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Europäischen Strafrecht**

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**Rethinking the Prosecutor's Discretion
at the International Criminal Court**

Substantive Limitations and Judicial Control

By

Jacopo Governa



Duncker & Humblot · Berlin

JACOPO GOVERNA

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European Criminal Law and Procedure

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Verona, October 2022

Jacopo Governa

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Abbreviations

AC	Appeals Chamber
AI	Amnesty International
AIDP	Association Internationale de Droit Pénal
AJ	Appeals Judgment
AJIL	American Journal of International Law
AmJCrimL	American Journal of Criminal Law
AmUILRev	American University International Law Review
ASP	Assembly of the States Parties
CLF	Criminal Law Forum
CLQ	Criminal Law Quarterly
CLRev	Criminal Law Review
ColJTransnatL	Columbia Journal of Transnational Law
ColLRev	Columbia Law Review
CornILJ	Cornell International Law Journal
c.p.	Codice Penale
CUP	Cambridge University Press
DCC	Documents containing the charges
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECCC Law	Law on the Establishment of Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004, NS/RKM/1004/006, 2004
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ed./eds.	editor/editors
e. g.	exempli gratia
EJCCLCJ	European Journal of Crime, Criminal Law and Criminal Justice
EJIL	The European Journal of International Law
et al.	et alia/et altri (and others)
ff.	following
fn.	footnote[s]
FordhamILJ	Fordham International Law Journal
GA	(UN) General Assembly
GA Res.	(UN) General Assembly Resolution
HarvILJ	Harvard International Law Journal
HRLJ	Human Rights Law Journal
HRW	Human Rights Watch
i. a.	inter alia (among other things)
IACtHR	Inter American Court on Human Rights
ibid.	ibidem (in the same place)
ICC	International Criminal Court
ICCS	International Criminal Court Statute

ICJ	International Court of Justice
ICL	International Criminal Law
ICLRev	International Criminal Law Review
ICompLQ	International Comparative Law Quarterly
ICTR	International Criminal Tribunal for Rwanda
ICTR RPE/ICTR Rules	Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda, Rev. 13 May 2015
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY RPE/ICTY Rules	Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, Rev. 49, 22 May 2013, IT/32/Rev.49
i. e.	id est (that is)
IHL	International Humanitarian Law
IHumRtsL&Prac	International Human Rights Law and Practice
ILC	International Law Commission
ILC Draft Code 1951	Draft Code of Offences against the Peace and Security of Mankind (Part I), Report of the International Law Commission on its third Session, 16 May–27 July, 1951, UN GAOR, 6 th Sess., Supp. No. 9, UN Doc. A/1858 (1951)
ILC Draft Code 1954	Draft Code of Offences against the Peace and Security of Mankind, the International Law Commission adopted the revised draft on its 6 th Session, 3 July–28 August, 1954
ILC Draft Code 1991	Draft Code of Crimes Against the Peace and Security of Mankind, Report of the International Law Commission on the work of its forty-third Session, 29 April–19 July 1991, UN GAOR, 46 th Sess., Supp. No. 10, UN Doc. A/46/10 (1991) YbILC
ILC Draft Code Draft 1996	Code of Crimes Against the Peace and Security of Mankind (Part II), 1996, Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May–26 July 1996, UN GAOR, 51st Sess., Supp. No. 10, UN Doc. A/51/10, 9 ff.
ILC Draft Statute 1994	Draft Statute for an International Criminal Court, Report of the International Law Commission on its Forty-Sixth Session, 2 May–22 July, 1994 (UN GAOR, 49 th Sess., Supp. No. 10, A/49/10, 1994), pp. 43 ff.
IMT	(Nuremberg) International Military Tribunal
IMTFE	International Military Tribunal for the Far East
IOM	Independent Oversight Mechanism
IRevRC	International Review of the Red Cross
JICJ	Journal of International Criminal Justice
JohnMarshallLRev	John Marshall Law Review
KSC	Kosovo Specialist Chambers
KSC Law	Law on Kosovo Specialist Chambers and Specialist Prosecutor's Office
KSC RPE/KSC Rules	Rules of Procedure and Evidence before the Kosovo Specialist Chambers, Rev. 1, KSC-BD-03/Rev1/2017, May 2017
LJIL	Leiden Journal of International Law
MICT	Mechanisms for International Criminal Tribunals

MICT RPE/MICT Rules	Rules of Procedure and Evidence of the Mechanisms for International Criminal Tribunals, Rev. 6, MICT/1/Rev.6, 18 Dec. 2019
MICT Statute	Resolution 1966 (2010), Annex 1, Statute of the International Residual Mechanism for Criminal Tribunals, UN Doc. S/RES/1966, 2010
NGO	Non-governmental organization
NILRev	Netherlands International Law Review
OJ	Opinio Juris
OTP	Office of the Prosecutor
OUP	Oxford University Press
p./pp.	page/pages
para./paras.	paragraph/paragraphs
PTC	Pre-Trial Chamber
PTD	Pre-Trial Division
QIL	Questions of International Law
RB	Referral Bench
RegC	Regulations of the Court (ICC)
RegOTP	Regulations of the OTP (ICC)
RegR	Regulations of the Court (ICC)
RPE	Rules of Procedure and Evidence
SC	Security Council
SCSL	Special Court for Sierra Leone
SCSL RPE	Rules of Procedure and Evidence, Rev., 30 Nov. 2018
Siracusa Draft	Association Internationale de Droit Pénal (AIDP)/Istituto Superiore Internazionale di Scienze Criminali (ISISC)/Max Planck Institute for Foreign and International Criminal Law (MPI), International Criminal Court, Alternative to the ILC-Draft (Siracusa-Draft) prepared by a Committee of Experts, Siracusa/Freiburg, July 1995
StGB	German Criminal Code
STL	Special Tribunal for Lebanon
STL RPE/STL Rules	Rules of Procedure and Evidence, Rev. 10, STL-BD-2009-01-Rev.10, Apr. 2019
STL Statute	Resolution 1757 (2007), Attachment, Statute of the Special Tribunal for Lebanon, S/RES/1757, 2007
TC	Trial Chamber
TJ	Trial Judgment
U.K.	United Kingdom
U.N.	United Nations
UN Doc.	United Nations Document
UNSC	United Nations Security Council
UNTAET	United Nations Transitional Administration in East Timor
Updated Siracusa Draft	Updated Siracusa Draft, 1994 ILC Draft Statute for an International Criminal Court With Suggested Modifications, prepared by a Committee of Experts
U.S.	United States
VCLT	Vienna Convention on the Laws of Treaties of 1969
Vol./Vols.	Volume/Volumes

VStGB	Völkerstrafgesetzbuch
WashUGSLRev	Washington University Global Studies Law Review
YaleLJ	Yale Law Journal
YbILC	Yearbook of the International Law Commission
Zutphen Draft	Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands (A/AC.249/1998/L.13, 1998)

Introduction

The prosecutor can probably be considered the cornerstone of any criminal justice system. His functions make the difference between criminal procedure and administrative and private law procedures. In his original role the prosecutor represented the State power in punishing those individuals who violated the law. The constitutions of the 20th Century and the culture of human rights enhanced the role of the prosecutor as minister of justice rather than as a mere party in a trial. At the same time, principles such as the equality of arms and the right to a fair trial have balanced the originally disproportionate relationship between prosecution and defence. It is therefore not surprising that there has been increased attention given to the prosecutor at the supranational level as well.

Supranational instruments provide for shared definitions of 'prosecutor' and identify the principles that must drive his actions. At the United Nations level, there are two significant instruments, namely the *Guidelines on the Role of Prosecutors adopted by the Eight United Nation Congress on the Prevention of Crime and the Treatment of Offenders*, Havana, Cuba, 27 August to 7 September 1990; and the UN handbook entitled *The Status and Role of Prosecutors* prepared by the United Nations Office on Drugs and Crime and the International Association of Prosecutors in 2014. At the European level, the Committee of Ministers of the Council of Europe adopted, on 6 October 2000, the Recommendation Rec (2000) 19 on the Role of Public Prosecution in Criminal Justice System. This recommendation defines the public prosecutor as the public authority who, on behalf of society and in the public interest, ensures the application of the law where the breach of the law carries a criminal sanction, taking into account both the rights of the individual and the necessary effectiveness of the criminal justice system. It also states that 'in all criminal justice systems' the public prosecutor: (i) decides whether to initiate or continue prosecutions; (ii) conducts prosecutions before the court; and (iii) may appeal or conduct appeals concerning all or some court decisions. The 'Rome Charter', i. e. the Opinion no. 9 (2014) of the Consultative Council of European Prosecutors to the Committee of Ministers of the Council of Europe, further highlights that prosecutors contribute to ensuring that the rule of law and public order are guaranteed by the fair, impartial and effective administration of justice.

The independence of the prosecutor is the first principle enshrined in all of these legal instruments, also when the prosecutor represents the executive power. Impartiality with regards to the conduct of the investigations, respect for the rights of the defence and attention to the interests of victims and witnesses are the necessary corollary to his functions.

Two other principles emerge from a comparative study of national legal systems and are also mentioned by some of the abovementioned supranational instruments: the principle of mandatory prosecution and the principle of discretionary prosecution (or principle of opportunity). They represent two alternative models of initiation of the prosecution. As the systems opting for the mandatory model have introduced mechanisms excluding prosecution in specific circumstances, it is important to further develop the concept of 'discretion' that drives the prosecutorial activity. The abovementioned Opinion no. 9 (2014) states that '[i]n order to achieve consistency and fairness when taking discretionary decisions within the prosecution process and in court, clear published guidelines should be issued, particularly regarding decisions whether or not to prosecute' and that '[e]ven when the system does not foresee that prosecutor can take discretionary decisions, general guidelines should lead the decisions taken by them'.

In this perspective, Chapter I is entirely devoted to the role of the prosecutor in national and international criminal law. In Section I the concept of discretion will be briefly analysed. Despite discretion being a privilege and a power, at the same time it is an onus, entailing responsibility and duties. Discretion does not mean acting as but acting within specific boundaries in order to achieve specific goals.

Section II is devoted to analysis of the role of the prosecutor in certain national systems, distinguishing between those systems opting for the principle of mandatory prosecution and those systems opting for the principle of opportunity.

However, in addition to national criminal law and national prosecutors, there is international criminal justice. International prosecutors were established throughout history in order to investigate and prosecute international crimes. Their choices have shaped and still shape the object of international criminal justice. The same applies to the Office of the Prosecutor attached to the first permanent international criminal court in history, the International Criminal Court. In light of the role of the Prosecutor and the consequences of his choices and activities, it is undeniable that the efficiency of his Office is subject to close scrutiny by the public and that its mismanagement can seriously affect the credibility of the entire system. Moreover, the identification of the Office of the Prosecutor with a single individual, often appearing in public and releasing statements, increases the perception of the Prosecutor as the main actor responsible for the efficiency or inefficiency of the Court. The permanent nature of this Office and the importance of its activities mean that it is necessary to analyse the actions of the Office. For this reason, Section III analyses the prosecutors in International Criminal Law in general, distinguishing between the International Military Tribunal, the *ad hoc* Tribunals and the International Criminal Court, whilst Section IV is entirely devoted to the Prosecutor of the International Criminal Court.

Chapter II is exclusively focused on the Prosecutor of the International Criminal Court and on the substantive limitations affecting his decision-making powers when opening an investigation or prosecuting individuals. After an overview of the required standard for both the opening of an investigation and commencing of a

prosecution in Section I, the criteria leading the prosecutor's determination will be taken into account. These parameters are jurisdiction, admissibility and the so called 'interests of justice clause'.

Jurisdiction is tendentially quite a strict parameter, which therefore does not pose great problems in terms of the discretionary assessment. For this reason, it will not be analysed in detail. Admissibility is instead a more challenging parameter. After an introduction on the principle of complementarity which drives the action of the whole Court, it is necessary to distinguish between the admissibility of an investigation and the admissibility of a case and the different criteria leading the Prosecutor's assessment. As the admissibility assessment is twofold, including a complementarity and a gravity test, in light of the 'objective' nature of the first test, only the gravity test will be analysed in depth, in order to try to reach a conclusion as to the functions that the concept of gravity plays in the statutory framework. It will be proposed to limit the role of gravity to an objective criterion, a threshold which should allow to determine whether a situation deserves or not the Court's intervention. Once that this threshold is met, the Prosecutor will have the duty to open an investigation. As to the prosecution, gravity would instead inevitably play a selective function as well, at least indirectly through the prioritisation of the cases.

Chapter II is closed by an analysis of the interests of justice clause, that allows the Prosecutor to maintain a margin of discretion. Nevertheless, the thesis proposes to reduce the factors which could be considered within the concept of interests of justice. Indeed, an excessively broad concept of the interests of justice risks transforming the discretion of the Prosecutor into something arbitrary, or at least could lead to accusations of arbitrariness, with negative consequences for the entire Court.

Chapter III is entirely devoted to the various controls over the activity of the Prosecutor. Section I will take into account the control exercised by 'external subjects', namely the Assembly of the States Parties, the United Nations Security Council and the States. As this control is not legal in nature, the topic is examined in less depth. The only exception concerns the role of the Security Council, whose powers of referral and deferral may significantly affect the Prosecutor's activity. Moreover, the role of the referral by both the States and the Council will be analysed in order to compare the extent of an investigation initiated upon referral with the extent of a *proprio motu* investigation.

Sections II, III, IV and V analyse instead the judicial control over the activity of the Prosecutor, respectively in case of submission of a request for investigation *proprio motu* under Article 15 of the Statute and in case of decision not to investigate or prosecute; in case of submission of a warrant of arrest under Article 58 of the Statute; during the procedure of the confirmation of the charges; and possibly during the trial. With the exception of this last case, which clearly falls within the competence of the Trial Chamber, in the other cases the PreTrial Chamber is the subject in charge of overseeing the action of the Prosecutor.