national constitutional framework of the MP and its agents can help understand the role of the Prosecutor in international criminal justice as perceptions are usually preceded and influenced by perceptions of the national justice. Identity and the institutional framework in which the Prosecutor stands internationally will be examined below in order to understand the evolutionary process and historical circumstances behind the positon's existence, as well as its importance today.

The Prosecutor of the International Criminal Tribunal for the former Yugoslavia

In 1993, the UN Security Council created the International Criminal Tribunal for the former Yugoslavia (ICTY).[11] The sheer scale of human rights violations in Bosnia and Herzegovina – think of the images of destroyed cities and people looking like cadavers in the death camps of Omarska, Keraterm and Trnopolje[12] – generated huge international outcry and prompted the international community to embark on its first course of international criminal justice since the Nuremberg and Tokyo trials.

Article 16 of the ICTY Statute states that:

> *The Prosecutor shall be responsible for the investigation and prosecution of persons [allegedly] responsible for serious violations of international humanitarian law... The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source.*

[11] On 25 May 1993, the UN Security Council formally adopted Resolution 827, establishing the International Criminal Tribunal for the former Yugoslavia, known as the ICTY. This resolution contained the ICTY Statute, which determined the Court's jurisdiction and organisational structure as well as criminal proceedings in general terms. This was the first war crimes tribunal established by the UN and the first international court of war crimes since the Nuremberg and Tokyo trials. This date marked the beginning of the end of impunity for war crimes in former Yugoslavia.

[12] This situation was tried at the ICTY, Kvočka et al. (IT-98-30/1) "Omarska, Keraterm & Trnopolje Camps"; in the BiH Court, Mejakić et al. (IT-02-65) "Omarska and Keraterm Camps".

A similar decision was made with regard to the Prosecutor of the International Criminal Tribunal for Rwanda (ICTR), according to Article 15 of the ICTR Statute. Paragraph 3 of the Article states that

> *"the Prosecutor of the International Criminal Tribunal for the former Yugoslavia shall also serve as the Prosecutor of the International Criminal Tribunal for Rwanda".*[13]

As shown in Articles 16 and 15 of the Statutes of the ICTY and ICTR respectively, the Prosecutor is independent and does not seek or take instruction from any government or international organisation, or from any of the other two organs of the Court. The ICTY Prosecutor's Office is mandated to investigate and prosecute those presumed responsible for serious violations of International Humanitarian Law (IHL) committed in the territory of the former Yugoslavia.[14]

> *[In early 1994] the Office of the Prosecutor has had to invent itself. Starting from nothing... a staffing plan was first formulated and qualified and experienced staff were recruited. Then an information management and litigation support system was developed... Following the work of the investigators, the final stage of the Prosecutor's task begins with the framing of indictments and the ensuing trial process*.[15]

Indeed, the ICTY Prosecutor's Office investigated many of the worst atrocities that have taken place in Europe since World War II – such as the 1995 Srebrenica massacre – and has prosecuted civilian, military and paramilitary leaders for crimes and atrocities. In 2011, the last two accused by the ICTY Prosecutor, Ratko Mladić and Goran Hadžić, were arrested and transferred to a UN detention centre in The Hague after many years on the run, thus ensuring that none of the 161 individuals accused went unpunished.[16]

The Prosecutor's Office is headed by a Prosecutor appointed by the UN Security Council for a renewable term of four years. A Deputy Prosecutor is appointed by the UN Secretary General.

In accordance with the Resolutions of the Security Council and the Statute of the Tribunal – notably pursuant to Chapter VII of the UN Charter – UN Member States are obliged to cooperate with the Prosecutor's Office in the investigation and prosecution of persons accused of committing serious IHL violations.

The Prosecutor's Office was organised into an investigation division and a prosecution division. The latter had three sections: trial, appeal, and information and evidence. The

[13] For this reason, only the Prosecutor of the ICTY is mentioned here.
[14] Since 1 January 1991.
[15] ICTY *Annual Report*, A/49/342, S/1994/1007, of 29 August 1994.
[16] In accordance with the Tribunal's completion strategy, the final charges were issued in late 2004.

Prosecutor's Office employed staff (such as police officers, investigators, forensic experts, analysts, lawyers, trial lawyers and legal advisers) from approximately 80 countries, whose experiences with national systems were combined into a single system of international criminal procedures.

When the ICTY began its pioneering work of investigating and prosecuting perpetrators of serious IHL violations, the statute only gave the Prosecutor the power to "initiate investigations" and "to question suspects, victims and witnesses, collect evidence and conduct investigations on the ground".[17] Unlike the criminal codes of national legal systems, the ICTY Statute contains a rather limited set of legal tools to investigate and prosecute crimes in the jurisdiction of the International Tribunal.

The situation that the ICTY Prosecutor faced in carrying out the mission was completely different from the one Prosecutor Robert Jackson met in the Nuremberg Tribunal. In the latter case, the accused were within reach, the archives were open and the witnesses were available; in the former Yugoslavia, everything took place at a distance (between The Hague and Belgrade, Sarajevo and Zagreb) and within sovereign countries that were unwilling to detain suspects or cooperate with the Prosecutor.

At the beginning in 1994, even those who encouraged and supported the establishment of the ICTY doubted that it would have any impact or success. Almost twenty years later, its jurisprudential legacy and its effect on peace and reconciliation remain a topic of vibrant academic debate. For the ICTY, it is generally accepted that there is a before and after, with new precedents being set for international law, international criminal justice and international humanitarian law.

Indeed, with the establishment of the ICTY, the UN Security Council hoped to deter civilian and military officials of the former Yugoslavia from committing further atrocities, sending a clear message that those responsible for atrocities would be brought to justice. Unfortunately, the establishment of the ICTY had little or no deterrent effect, with the Srebrenica massacre in July 1995 – the greatest crime of all in the armed conflict – occurring after the tribunal had been established. Following Srebrenica, the Prosecutor filed charges and arrest warrants were issued against the Bosnian Serb leader Radovan Karadžić and his Chief of General Staff, General Ratko Mladić. Again, many doubted that they would ever face justice; however, they were arrested and transferred to The Hague's detention centre in 2008 and 2011 respectively.

The ICTY was created in May 1993. The conflict began in 1991 and ended in December 1995 with the Dayton Accord. Even before that date, and during the conflict, the Prosecutor sent several investigation teams to Bosnia and Herzegovina (BiH).

In 1996, the Bosnian Serb Duško Tadić became the first to be tried for war crimes and crimes against humanity at the ICTY. This case was an important sign that the Tribunal would prosecute the perpetrators of serious international crimes. The evidence and testimonies collected for the trial of Duško Tadić proved to be very useful in the Prosecutor's guidance for other cases, a bottom-up approach that culminated on 28 June 2001 with the arrest of former President Slobodan Milošević.

[17] The statute is silent as to how to accomplish these tasks and by what means. In fact, there are more paragraphs in the Statute on the appointment and qualification of the judges than on skills and research tools.

The ICTY created a large and rich body of jurisprudence that decisively influenced international criminal justice and which, to a large extent, has been adopted by the International Criminal Court (ICC). For approximately two years (1996-1997), the Prosecutor investigated the July 1995 Srebrenica massacre. On 2 November 1998, the Prosecutor filed an indictment. The trail started on 13 March 2000 and ended on 2 August 2001. The trial took place over 98 days, with hearings lasting five hours a day. Being a first for European history, the July 1995 Srebrenica massacre was judged by the Tribunal as genocide.

The most immediate goal of the ICTY was to end impunity and prosecute those presumed responsible for the most serious crimes in the former Yugoslavia. Another more ambitious and long-term goal was to contribute to peace and reconciliation in the region and provide resolution for victims and their families.

The Prosecutor of the International Criminal Court

On 17 July 1998, the international community reached a historic landmark when 120 States adopted the Rome Statute, through which the ICC Statute was approved. The Rome Statute entered into force on 1 July 2002 after ratification by 60 countries, including Portugal.

One of the ICC organs is the Prosecutor's Office, which is responsible for receiving reports of the crimes that fall within its jurisdiction, examine them and eventually institute criminal proceedings.

The roots of the ICC Statute are close to those of the ICTY and the ICTR, although there are differences regarding several legal and structural characteristics. In fact, the ICC is a permanent judicial body with universal reach[18] and its activity complements that of national courts.[19] The ICTY and the ICTR are subsidiary bodies of the UN Security Council; the ICC was established and is maintained by the Assembly of States Parties, who acceded to the Treaty of Rome. The UN Security Council appoints the Prosecutors of the ICTY and the ICTR; in the case of the ICC, the Prosecutor is elected by States party to the Treaty of Rome. One of the major differences in the two *ad hoc* tribunals is the possibility for victims to appear before the ICC to express their opinions and to claim reparation for the injustices they have suffered.[20]

The Court's exercise of jurisdiction is dependent on referrals being made to the Prosecutor by a State Party or by the UN Security Council, whenever one or more crimes have been committed within its jurisdiction (Article 13 of the ICC Statute). Information received by the Prosecutor about crimes committed within the Court's

[18] The ICTY and ICTR are *ad hoc* tribunals with limited territorial and temporal jurisdiction. It can be said that the ICC is forever and for all. The difference between *ad hoc* and permanent justice was and still is a major obstacle to the ratification of the Rome Statue by some countries, which, having supported *ad hoc* justice solutions (in the case of some countries and if deemed convenient), are reluctant to support a permanent justice solution (for all and on every occasion).

[19] The jurisdiction of the ICTY and ICTR is concurrent with that of national courts and has primacy over national courts. The ICC operates on the principle of complementarity, i.e. exercising jurisdiction only when national courts are unwilling or unable to genuinely investigate and prosecute.

[20] In the former Yugoslavia and Rwanda tribunals, victims stood before the courts as witnesses. However, in the ICC Statute, victims were elevated to the category of procedural participants in their own right. Indeed, several provisions in the ICC Statute stipulate the involvement of victims at all stages of the proceedings. Most importantly, victims of international crimes can claim redress for violation of their rights.

jurisdiction may lead to the initiation of an investigation by itself if it is believed that there are sufficient grounds to do so and if the Pre-Trial Chamber's permission to start the investigation has been obtained (Article 15 of the ICC Statute). When conducting investigations, the Prosecutor has to trigger some preliminary decision on admissibility to ensure the functioning of the complementarity principle of intervention (Article 18 of the ICC Statute). That is,

> *"it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" (Preamble of the ICC Statute)*;

the Prosecutor may start criminal proceedings only if the State is genuinely unable or unwilling to investigate and prosecute.

The Prosecutor may, as a rule – only once and before the trial or at its commencement – ask the ICC to rule on issues related to jurisdiction and admissibility. If it is decided that an inquiry is to be transferred to a State, the Prosecutor may request the State in question to pass on information about the progress of the proceedings. This information should be kept confidential if the State so requests. If the Prosecutor thereafter decides to open an investigation, the decision must be shared with the State in question (Article 19 of the ICC Statute).

Article 42 of the ICC Statute, in its nine paragraphs, presents the ICC Prosecutor's Office as acting autonomously from the Court. It is chaired by the Prosecutor and assisted by one or more Deputy Prosecutors, who must be highly competent individuals of high moral character with extensive practical experience in the prosecution or trial of criminal cases. The Prosecutor is elected by the members of the Assembly of States Parties through a secret ballot and must gain an absolute majority. The Prosecutor and the Deputy Prosecutors are subject to the exclusivity rule and they may be subject to disqualification if their impartiality is in question.

A Victims and Witnesses Unit, established within the ICC Registry, takes protective measures and prepares security arrangements. It also provides counsel and other assistance to witnesses and victims who appear before the Court, or others at risk (Article 43 of the ICC Statute).

The Prosecutor appoints

> *"such qualified staff as may be required to [its] respective [office]", namely, investigators. In the employment of staff, the Prosecutor ensures the "highest standards of efficiency, competency and integrity".*

In exceptional circumstances expertise of seconded personnel offered by States Parties, intergovernmental organisations or non-governmental organisations may be employed (Article 44 of the ICC Statute).

The Prosecutor, Deputy Prosecutors and staff from the Prosecutor's Office, when engaged in the business of the Court, enjoy privileges and immunities that are necessary to the fulfilment of their duties (Article 48 of the ICC Statute). The primary function of the Prosecutor is to investigate and prosecute the perpetrators of massive violations of human rights and IHL.

It is possible to discern some similarities between the prosecution of massive crime violations internationally and the prosecution of organised crime at a national level. There are also important differences that make the types of procedure dissimilar. At least two in international prosecution stand out. The first has to do with a lack of external administrative structure able to carry out investigations in the territory of a State without its help – as well the absence of an international police force to make arrests, giving paramount importance to the State's cooperation.[21] The second is that the procedural model of international criminal tribunals is a combination of elements of the accusatory system (common law) and the inquisitorial system (civil law).

Several concepts and procedures from both legal traditions can be found in the Statutes of the Courts and the Procedure and Evidence Rules; in the approach of the Prosecutor, judges and defence lawyers; in the introduction of evidence; and the manner in which the case is conducted in general.

As a result of that combination of elements of the different legal systems, some general principles are acquired in relation to the international rules of evidence: national rules of evidence not binding, application of the rules of evidence which best favor a fair determination of the matter, admissibility of any relevant evidence with probative value, exclusion of evidence if its probative value is substantially outweighed by the need to ensure a fair trial, possibility of verification of the authenticity of evidence obtained out of court and reception of the evidence of a witness orally or, where the interests of justice allow, in written form[22]. Further examples of that combination in the production of evidence are the testimony of the accused[23] and a statement of the accused[24] (common law), and the possibility for the Court *proprio motu* to summon witnesses and order their attendance[25] (civil law).

Still, some methods commonly used in national criminal proceedings may be of use internationally, such as resorting to "insiders" as witnesses. Although national systems are aware of this practice, it may have a particular meaning in the context of the prosecution of international crimes, especially when the accused enjoy top hierarchical positions. It may also be relevant in certain forms of criminal participation (such as joint criminal enterprise). The testimony of an insider in a case of joint criminal enterprise is one of the best ways to prove the purpose of the criminal enterprise and its members. Insiders can and should be used in complex criminal cases, because finding evidence of a complex criminal organisation and its leaders can be difficult and consuming in terms of time and resources.

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21 Section 9 of the ICC Statute provides for international cooperation and judicial assistance of the States Parties. Article 86 (General Obligation to Cooperate) establishes that "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court".

22 Rule 89 of ICTY Rules of Procedure and Evidence. See also Article 69 of the ICC Rules of Procedure and Evidence.

23 Rule 85 C of ICTY Rules of Procedure and Evidence

24 Rule 84 bis of ICTY Rules of Procedure and Evidence

25 Rule 98 of ICTY Rules of Procedure and Evidence

Although similar investigating tools or legal concepts can be used nationally, unique challenges arise when investigating and prosecuting international crimes. Some are obvious, such as a lack of police or enforcement officers; others are less obvious, such as the impact of the combined common law/civil law process.

Such challenges have an impact on the type of investigation methods, the recruitment of personnel as well as the legal tools used and their effectiveness. Only a mix of traditional and innovative criminal investigation tools and a balance of the different national legal cultures can ensure effective investigation and prosecution of international crimes.

Similar to what had happened with the ICTY, the ICC adopted the accusatory model, which is one of the fundamental pillars on which all functions and activities of the Prosecutor stand. Thus, it is up to the Prosecutor to investigate *à charge et à dècharge* suspicions of the existence of crimes and, where appropriate, indict suspects. However, there are at least three important exceptions in the accusatory model.

Firstly, as at Nuremberg and Tokyo, there are no technical rules for the admissibility of evidence. Consequently, all relevant evidence may be included in the process unless their probative value is substantially offset by the need to ensure a fair trial or if the evidence was obtained through serious violations of human rights.

Secondly, while in the accusatory system courts must normally be satisfied with the evidence submitted by the parties, the Court may *proprio motu* order the production of additional evidence. This allows the Court to be fully satisfied with the evidence on which it bases its final decisions. It was considered that, in the international sphere, the interests of justice are best served by this provision and that the decrease, if any, of the rights of the parties is minimal by comparison.

Thirdly, the granting of immunity and plea-bargains have no place in the Rules of Procedure and Evidence. It remains entirely a matter for the Prosecutor to determine whom to investigate and to prosecute. Cooperation of an accused person will also be taken into account as a mitigating circumstance, as well as for the purpose of granting pardon or commutation of the sentence. The Prosecutor's Office operates independently from the Court's judges. There is, however, a close and cooperative relationship between the Prosecutor’s Office and the rest of the Court in administrative, personnel and other issues related to the functioning of the Court as a whole.

The selection of personnel is a demanding and time-consuming exercise. It is no exaggeration to note that the success of the Court as a whole depends largely on the quality of the Prosecutor's Office investigation staff. Having experienced and qualified prosecutors is important: If the prosecution evidence is not exhaustive, relevant and complete – or is insufficiently prepared – the risk of failure of the charge is high, given the principle of *in dubio pro reo* and the requirement of evidence beyond reasonable doubt.

The ICC Prosecutor, as in other cases, governs actions through the principle of mandatory prosecution whenever there are elements of criminal conduct and action must be taken, and when not acting is not an option. There is no police force at an international level. Thus, the Prosecutor must rely on the support of State police in carrying out investigation, accusation and prosecution functions. There is no

international enforcement body, but the Prosecutor can count on numerous other investigation mechanisms, be them governmental or not.

The Prosecutor's Office is one of the organs that make up the Court (Article 34 of the ICC Statute). Article 42 of the ICC Statute guarantees its functional autonomy, stating that the Prosecutor "shall act independently as a separate organ of the Court". The Prosecutor is responsible for receiving, through any suitable form, *notitia criminis* about crimes within the jurisdiction of the ICC and then investigates and institutes criminal proceedings.

The Prosecutor may also propose amendments to the Elements of Crimes (Article 9 (2) of the ICC Statute) and the Rules of Procedure and Evidence (Article 51 (2) c) of the ICC Statute). For an independent and impartial ICC, the Prosecutor enjoys privileges and immunities in carrying out duties in the territory of each State party (Article 48 of the ICC Statute).

The Prosecutor's Office is headed by a Prosecutor (who holds full directive and administrative powers) and assisted by dedicated Deputy Prosecutors of different nationalities, working on a full-time basis.

4. The Prosecutor and international criminal procedure

The international criminal procedure is different from the national in several ways. One of the most striking differences is the symbolic function of international criminal procedures, which are deemed essential to the peace and reconciliation process in post-armed conflict societies; in other words, there can be no peace without justice and reconciliation. "Thus, Peace and Justice go hand in hand" (Antonio Cassese).

However, this is only possible when the communities involved give legitimacy to these procedures, and when the messages of the procedures are received and accepted by their communities. Thus, if courts are to contribute to peace and reconciliation in affected communities, there is a need to communicate with the people involved. Although much progress has been made over the past decade, outreach programmes remained a significant challenge for *ad hoc* tribunals and still remain for the ICC.

In addition to these external communication obstacles, there are also internal barriers. On the one hand, there are those who repeatedly ask for more resources to enable the court to achieve their ambitious goals. On the other hand, others question whether it is appropriate for prosecutors and judges to be involved in dissemination activities. After all, the international criminal courts are modelled on national courts, which, as a rule, do not have such a role.

Domestic prosecutors and judges focus mainly on the technical elements of crimes and procedural aspects of the case. In addition to the application of the law, any activity is considered to be "political" (a taboo term). Nevertheless, it should be pointed out that the rhetorical functions of international criminal law are fundamentally different from nation legislation. There are important reasons for international courts to carefully manage public evaluation and their image, which incidentally should also be done at a national level.

International criminal justice is still in its infancy. The ICTY, as the first *ad hoc* tribunal in recent history, was established only two decades ago. Unlike domestic criminal law

that could be centuries old in terms of history and jurisprudence, there is still a lack of understanding about what purpose the international criminal tribunals serve. The ICC also remains either unknown or unaccepted in many parts of the world.

Besides this alienation and ignorance, international criminal justice is normally intended for communities with little previous experience of an impartial and independent judiciary – otherwise they would be willing and able to investigate and prosecute the crimes by themselves. It is therefore important for international criminal law to establish a new beginning for these communities and to be an example to the national courts. This is only possible if the public has a positive and fair view of international criminal courts.

International criminal justice essentially covers genocide, crimes against humanity and war crimes. Of course, communities devastated by these crimes are traumatised, fearful, eager to find a culprit, and take revenge. In turn, in most cases, local politicians and media agitate these feelings, jeopardising the peace and reconciliation process, with no other help being available, except the intervention of international courts. National criminal law seeks mainly to punish and prevent crimes; international criminal law is intended to also contribute to peace, reconciliation, security and the wellbeing of the international community.

Being a case of massive violations of human rights and international humanitarian law, the Srebrenica massacre presented exceptional legal and logistical challenges due to the large number of victims, witnesses, forensic investigations, incidents and supporting documents involved,[26] as well as the original legal complexities of the various crimes in question.[27]

The ICTY and the ICTR were created as auxiliary bodies to the UN, which until then had never practised international criminal justice. Therefore, the need to strike a balance between the priorities of criminal operations, the detention of suspects and compliance with other UN principles posed legal, institutional and operational challenges specific to the Prosecutor in terms of fulfilling mandates to investigate crimes and initiate criminal proceedings before the Court. These challenges increase with the complexity of crimes, their size, the safety concerns of potential witnesses, and the fact that in the early years arrests of suspects often preceded the investigation.[28]

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[26] In the first instance, and after much filtering in the preparation for trial, the case had 103 witnesses called by the Prosecutor; 13 witnesses called by the Defence (including the very General Radislav Krstić). The Prosecutor filed 910 documents (some of which extensive dossiers) and the Defence presented 183 documents.

[27] See ICTY, KRSTIĆ (IT-98-33) "SREBRENICA DRINA CORPS" and other related cases: BLAGOJEVIĆ & JOKIĆ (IT-02-60) "SREBRENICA; ERDEMOVIĆ (IT-96-22) "PILICA FARM"; KARADŽIĆ (IT-95-5/18) "BOSNIA AND HERZEGOVINA" & "SREBRENICA"; MILOŠEVIĆ (IT-02-54) "KOSOVO, CROATIA AND BOSNIA"; MLADIĆ (IT-09-92) "BOSNIA AND HERZEGOVINA" & "SREBRENICA"; NIKOLIĆ MOMIR (IT-02-60/1) "SREBRENICA"; OBRENOVIĆ (IT-02-60/2) "SREBRENICA"; ORIĆ (IT-03-68); PERIŠIĆ (IT-04-81); POPOVIĆ et al. (IT-05-88) "SREBRENICA"; STANIŠIĆ & SIMATOVIĆ (IT-03-69); TOLIMIR (IT-05-88/2) "SREBRENICA"; TRBIĆ (IT-05-88/1) "SREBRENICA".

[28] When investigating and prosecuting massive violation of human rights or international humanitarian law, it is extremely important to first investigate suspected violations, then jointly indict the suspects who participated in the same criminal action, and arrest the accused in an organised manner. Those suspected of having committed war crimes are heroes to the other side of the conflict and keep communication lines and networks of relationships that can disrupt investigations, destroy evidence, intimidate witnesses, and organise escape from detention.

5. Some questions

Genocide, crimes against humanity and war crimes are, by definition, massive. International crimes can be widespread and systematic, with multiple offenders and victims. Thus, perpetrators are often coordinated and organised by senior military and/or civilian officers. Their nature requires national jurisdictions to have a different approach in terms of "selecting", investigating, indicting, proving, adjudicating, defining responsibilities, punishing, repairing, and enforcing penalties.

In short, this means that criminal theory built on common cases of individual criminal offense is unsuitable in cases of massive criminal violations. In all, prosecuting war crimes is not the same as dealing with common individual criminal cases.

In addition, a national court with jurisdiction to try war crimes must regard the cases as urgent and recognise their international impact, considering the circumstances and nature of violations of IHL. In fact, war crime trials must be timely, given the requirements of peace and reconciliation processes, and conducted by independent and impartial judges. National judges, even if they have not taken up arms in conflict,[29] in a sense have always taken the side of a party in the conflict. In principle, those who took part in a conflict cannot be completely independent and impartial or, at least, cannot be publicly perceived as such. Justice must be done and must be seen to be done.

Is there a need for strategy in the prosecution and trial of war crimes? The answer is clearly yes. The Prosecutor must act with a view of closure and completion considering that: war crimes are usually committed in the past; most criminal operations have been investigated and documented by different public and private entities; the majority of suspects have been identified; there is a risk of losing evidence; fatigue and a lack of witnesses motivation increases over time; new generations are more focused on the future; expeditious and fair trials are the only way to close the door to the past and open the door to the future[30]; and justice is about the past and reconciliation is about the future.

After considering these points, the Prosecutor is asked how many cases to investigate and prosecute and what strategy (selecting and mapping cases, establish interactive and centralised databases, and deduce accusations) [31] is being considered. The Prosecutor also needs to take into account available resources (human, financial and material) and organise interaction in order achieve the common goal of closing the door to the past.

The joint criminal enterprise is particularly applicable in circumstances when senior leaders share the intent of committing a crime and each contributes to fulfilling the

[29] Most armed conflicts that took place after World War II were not international conflicts, but civil wars. Thus, the public perception of independence and impartiality of the Court becomes even more important and decisive. Without this dimension, trials, regardless of how fair and fast they may be, will have no effect and impact on the peace and reconciliation process of communities.

[30] In Sarajevo (2008) diplomats said that the issue of "war crimes" in Bosnia was poisoning the political, social and economic environment, as well as personal relationships. It was necessary to clean up this type of poison and close the issue of war crimes as quickly as possible.

[31] See the Office of the UN High Commissioner for Human Rights, Rule-of-Law tools for post-conflict States, Prosecution initiatives, UN, New York and Geneva, 2006.

criminal purpose. The relationship among perpetrators may or may not be hierarchical, although this is not decisive.[32]

It is the practice of joint murder with shared intention that defines relationships. Even if perpetrated by others, enterprise members, and not necessarily those individuals who physically carried out the crimes, are culpable. The concept reflects a reality where large-scale atrocities are committed by the combined action of various forces or agents, and criminal purpose can only be shared by leaders who take action to achieve their ends.

In August 2003, the Security Council issued Resolution 1503, urging the ICTY to "focus on the prosecution and trial of senior leaders suspected of being responsible for crimes within the jurisdiction of the ICTY" and transfer other cases to competent national courts in Bosnia, Herzegovina, Croatia and Serbia.

The transfer of a case from an international to a national court proved to be a complex subject and raised a series of new legal and organisational issues that were difficult to foresee and solve. However, the efficient and effective manner in which the War Crimes Section of the Court of Bosnia and Herzegovina – in cooperation with the ICTY – handled the situation should be stressed.[33]

Other legal principles that were also developed as a result of the transfer process also deserve analysis. They include the development of the ICTY and Court of Bosnia and Herzegovina Prosecutors' cooperation mechanisms, the notion of "proven facts" and "documental evidence" from the ICTY proceedings. These developments contribute to the heritage of the ICTY, leaving a lasting legacy for future national courts dealing with international crimes. Despite the different legal natures of the ICTY and the ICC, this experience can be seen as supplementing the principle of complementarity and constitutes critical learning for the future relationship between international and national criminal jurisdictions.

One of the pre-project objectives of investigation in "International Criminal Justice" is "to bring about new proposals for some of the problems that currently arise in the context of international criminal justice".

Given the above, and particularly due to the nature of war crimes, some relevant questions regarding the work of the Prosecutor in international criminal justice will need to be asked in the hope that they will translate into new proposals for some of the problems that currently arise from international criminal justice.

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[32] On the contrary, the hierarchical relationship is crucial for assessing and establishing the responsibility of the superior, be it civil or military, i.e. *de jure* or *de facto* responsibility.

[33] The case of Radovan Stanković was the first to be transferred from the ICTY to the War Crimes Section of the Court of Bosnia and Herzegovina. On 10 July 2002, he was placed in custody in the ICTY detention unit. On 1 September 2005, the ICTY decided to transfer the case to the Court of Bosnia and Herzegovina, and on 29 September 2005, the accused was transferred to Bosnia and Herzegovina. On 7 December 2005, the indictment was confirmed/accepted. This was also the first "11bis case" finalised in the Court of Bosnia and Herzegovina. In fact, on 14 November 2006, the first trial sentenced Radovan Stanković to crimes against humanity and imposed a prison sentence of 16 years. On 28 March 2007, the Board of Appeal modified the sentence to 20 years. Other cases transferred from the ICTY to the Court of Bosnia and Herzegovina were Ljubičić (IT-00-41) ''Lašva Valley''; Mejakić et al. (IT-02-65) "Omarska and Keraterm Camps"; Stanković & Janković (IT-96-23/2) "Foča"; Todovic & Rasevic (IT-97-25 /1) "Foča"; Trbic (IT-05-88/1) "Srebrenica"; Stanković & Janković (IT-96-23/2) "Foča" ; Todović & Rašević (IT-97-25/1) "Foča" ; Trbić (IT-05-88/1) "Srebrenica"

Accordingly, what will be the impact on court independence and impartiality, at least in terms of public perception especially in cases of non-international armed conflict?

What criminals and crimes should be tried? How should charges of large-scale international crimes be addressed? How should cases that are investigated and submitted to trial be selected when it is impossible to try all those presumed as responsible for the crimes committed in armed conflicts?

What form of criminal responsibility (individual, command or joint criminal enterprise) does the Prosecutor choose to accuse suspects of having committed massive violations?

How should evidence be collected and taken to trail in order to build a case, given that under certain circumstances it is not possible to gather modern evidence (i.e. wiretapping, pictures, video and audio records). What if the investigation depends on the cooperation of States that are not always willing to collaborate?

What about victims and witnesses? How should reparations for victims be determined? What contribution, if any, does national law make to the process? Which concept of reparation should be used, given that not all people displaced by conflict return home? Should reparation mean collective reparation or a reconstruction of life?

How should investigation and prosecution at an international and national level should be combined, given that international crimes contain general (chapeau elements, e.g. widespread or systematic attacks) and more specific elements (underlying criminal offences, e.g. murder)?

How should the proven facts be transferred from the international tribunal to the national court and how should technical and human resources and criminal investigation materials be shared?

What kind of evidence has proved to be useful in rendering serious IHL violations? What are the challenges affecting the collection of relevant evidence? How should the presentation of evidence, including collecting and stabilising witness testimony in order to be used in different processes be optimised? For example, why subject a victim of rape to different testimonies in different cases in different places on different dates? Is it necessary and permissible to traumatise victims on behalf of justice and reconciliation?

What are the most effective means of dealing with the external factors that influence the investigation and prosecution of suspected IHL violations?

6. Conclusion

The Prosecutor in international criminal justice is an organ that is part of the International Criminal Court. To some extent, duties and power nominally equate to those at a national level; however, such powers and tasks differ substantially and methodologically in the framework of international criminal justice. Experience required nationally does help, but is clearly not enough for an efficient and effective performance of duties at an international level. A special requirement is having a good understanding of the dynamics of massive criminal violations and, consequently, approaches to investigation, prosecution and some specifics of international criminal proceedings.

The challenges posed in the investigation and prosecution of large-scale crimes or massive criminal violations committed years ago in a foreign sovereign country are unique. Thus, it is both remarkable and surprising in many ways that tools of investigation available to the Prosecutor have produced results that one can see and quantify. It is important to remember that these legal tools were developed in an environment with contributions from common law and civil law systems, and were always geared towards answering the essential question of how to execute a fair and expeditious trial. Although challenges remain, the work of the Prosecutor in international criminal justice is a considerable achievement in the fight against impunity for serious violations of human rights and international humanitarian law.

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