The Legitimacy of Initiating Contemporary International Criminal Proceedings: Rethinking Prosecutorial Discretionary Powers from a Legal, Ethical and Political Perspective

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1. INTRODUCTION

In 1993 and 1994 the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) were set up and as of July 1, 2002 the International Criminal Court (ICC) became operative. During 2002, the development of international criminal proceedings entered a new era, namely that of the establishment of internationalized criminal courts. In four parts of the world such mixed courts were set up: Cambodia, East Timor, Kosovo and Sierra Leone.(1) Criminal Trials in its mixed form will probably commence in the summer of 2004, whereas both ICTY and ICTR already concluded various international criminal trials. As for the ICC, from its outset on July 1, 2002, numerous complaints and charges have been filed with the Office of the ICC prosecutor. Reportedly, as will be elaborated in

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this essay, charges related to only two types of international crimes have, so far, drawn serious attention from the ICC prosecutor. Central to the legitimacy of these international criminal proceedings is the decision concerning the initiation of these trials. However, the legal-political implications of such a decision are ill displayed. Considering the consequences of a decision to initiate international criminal proceedings, for both the international legal community and the defendant as an individual, this flaw in legal doctrine may undermine the legal-political justification of such proceedings.

This essay argues that the legal political foundation of prosecutorial decisions to commence international criminal proceedings within contemporary international criminal law remains uncertain. This uncertainty and unclearness puts a very high burden of justification on those who believe in the functioning of international criminal trials. Moreover, this ambiguity is fertile ground for a gradual decrease of consensus on the legitimacy thereof. Especially, as this essay will determine, in view of the absence of international prosecutorial guidelines, the international criminal law system may be further undermined.

Before international criminal tribunals, the prosecutor most often is empowered to decide proprio motu on initiating an investigation. In December 1997, the former Chief ICTY-Prosecutor, Ms. Arbour, observed that there exists a major distinction between domestic and international criminal prosecution, namely the rather unlimited discretion of the prosecution in the latter area. Unlike domestic prosecution, international prosecutors may, to a considerable extent, select their cases. This distinction is aptly illuminated by the words of this former Chief Prosecutor that “the direction prosecute is considerably larger, and the criteria upon which such prosecutorial discretion is to be exercised are ill-defined and complex. In my experience, based on the work of the two tribunals to date, I belive that the real challenge posed to a prosecutor is to choose from many meritorious complaints the appropriate onec for international intervention, rather than to weed out weak or frivolous ones.”(2)

In order to promulgate recommendations to counterbalance these

potential negative legal political implications, this essay will first examine the current prosecutorial framework within which contemporary international criminal trials may commence (paragraphs 2.1 - 2.3). Second, I will examine existing international criminal instruments which potentially may have supervisory influence on this framework. To this end, recourse is in particular had to the doctrine of abuse of powers (paragraph 3). In paragraph 4, I will, while elaborating several recommendations, focus on how a public debate on the normative prosecutorial guidelines as to the commencement of international criminal trials can contribute to a more incremental change in legal political perception on these trials and may improve the ethical basis of such trials.

The most fundamental problem when it concerns prosecutorial powers to start international criminal trials is the question whether and to which extent unconditional sovereign independence should be attributed to institutions or organs which are susceptible to external political influence and pressure. At the level of public international law, this debilitating problem is evidenced by for instance, the request of the General Assembly of the UN for an advisory opinion from the ICJ on the legal consequences arising from the construction by Israel of a wall in the Occupied Palestinian Territory. The Advisory Opinion is initiated by the General Assembly of the UN; a politically-led organ.(3) Holding onto international judicial and prosecutorial mechanisms able to overturn classic unitary conceptions of State Sovereignty, without objective standards, may easily create irresolvable dilemmas and ambiguities.

2. THE PROSECUTORIAL CONTEXT FOR THE COMMENCEMENT OF INTERNATIONAL CRIMINAL PROCEEDINGS

2.1. The Exercise of Prosecutorial Powers before the ICTY and ICTR: Interpretative Parameters

Unlike the ICC system, the ICTY and ICTR Statutes exclusively restrict the powers to start criminal investigations to the Prosecutor only. Article 18 (1)

of the ICTY Statute and Article 17 (1) of the ICTR Statute provide that: "the Prosecutor initiate investigations ex officio or on the basis of information obtained from any source, particularly from Governments, United Nations Organs, intergovernmental or non-governmental organizations. The Prosecutor shall assess the information received or obtained and decides whether there is sufficient basis to proceed."

Plainly, this provision is intended to exclude as much as possible the judicial power of other entities than that of the Prosecutor, when it concerns the setting in motion of trials before the ICTY and ICTR. Accordingly, neither alleged victims nor Governments are endowed with legal instruments to initiate investigation or prosecution before these Tribunals, albeit that these entities, including non-governmental and inter-governmental bodies, may bring potential charges to the attention of the Prosecutor.(4)

In the absence of any other provision than the mentioned Articles 18 (1) and 17 (1) of the ICTY and ICTR - Statutes, it seems fair to say that the ICTY and ICTR Prosecutor has considerable powers with respect to both the start of investigations and prosecutions before these Tribunals as well as the scope of the indictees. Moreover, any guidance concerning the application of any standard or criteria is not available within the Statutes neither are the Rules of Procedure and Evidence.(5) Yet, the rationale for these wide discretionary powers is absent in the ***travaux preparatoires*** of these Statutes.

The argument of being subject to a selective prosecution policy by the ICTY prosecutor was raised before the Appeals Chamber by the accused Landzo, but was rejected by the judges of the Appeals Chamber. It ruled that

> "[602] It is beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments. This is acknowledged in Article 18 (1) of the Statute … It is also clear that a discretion of this nature is not unlimited. A number of limitations on the discretion entrusted to the prosecutor are evident in the Tribunal's Statute and Rules of Procedure and Evidence.
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> …

> [604] The discretion of the prosecutor at all times is circumscribed in a more general way by the nature of her position as an official vested with specific duties imposed by the Statute of the Tribunal. The Prosecutor is committed to discharge those duties with full respect of the law…
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> …
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> [618] Finally, even if in the hypothetical case that those against whom the indictments were withdrawn were identically situated to Landzo, the Appeals Chamber cannot accept that the appropriate remedy would be to reverse the convictions of Landzo for the serious offences with which he had been found guilty. Such a remedy would be an entirely disproportionate response to such a procedural breach. As noted by the Trial Chamber, it cannot be accepted that "unless all potential indictees who are similarly situated are brought to justice, there should be no justice done in relation to a person who has been indicted and brought to trial."(6)

Regrettably the Appeals Chamber did not go into the matter of non-discrimination as such. Suppose it were established that an accused was selected for prosecution only because he was a Muslim, this could qualify to an ethnically motivated prosecution.(7) The Appeals Chamber did refer to Article 21 (1) of the ICTY Statute which provides that all persons shall be equal before the ICTY and observes that this principle embodies a prohibition against discrimination in the application of the law based on impermissible motives such as race, colour, religion, opinion, national or ethnic origin. Therefore, as the Appeals Chamber notes, the prosecutor, in exercising its discretion in investigating and prosecuting accused persons, is subject to this principle of equality. In the event of an alleged violation of this principle, the burden of proof rests on the accused in that the prosecutor improperly exercised its discretion.(8)

It seems thus that the discretion of the prosecutor under both the ICTY and ICTR systems is only limited to the extent that it does not violate mentioned Article 21 (1) of the ICTY Statute. Apart from that, no restrictions emerge with respect to this prosecutorial discretion.

In conclusion, it may be said that, unlike for instance Article 1 of the Statute for a Special Court for Sierra Leone, referring to the persons who bear the "greatest responsibility,"[9] the ICTY and ICTR Statutes provide no lead regarding the ***ratione personae*** of the potential indictees before these ***ad hoc*** tribunals.

2.2. Commencing International Criminal Proceedings before the ICC: A New Prosecutorial Era?

2.2.1. The ICC Prosecutorial System

This paragraph enters into a legal political assessment of the prosecutorial mechanism empowered to set proceedings before the ICC in motion.

On April 23, 2003 the first ICC Prosecutor was sworn in. According to the ICC Statute, the Prosecutor's duty involves the prosecution of four categories of international crimes, namely genocide, war crimes, crimes against humanity and aggression. As observed, from the operative start of the ICC on July 1, 2002, numerous complaints and charges were filed with the Office of the ICC Prosecutor. Two types of international criminal crimes have so far drawn serious attention from the Prosecutor, namely, the killings in the area of Ituri within the Republic of Congo and the alleged crimes committed by rebel commanders attached to the rebel army in North-Uganda.[10]

The most fundamental problem when it concerns the commencement of trials before international courts relates to the attribution of unconditional sovereign independence to institutions which are vulnerable to external political influence and pressure. One such example is the ICC System as far as it relates to the position of the prosecution.

It is important to observe that in particular one of the major concerns of the non-States parties to the ICC Statute is the Prosecutor's power to commence an investigation before this Court without direct supervision.[11] The ICC Prosecutor's position is the clearest contemporary example of States accepting obligations that restrict their external sovereignty. The ICC Statute does not inhere any direct condition that the Prosecutor acts on the

request of a sovereign State or at the direction of an international organization such as the Security Council.(12) As a consequence, the ICC Prosecutor is endowed with an absolute independent position, bearing no direct accountability for the selection, at the initial stage, on which case to take up to the Court.(13) The question arises whether the ICC Statute in itself transposes supervisory criteria to control this Prosecutor's discretion or that such supervision should come from other instruments.

The centre of the ICC prosecutorial system is thus the ICC Prosecutor as separate entity who is able to initiate a criminal investigation and prosecution before the ICC proprio motu (i.e., at his own initiative) pursuant to Article 15 of the ICC Statute.(14) Although the ICC Statute subjects its Prosecutor to a set of conditions whenever the initiation of investigations has been requested by a State or has been made by the Prosecutor ***proprio*** motu, the exact determining criteria in order to enable the ICC Prosecutor to select a case for investigation and prosecution remain unclear.

Hence, the question merits attention whether and to which extent prosecutorial discretion under the ICC Statute can be subjected to judicial scrutiny.(15) The key to solve this apparent flaw cannot be found within the ICC Statute as such and should not be based on merely a simplistic choice dependent on the seriousness of the charges. Moreover one should be aware that this apparent flaw within the ICC Statute bears the risk of initiating a prosecution which can be perceived as politically led.

As observed the initiative to prosecute a case before the ICC may originate from three sources: a State party, the Security Council, acting under Chapter VII of the UN Charter, or the ***Prosecutor proprio motu***.(16) Similar to the ICTY and ICTR systems, the ICC Statute does not recognize international organizations, individuals, non-States parties and non-governmental organizations as independent entities to trigger investigation or prosecution before the ICC. Probably, the drafters of the ICC Statute were not willing to acknowledge such a right, because of the fear for many unfounded complaints.(17) Also here, in practice these entities may fuel the work of the Prosecutor in that they bring information or cases to his attention.(18)

Yet, the introduction within international criminal law of a conception of an international Prosecutor acting ***proprio motu*** did meet controversy.

The International Law Commission (Geneva), in its draft Statute for the ICC, excluded the Prosecutor from the entities which could initiate ICC prosecution; it restricted this power only to States parties and in certain cases to the Security Council.(19) This proposal was however opposed and replaced by the concept of the independent prosecutor, a concept which was strongly fuelled by the example of the previous ICTY - ICTR Chief Prosecutors, Mr Richard Goldstone and Mrs. Louise Arbour.

Moverover, the United States (US) did not favour this concept of an independent Prosecutor saying that such model "not only offers little by way of advancing the mandate of the Court and the principles of the prosecutorial independents and the effectiveness, but also will make much more difficult the Prosecutor's central task of thoroughly and fairly investigating the most egregious of crimes."(20) To some extend, the US concerns were absorbed within the current text of the ICC Statute, more particularly through provisions by which the ICC judges are empowered to supervise prosecutorial discretion. Unlike the ICTY and ICTR systems, within which the Prosecutor is able to conduct criminal investigations outside any judicial control (albeit judicial control at the trial), within the ICC system the investigative and prosecutorial conduct of the prosecutor encounters some form of judicial control in that it must comply with several conditions, whenever these investigations are requested by a State party or by the Prosecutor ***proprio motu***.(21) These prosecutorial restraints are to be found in Article 53 of the ICC Statute.

Article 53 comprises three factors the ICC Prosecutor must comply with before commencing an investigation:

(a) the information available should provide a reasonable basis to believe that a crime within the ICC's jurisdiction has been or is being committed;
(b) the case is admissible under Article 17 of the Statute; and
(c) taking into account the gravity of the crime and the interest of the victims, there should also be substantial reasons to believe that an investigation serves the interests of justice.

Prosecutorial discretionary powers in particular emerges with respect to factor (a).

Both in the event of a State request and in the event of a request of the Prosecutor ***proprio motu***, the first requirement is therefore that these requests comply with Articles 18 (1) and 53 (1) providing that "there would be a reasonable basis to commence an investigation." Yet, a definition or description of "reasonable basis" is absent. It is therefore, the Prosecutor himself who remains empowered to determine whether this reasonable basis exists. At this stage, the Prosecutor may even decide not to proceed with a certain complaint.

If we look a little closer, it is thus to be observed that the way Article 53 is framed, considerable prosecutorial leeway exists in initiating investigations, as it also extents to the power to set aside an investigation based on political reasons.(22)

Perhaps that the only realistic limitation on said prosecutorial discretion relates to the special position on this area of the ICC Pre-Trial Chamber. In case of preliminary investigations or inquiries fuelled by the Prosecutor ***proprio motu***, he is obliged to call upon the Pre-trial Chamber to authorize an official investigation. This judicial authorization is therefore mandatory in order to start an official investigation at the request of the Prosecutor or a State-party. It may be held that the condition of judicial authorization here focuses at limiting the power of the ICC Prosecutor and may qualify as a restriction on prosecutorial discretion.

Importantly, the ICC prosecutorial system, as described above, enables the Prosecutor to proceed when sufficient information or materials exists to start an investigation. Conversely the ICC Prosecutor is also empowered not to proceed for reasons of "***real*** politik" or public interest, for instance in the event victims may be too traumatized to give evidence,(23) albeit that such decision, according to Article 53 (1) of the ICC Statute, is subjected to approval by the Pre-Trial Chamber. Maybe that this review mechanism will indeed turn out to be the only effective limitation of the prosecutor's powers. In view of these limited prospects for external supervision, we should be thinking more seriously about constructing objective criteria within which the prosecutor should operate.

2.2.2. Rethinking Prosecutorial Criteria to Initiate ICC Investigation or Prosecution

The question becomes thus how to determine decisive and transparent criteria for the ICC prosecutor to seek approval of the Pre-Trial Chamber for an official investigation. Is the power of the Prosecutor indeed rather unlimited or is his/her choice to proceed under the ICC Statute subjected to some form of objective scrutiny, outside the judicial review of the pre-trial chamber? Article 53 (1) of the ICC Statute endorses objectivism only in a limited way; it says that three factors should be taken into account by the Prosecutor:

1. The gravity of the crime;
2. the interest of victims; and
3. the interest of justice.

This enumeration reinforces the picture that it is virtually the ICC Prosecutor alone who selects cases to investigate and prosecute before the ICC. Contrary to domestic criminal cases, where in principle all crimes are to be prosecuted at least within those systems which pursue the principle of legality, the discretion to prosecute under the ICC Statute amounts to a departure of this principle of legality. As the criteria upon which the ICC Prosecutor is able to found its investigation and prosecution are not well-defined, this may bear the danger of subjecting such investigation and prosecution to decisions which may be easily perceived as political by the international community. The challenge for the ICC Prosecutor will therefore be to overcome this obstacle and to motivate every decision concerning investigation and prosecution thoroughly. Only with transparency, these decisions may encounter legitimacy.

Such motivation will be burdensome and it is therefore to be recommended that the mentioned three factors will be extended by more concrete criteria such as:

(a) the position of the accused, politically, military or civil, including his/her factual abilities to prevent the alleged crimes;

(b) the duration of his/her function at the time of the alleged crimes;[24]

(c) the existence of certain aggravating factors which distinct the conduct of the potential accused from other individuals in the same position, for instance his/her actual presence during the alleged crimes.[25]

The legacy of the prosecutions before the ICTY thus far is that it they are ambiguous and represent selectivity in that indictments are not equally issued amongst the most responsible persons from the various regions of the Balkans.[26] International criminal proceedings can only gain force in terms of legitimacy when they are successfully able to make transparent why person A is indicted and not person B who is perceived to bear, at least, the same responsibility. The initiative for this transparency has to come from more clear criteria which should be promulgated by the international legal community and codified within the respective Statutes, Rules of Procedure and Evidence, or other directives which are accessible to the public. Here, the principle of legal certainty is essential.

The next paragraph will assess whether the first attempt made in the Statute of the Special Court for Sierra Leone (SCSL) did attain the level of legitimacy sought for this Court.

2.3. The Changing Discretionary Role of Prosecutors within the System of Internationalized Criminal Courts: From Discretion to Legal Political Authority

As observed in paragraph 1, as of 2002, several internationalized criminal tribunals were set up, among which the Special Court for Sierra Leone. This mixed court is specifically meant to try international crimes and certain crimes under Sierra Leonean law committed during the civil war which took place in 1991-2000. The final draft for the Statute for the Special Court was agreed in Freetown on 6 January 2002. Article 1 of the Statute directly raises the issue of prosecutorial discretion. It provides in section 1 that:

> The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility (emphasis added; GJK) for serious violations of

> international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.

The criterion of "the greatest responsibility" is neither defined in Article 1 nor elsewhere in the Statute. The same counts for the term "these leaders who threatened the peace process."

The Secretary-General of the UN initially proposed prosecuting those "most responsible" for the crimes committed in Sierra Leone. The term "most responsible" was meant to confine prosecution to individuals with "both a leadership or authority position of the accused, and a sense of gravity, seriousness or massive scale of the crime."(27) As such the term was apparently not meant for jurisdictional purposes but, rather, as guidance for the prosecutor in developing a prosecutorial strategy and thus totally brought within the phenomenon of prosecutorial discretionary powers.(28) The Security Council, however, held that the choice of the phrase "most responsible" was too expansive and preferred to limit prosecution to those who had exercised a leadership role. Consequently, the Sierra Leone Statute was amended to provide jurisdiction over those who exercised the "greatest responsibility" for the alleged offenses.(29) Based on this amendment, the Sierra Leone Special Court was initially expected to prosecute between twenty and twenty-five persons, far fewer than would have been the case under the Secretary-General's formulation.(30)

It appears therefore that the ultimate decision as to which person to indict as having "the greatest responsibility" is ultimately up to only the Prosecutor of the Special Court. One could argue that this criterion, without any further definition of its contents, is no improvement of the international legal system. One can not assume, without argument, that no alternative was available to delineate the criterion of "the greatest responsibility." As a matter of fact, the Statute or at least its Rules of Procedure and Evidence could have set forth several sub-criteria in order to subject prosecutorial

discretion more clearly to judicial scrutiny, for instance in view of the earlier mentioned principle of equal application of the law to all persons. After all, how is the Special Court for Sierra Leone to assess whether an indictment of sergeant-major A complies with the criterion of "the greatest responsibility" when the defense raises the argument that sergeant-major B, who is not indicted, bears - at first glance - equal responsibility so that therefore the prosecution of A is considered arbitrary and a clear violation of Article 1 (1) of the Statute of the Special Court for Sierra Leone?

Yet, such an argument is imaginable considering the fact that, as until today only thirteen persons are indicted before this Special Court, among which several low-ranking non-commissioned officers. In view of the length and intensity of the civil war in Sierra Leone, it seems not realistic that only these nine persons, presupposed they (as is alleged) bear legal and factual responsibility, can be attributed with "the greatest responsibility" for the alleged serious crimes committed during this civil war.

The aforegoing implies that the legitimacy of criminal prosecutions before internationalized courts such as the one of the Sierra Leone Special Court, may be seriously endangered by such vague prosecutorial criteria as "the greatest responsibility" without providing the international legal community with more concrete parameters as to its content.

The wording of Article 1 (1) of the Statute for the SCSL produces novel prosecutorial discretion within international criminal law; its text may have serious impact on political independence and integrity of trials in that it allows the prosecution exclusively to preliminary select and qualify cases and persons as being the greatest responsible and "those leaders who (...) have threatened the establishment of and implemention of the peace process in Sierra Leone." Accordingly, it attributes the prosecution with legal political authorative powers as to the selection of cases and persons. This observation may result in additional drawbacks in terms of moral justification to start prosecutions before this mixed court. In particular this conclusion emerges as the term "greatest responsibility," as noted, is developed as merely a prosecutorial instrument for strategy purposes, rather than a jurisdictional threshold. In this sense a shift is visible from purely

discretionary powers to attribution of legal political authority to the prosecution acting before an internationalized court.

As a result, ambiguities and differences of view about the legitimacy of such selection will arise that may compromise the validity of the trials before the SCSL. While no normative consensus exists as to the content of a criterion such as "the most responsible" or "greatest responsibility," prosecutorial discretionary powers stemming from such factors, can further erode the gap between legality and moral justice.

The conclusion seems therefore warranted that the setting up of these internationalized criminal courts do not reflect a change as far as arbitrariness is concerned compared to the previous international prosecutorial systems who suffered from that same weakness. Yet, it might be said that they may result in selective investigation by its prosecutors in that it increasingly allows them to take legal political decisions. Still, safeguards against such a pessimistic view exist within international criminal law, to which issue I will arrive now.

3. INTERNATIONAL LEGAL INSTRUMENTS TO SUPERVISE PROSECUTORIAL DISCRETIONARY POWERS: THE DOCTRINE OF ABUSE OF PROCESS

3.1. The Need for Supervisory Mechanisms

The challenge of the legitimacy of initiating international criminal proceedings is, as observed, not only conceptual. It pertains also to the tension between legal positivism and moral justice that arise from it. This paragraph will look into ways to counterbalance or monitor these challenges while at the same time attempting to search for international legal tools which can serve as safeguards against arbitrariness and abuse of prosecutorial discretionary powers.

Fundamentally, the case for establishing a moral and legal political justification for prosecutorial investigation powers rests on a normative view

about the interdependency of the judiciary and prosecution. To put it differently; whether and to which extent should the judiciary be able to control the monopolistic position of the prosecution when it concerns its power to start international criminal investigations?

It may be useful to seek support from the doctrine of abuse of process (or powers) that can assure that prosecutorial discretion within international criminal law will not result in mere arbitrariness. It is important to see that this doctrine was invoked several times within international criminal proceedings to assess prosecutorial behaviour and discretion.(31)

3.2. The Abuse of Process Doctrine applied to Prosecutorial Discretion

According to the British House of Lords the rationale of the abuse of process doctrine is meant to stage "Proceedings (…) in the exercise of the judge's discretion not only where a fair trial is impossible, but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place" and applied it in several cases and situations.(32) The Trial Chamber of the SCSL recently was asked to give its view on this doctrine and held that: "under the abuse of process doctrine, proceedings that have been lawfully initiated may be terminated after an indictment has been issued if "improper or illegal proceedings" are employed in pursuing an otherwise lawful process."(33) Furthermore, the Trial Chamber of the SCSL indicated that this doctrine:

> "operates as a matter of judicial discretion, and will be utilized where proceeding with the trial would contravene the court's sense of justice, due to pre-trial impropriety or misconduct. As the House of Lords made clear in R. v. Latif, proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible, but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place."(34)

At the level of international criminal trials, an example of direct application

of this doctrine is envisioned by the ICTR Appeals Chamber decision in ***Prosecutor v. Barayagwiza*** of November 3, 1999.[35]

The abuse of process doctrine is thus to be seen as a legal supervisory instrument to protect the integrity of the judicial process in view of the rights of the accused. This concept clearly encompasses control on prosecutorial discretionary powers as to the commencement of international criminal investigation and prosecution.

The principal value of this doctrine for the present discussion became visible in the mentioned SCSL case, currently pending before the Trial Chamber of that Court. On 20 October 2003, the defense in that case filed a motion on "abuse of process due to infringement of principles of ***nullum crimen sine lege*** and non-retroactivity as to several counts." It argued, in short, that the principle of non-retroactivity was violated in that the accused was charged with violations of the Geneva Convention while under domestic Sierra Leone laws, at the time of the alleged crimes, these Conventions were not part of the law of the land. According to the Defense the indictment against the accused qualified as abuse of process.

In its Decision of 31 March 2004, the Trial Chamber of the SCSL, in rejecting this argument, ruled that:

> "Although this Chamber does not accept the Defence's unsupported observation that "the doctrine [of abuse of process] has no limitations as to the extent of the legal principles it may apply to," the Trial chamber acknowledges the breadth and latitude of its discretionary authority in this regard. The categories of such circumstances are indeed not closed. It has, for example, been invoked in extradition proceedings where the prosecuting authority has an obligation of due diligence to make a good faith effort to bring the defendant before the court. It has also been frequently invoked in cases of delay in proceedings caused by the Prosecution, on the grounds that the delay must not be "unconscionable." Another use has been in quashing a conviction based on an unlawful arrest and an illegally obtained confession.

> The Trial Chamber wishes to emphasise that the operation of judicial discretion involves an assessment of the nature and severity of the crimes with which the accused is charged, weighted against the abuse of process that continuing the prosecution would engender. In this regard, Lord Lowry in the House of Lords case ex parte Bennett was of the opinion that there may be situations:
> in which the seriousness of the crime is so great relative to the nature of the abuse of process that it would be a proper exercise of judicial discretion to permit a prosecution to proceed or to allow a conviction to stand notwithstanding an abuse of process in relation to the defendant's presence within a jurisdiction. In each case it is a matter of discretionary balance, to be approached with regard to the particular conduct complained of and the particular offence charged."(36)

As to the subject in question, attention should be paid to the fact that, as the Trial Chamber of the SCSL observed, evidence of improper motive is not required for a finding of abuse of process, meaning that a finding of specific guilt by one section of the court is not required.(37) What matters is that the violation of the rights of the accused must reach a certain threshold level to constitute an abuse of process in that it undermines the integrity of the proceedings.(38) These parameters may bring the issue of the commencement of international criminal proceedings within the scope of this doctrine. Support for the application of this doctrine in this area can be lent from paragraph 30 of the mentioned judgment of the Trial Chamber of the SCSL, stating that:

> "The Trial Chamber finds that neither the lawful exercise of the powers of the Prosecutor to bring an Indictment which is based upon the alleged commission of crimes within the jurisdiction of the Special Court for Sierra Leone nor the approval of such an Indictment by a Judge of the Special Court in accordance with the Statute and the Rules would, and indeed could, constitute an abuse of process."(39)

This reasoning leaves thus open that unlawful exercise of prosecutorial powers to issue an indictment under circumstances may qualify as abuse of process. Unlawfulness in this sense may encompass the commencement of investigation or prosecution in contravention to the principle of equity and non-discrimination.(40)

4. REFORM OF THE LEGAL POLITICAL AND ETHICAL BASIS OF INTERNATIONAL CRIMINAL PROSECUTIONS: SOME RECOMMENDATIONS

4.1. The Need for Normative Constitutionalization of Prosecutorial Mechanisms

The previous paragraphs sought to specify moral or legal criteria to govern prosecutorial discretion with respect to the commencement of international criminal trials. It was observed that granting absolute prosecutorial sovereignty without legal-political justificatory criteria is likely to lead to legitimacy problems. Intrusion on the classic unitary conception on State sovereignty requires a normative structure that all parties to an international criminal trial accept. There is precedent for the negative impact of the absence of such structure in the ICTY and ICTR proceedings.(41)

Such an international institutional solution requires a matrix of norms or guidelines within which the prosecution's status is not anomalous. Where strong and transparent supranational authority structures exist, States are more willing and can afford to accept more external sovereignty as they are then protected by the normative constitutionalization of those (prosecutorial) structures.(42) Without such normative and objective supranational structures governing the prosecutorial discretion with respect to the initiation of an international criminal trial, the probability for non-abusive, self-sustaining structure with legal-political authority, will increase. This is not to say that international prosecutorial discretion should be abandoned at all or be discredited as a concept. It should, however, be consistent with fundamental principles of equity and fairness.

We thus somehow have to reconceptualize prosecutorial discretion within

international criminal law in order to constrain prosecutorial autonomy to outlaw as much as possible arbitrariness as well as to proximate legitimacy. The standards to achieve this goal will be set forth in the next sub-paragraph.

4.2. Determining Legal-Political Criteria for International Criminal Prosecutions

International criminal prosecutions can thus only gain acceptance within the international legal community when these prosecutions are consonant with several ethical and legal-political parameters. The aforegoing paragraphs indicated that this way of perceiving international criminal prosecutions requires more attention; there seems to be a gap between what international criminal law allows and what morality requires. Although of course an overall justificatory criterion for international criminal prosecutions is hardly available, international criminal prosecutors should be provided with clear norms in order to direct the start of an international criminal investigation or prosecution. The following preliminary findings could be helpful in developing such norms:

> 1. Often the question of moral justifiability of international criminal prosecution is framed as a simple choice as to which should take priority. Such priority is in most cases directed by financial and time burdens. For instance, the mandate for the Special Court for Sierra Leone is limited to a period of three years and this court operates on a predetermined budget consisting of voluntary contributions of Members States.(43) Also with respect to the internationalized criminal panels in Kosovo (which started in February 2000) as well as the Special Panels for Serious Crimes in East Timor (established on 6 June 2000) the financial resources for these two mixed tribunals have proven to be insufficient. As a consequence, although internationalized courts may be "cheaper alternatives" to international criminal tribunals, "they cannot be expected to operate effectively within limited budgets and low levels of commitment."(44) Therefore, the challenge of legitimacy is not only conceptual. It is

also fundamentally a question of means capacity political will; legitimacy in these terms can only be achieved when there exists an international commitment to provide adequate resources to carry out the mandate of an international court with respect to all parties to the trials.

This observation may also have ramifications on the application of the prosecutorial discretionary powers in terms of compliance with the principle of equal application of the Law to all persons and may erode legitimacy once these recourses prove insufficient to the defense.

2. Second, in legal literature it is remarked that, as a matter of policy, international prosecutions should be limited to leaders, policy-makers and senior executors.(45) If this would become the novel conception of international criminal proceedings, we still need criteria to define the level of accountability from which international criminal prosecutions are justified.

3. Third, the validity of the ICC (and that of other international tribunals) will, as is observed by Robertson, ultimately depend more "on the caliber and experience of its judges and prosecutors than on the print of its Statute."(46) It seems to me that part of this "caliber" must be the attitude and willingness of international criminal prosecutors to properly account for the exact reasons why to prosecute individual A and not individual B. To engage in a responsible act of international criminal prosecution, is not simply to perform an action to start an investigation. It is also necessary to perform this action as such, to justify it publicly and to follow through on it in such a way as to facilitate the satisfaction of both the opinio juris requirement and that of the international community.

5. CONCLUSIONS

International and internationalized criminal courts are the product of political decisions and, inevitably, political compromises. To counterbalance

prosecutorial and judicial selectivity, which seems inherent to this, these institutions should endorse judicial products of high quality and accommodate the integrity of international criminal law as a whole; after all, the credibility of the nascent international criminal law system is at stake.(47) The legitimacy of international prosecutions and the way discretionary powers are dealt with, will prominently shape future prosecutions of international crimes both nationally and internationally.

Yet, the current Statutes of the international and internationalized criminal courts, as the preceding analysis shows, fail to take through account of the legal political authority of prosecutorial discretion that underlies international criminal investigations and prosecutions in an effective way. Accordingly, the ethical and moral justification of international criminal prosecutions may have deficiencies and makes this process vulnerable to morally unjustifiable perceptions.

Facing the problem of justifying international criminal prosecutions, rather than by pretending that these prosecutions serve to merely set precedents to the international community to the detriment of the concept of equal application of the law, one should focus on promulgating and implementing normative prosecutorial guidelines and criteria. Maybe that this principle of equal application of international criminal prosecutions for all persons can be preserved best by implementing within the respective Statutes or Rules of Procedure and Evidence of the tribunals the following guidelines or criteria mentioned in paragraph 2.2.2 above, namely:

(a) the authority position of the accused, politically, military or civil, including his/her factual abilities to prevent the alleged crimes;
(b) the duration of his/her function at the time of the alleged crimes;(48)
(c) the existence of certain aggravating factors which distinct the conduct of the potential accused from other individuals in the same position, for instance his/her actual presence during the alleged crimes or factual influence on the course of action;(49) and
(d) gravity, seriousness or massive scale of the alleged crimes.

Of course one should realize that setting forth such criteria does not result in an absolute preservation of the principle of equality of all persons before the law. However, these criteria can be seen as a starting point to attain moral and ethical justification of international criminal prosecutions. The most promising path for the future seems thus to lie in advancing and identifying a transparent system of normative criteria as guidance for future prosecutorial decisions on the commencement of international criminal proceedings.

To advance such a system, support could be drawn from prosecutorial guidelines set forth by several domestic systems. Through this process of normative evolution, the legal-ethical political foundation of international criminal trials, will be strengthened. The prosecutorial guidelines for determining a moral justifiability of international criminal prosecutions and to restrict arbitrariness vis-à-vis prosecutorial discretion, derived from the preceding analysis, do also supply significant cautionary considerations to be taken into account in determining whether enter into in other international proceedings. Certainly, they could also direct (deferral) decisions of the Security Council acting under Chapter VII to initiate proceedings before the ICC pursuant to Article 13 (b) of the ICC Statute.

Critical and systematic thinking on moral and ethical parameters to initiate international proceedings in general is needed to endeavour legality and legitimacy. The proper lesson to draw from the mentioned Israeli Fence-case,[50] referred to the ICJ by the UN General Assembly, is that the application of international (criminal) law rests upon a symbiosis of the conception of the rule of law and moral authority. ❖

NOTES:

1. See Sylvia de Bertodano, Current Developments in Internationalized Courts, in *Journal of International Criminal Justice* 226 - 244 (2003); see also Geert-Jan Alexander Knoops, International and Internationalized Criminal Courts: the new face of international peace and security? Inaugural address University of Utrecht, 13 November 2003, Boom Publishers, The Netherlands.

2. See statement by Justice Louise Arbour for the Preparatory Committee on the Establishment of an ICC, 8 December 1997.

3. See Resolution of 8 December 2003 of the General Assembly of the UN, Res. A/RES/ES-10/14, A/ES-10/L.16..

4. See A. Cassese, International Criminal Law 406 - 407 (2003).

5. See also M. Cherif Bassiouni and Peter Manikas, The Law of the ICTY 872-873 (1996).

6. See *Prosecutor v. Delalic et al.*, Appeals Chamber Judgment 16 November 1998, Case. No. IT-96-21-A.

7. See John R.W.D. Jones & Steven Powles, International Criminal Practice 96-97 (2003).

8. See *Prosecutor v. Delalic*, o.c. paras. 605-607.

9. See para. 2.3 below.

10. See Press releases of the ICC of 26 September 2003, 29 January and 23 February 2004, available on www.icc-spi.int.

11. See also Jackon Nyamuya Maogoto, State Sovereignty and International Criminal Law: Versailles to Rome 236 (2003).

12. *Ibid.*

13. See, however, Article 15 of the ICC Statute; see below.

14. The other two mechanisms to initiate investigation and prosecution are that of State and Security Council deferral; see Article 14 ICC Statute.

15. See also Antonio Cassese, International Criminal Law 407-409 (2003).

16. See Article 13 of the ICC Statute.

17. See Cassese, o.c. at 407.

18. See also William A. Schabas, An Introduction to the International Criminal Court 97 (2001).

19. See Report of the ILC, 2 May-22 July 1994, UN Doc. A/49/10, at 89-90.

20. See for these concerns of the US with respect to the proposal for a *Proprio Motu* Prosecutor, 22 June 1998, p.1.

21. These requirements do not apply when ICC investigation is requested by the Security Council.

22. See also Maogoto, o.c., at 236-237.

23. See Article 53 (1) (c) of the ICC Statute; see Robertson o.c., at 353.

24. This factor was also considered by the ICTY Appeals Chamber in *Prosecutor v. Krstic* Judgment of 19 April, 2004, Case NO. IT-98-33-A, paras. 272-273.

25. See further para. 4.3 below.

26. See Geert-Jan Alexander Knoops, An Introduction to the Law of International Criminal Tribunals 17-19 (2003); see Snezana Trifunovska, Fair Trial and International Justice: The ICTY as an Example with Special Reference to the Milosevic Case, 1 RM Themis 5, 10-11 (2003).

27. See Secretary-General's Sierre Leone Report, UN DOC. S/2000/915 para. 30.

28. See Daryl A. Mundis, Current Development, New Mechanisms for the Enforcement of IHL, in 4 AJIL 936 (2001).

29. See letter of 22 December 2000 from the President of the Security Council to the Secretary General, UN Doc. S/2000/1234, para. 1.

30. See Mundis, o.c., at 936.

31. See also for this doctrine, Geert Jan Alexander Knoops, Surrendering to International Criminal Courts: Contemporary Practice and Procedures 236-243 (2003).

32. See R. v. Horseferry Road Magistrates'Court ex parte Bennett; see Knoops, ***o.c.*** at 236-237.

33. See Decision Trial Chamber SCSL in *Prosecutor v. Kanu*, Case No. SCSL-04-16-PT, 31 March 2004, paras. 24-25.

34. See Decision Trial Chamber SCSL in *Prosecutor v. Kanu*, Case No. SCSL-04-16-PT, 31 March 2004, paras. 20-22

35. Case No. ICTR-97-19-AR72, paras. 74-77.

36. *R. v. Horseferry Road Magistrate Court, ex p. Bennett* (1994) AC 42 at p. 158.

37. See decision *supra* note para. 26.

38. *Ibid.*

39. See decision SCSL, o.c., para. 30.

40. See the Judgment of the Dutch Supreme Court 21 June 1988, NJ 1988, 1021.

41. See para. 2.2 above.

42. See for this topic also Robert O. Keohane, Political Authority after Intervention: gradations in Sovereignty, in Humanitarian Intervention 288 (J.L. Holzgrefe*et al.,* eds. 2003).

43. See De Bertodano, o.c. at 242.

44. See De Bertodano, o.c., at 244.

45. See M. Cherif Bassiouni, Introduction to International Criminal Law 706 (2003).

46. See Geoffrey Robertson, Crimes against Humanity 351 (2000).

47. See Mundis, o.c. at 952.

48. This factor was also considered by the ICTY Appeals Chamber in *Prosecutor v. Krstic,* Judgment of 19 April, 2004, Case No. IT-98-33-A, paras. 272-273.

49. See for a domestic example, judgment Dutch Supreme Court of 21 June 1988 NJ1988, 1021.

50. See para. I above.