

Genesis and Evolution of the Prosecutor's Discretionary Power

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Abstract:

This article addresses the history and origins of the principle of discretionary power of the prosecutor within a historical and legal context starting from antiquity to the emergence of international criminal courts, military as well as ad hoc ones, face-to-face with the permanent International Criminal Court, primarily the tools that govern this principle and how to be developed and interpreted, through a broad line and policy statements guide mostly consistent and coherent with the mandates of Courts as a whole and with the criminal justice in particular, and the undergo all of this for more oversight since some considered that this discretion has become more restrictive than it was in the past, in the scope of national or international criminal courts and tribunals.

Key Words: discretionary power, general (public) prosecutor indictment, courts judicial oversight, judicial review...

نشأة وتطور السلطة التقديرية للمدعي العام

الماضي

يتناول هذا المقال تاريخ وأصول مبدأ السلطة التقديرية للمدعي العام ضمن سياق تاريخي وقانوني بداية من العصور القديمة إلى غاية نشأة المحاكم الجنائية الدولية العسكرية وكذا المخصصة منها وجها لوجه مع المحكمة الجنائية الدولية الدائمة، وبشكل أساسي الأدوات التي تحكم هذا المبدأ وكيفية تطويره وتفسيره من خلال دليل خطوط عريضة وبيانات السياسة الأكثر اتساقا وتماسكا تماشيا مع العدالة الجنائية، وخضوع كل ذلك لمزيد من الرقابة، ذلك لأن البعض اعتبر أن هذه السلطة التقديرية أصبحت أكثر تقييدا مما كانت عليه في السابق سواء في نطاق المحاكم الجنائية الوطنية أو الدولية.

الكلمات المفتاحية: السلطة التقديرية، المدعي العام، توجيه الاتهام، المحاكم، الرقابة القضائية المراجعة القضائية...

Introduction:

Much has been said and written about the establishment of the national or international criminal courts and the recent contribution to the latter in development of international law in all its branches, particularly international humanitarian law⁽¹⁾, but there have been very few studies on the prosecutor in itself, thus the latest developments in the Criminal justice institutions did not emerge in a vacuum but their foundations and roots extend to ancient times, although they are not showing themselves in the form on which they are now.

After several centuries, significant progress in international criminal law field has been made, both in terms of tools or institutions, the bodies of international criminal justice administration brought amazing changes in the world of this law, making international humanitarian law rise from the hibernating state it was in after the tribunals of Nuremberg and Tokyo⁽²⁾, For many years, international humanitarian law was limited among the diplomatic, political and military communities, restricted, confined and confiscated by the States⁽³⁾, so a genuine revolution in international law was to be to exclude the dominance of states, to some extent, by updating the criminal justice administration bodies.

That update particularly is manifested in the integration of the discretionary power directly into the universal jurisdiction law, and it was often a unique exceptional strength of its kind to lodge complaints before the universal jurisdiction, The powers vested to prosecutors and the border recently imposed on these powers relating primarily to discretion which is the heart of the international criminal justice, decide to a large extent their success or failure as well as their credibility in order to achieve "peace, security and well-being" of the world⁽⁴⁾.

The structural and institutional aspects of any judicial body are often raising a lot of controversy and opposition, as is the case in the International Criminal Court, but the most discussed topic is the position which the Prosecutor of the Court is enjoyed by with respect to his discretion authority in conducting investigations and indictments for alleged crimes, and the debate on this prosecutorial power is usually followed either by supporters to keep the Prosecutor with this power in parallel with a necessity guided by legal standards and flanked against external political pressure, or by opponents supported with various pretexts, including the existence

of strong political control is necessary to prevent the prosecutor from politicization of the court must, thus he should be able to initiate investigations *proprio motu* and *ex-officio* on the basis of reliable information received from any source, and this is to enable him to choose a non-political, independent and professional cases based on the relevant legal standards⁽⁵⁾.

From the above, we will answer the following problematic:

How did the prosecutor's discretion evolve, and what are its similarities in local and international judicial systems?

Chapter One: Nature and historical background of discretion principle

Discretion is not a unique idea, but its structure is similar to a traditional common law type in which prosecutors are subject to varying degrees of judicial supervisions with an enjoyment of fundamental authority to choose and pursue criminal cases⁽⁶⁾, therefore law literature focused especially on its promotion and the need to respect justice and equality⁽⁷⁾.

I- Definition of discretion:

The term "Prosecutorial discretion" refers to a prosecutor's power to choose from the options available in a criminal case, such as filing charges, recommending a sentence to the court, prosecuting, not prosecuting, plea-bargaining and other⁽⁸⁾.

The legal philosopher Ronald Dorkinmes distinguished between several meanings of "discretion" use in legal discourse, it is sometimes used in a relatively weak context to indicate that "the criteria that must be implemented can not be applied mechanically as they require prior rule or experience standard in different ways⁽⁹⁾, and in another weak but different context, enjoying a discretionary power when we mean that a decision can not be reviewed or canceled by a higher authority, and sometimes the use of the phrase is found in the very strong sense, to say not to comply with any standard because there are no standards from which it can be said that the decision is wrong⁽¹⁰⁾, even in this strongest sense, the discretionary power is always granted for a particular purpose and it operates within certain limitations that may be assumed or external⁽¹¹⁾.

1.1) Restrictions on discretion

Although the prosecutor's discretionary power, especially in indictments, is too broad, there are some Constraints:

First, the prosecutor's estimate is working within a framework of cases in which a minimum of legal punishment existing requirements must exist, thus while the prosecutor has a wide discretion not to bring charges, he had not also the right to bring them if they were not supported by sufficient evidence, he should work under the legal standards in place to acquit the accused of such decisions⁽¹²⁾, so practically, the prosecutor's duty is to review very largely and consider the scrutiny of evidences⁽¹³⁾.

Second, the public prosecutor's decision to indict should not be based on discriminatory grounds such as race, religion, or expression of political opinions "selective prosecution", it also should not be a retaliation on the basis of a successful exercise of legal rights such as the right to appeal "vindictive prosecution."

Third, the prosecutor has, for the most part, discretion in the strong sense, too, because, outside the limited areas in which judgment can be considered in illegal principle, it is up to the prosecution itself to decide what are the principles that influence the decision whether to proceed with prosecution and the amount of the charges.

1.2) Reasons for discretion

The most important side of the the prosecutor's discretion authority is the decision to charge, the charges against; he almost has unlimited discretion not to proceed with the case for any reason which deems appropriate, and this power is often exercised, particularly in slight cases where it was frequently decided that a particular incident or a certain category of crimes do not justify spending resources or serious social punishment resulting from the criminal trial. .

The prosecution also has an impact on the fate of the accused through other decisions within their discretion, Prosecutors have broad authority to conduct investigations and choose from among the various investigative tools and generally without judicial supervision or restriction, among that they master the interventional investigation authorities such as witnesses' Summon, even in the absence of a legally valid privilege, so prosecutors are to be the subject of judicial review is very limited, therefore the prosecutor also can decide that the case is not worth investigation or to conduct a prompt investigation will be enough.

II- Discretionary power in ancient systems

In old systems, there has been progress in all walks of life, including the legal and judicial side; the latter was not properly as the present form where social judges dominated all the cases brought before them, so the allegation had no impact as a result there were wide-ranging powers to judges in conducting civil and criminal cases.

2.1) In ancient Athens

States vary in the application of laws and regulations, but Ancient Greece was too unique⁽¹⁴⁾, and by reference to the post-Dark Ages about 1200-900 BC and starting around 900 BC, the Ancient Greeks had not any official or punitive laws, where, For example, homicides were settled by members of the victim's family who truncate of the killer and that's what made revenge does not end until the middle of the seventh century BC, where the Greeks first began to develop formal laws.

Athenian law was divided into common procedures which include the community as a whole and into private ones related to individuals, and as there was not a public prosecutor in a lot of cases, anyone is free to file a public suit, but the private suit is the responsibility of the injured party, so in cases of murder victim's relatives became in charge of the killer's prosecution.

Although judges chaired the trials, they were not considered as judges in the modern sense of the word, they offered no advice nor proposed sanctions against convicted, they just were supervisors on procedures in general, and as an example, during Socrates trial period, there was not a prosecutor, instead, the judicial proceedings could be set in motion by any citizen, and in the case of Socrates', procedures began when he was handed a Summon by a poet named Miletus in presence of witnesses to appear at a specified date before a legal judge or before the King in The Greek Royal building to answer impiety charges; after listening to Socrates, to the poet and two other defendants by the King and Since the lawsuit was allowed under Athenian law, a preliminary hearing was scheduled and the contents of the siting were published as a notification to the kindom's audience⁽¹⁵⁾.

The murder trials in Classical Athens were distinctive and unique, as after providing preliminary evidences, the defendant is given voluntary exile option with the loss of all forms of protection, rights and wealth, in the case of rejection, the trial will continue with the provision of additional arguments, and if the judges voted

to conviction, a death penalty or a set of Athenian limited available sanctions would be imposed⁽¹⁶⁾.

2.2) In ancient Rome

One of the most distinctive features of ancient Rome as compared with any of the contemporary systems is its legal system of large-scale, of course, many Greek and Near East civilizations had legal codes a lag prior the Romans, some even speculated that the roots of Celtic "Brehon" laws (a set of laws used in Ireland related to tribes since early times) were earlier than Rome origins⁽¹⁷⁾, however, none of these legal systems was to emerge until for another thousand years, as a result of this great system, Romans cared of setting legal rules not only for the most common or more general cases, but also for all eventualities.

The Roman Senate doesn't act legislations, but only provides advice and is the people who directly vote on bills and appointments in the People's Councils and the selection of judges who propose draft laws, conduct prosecutions, lead the military forces and organize the other governmental functions⁽¹⁸⁾.

In ancient Rome, there were two types of supervisors (aediles) elected in different ways and had functions such as responsibility for maintaining public buildings (such as temples) and public order; they had an authority as public prosecutors in the trials involving the common law, the Romanian Constitution also provided for the existence of a person "Alkstor" being from Roman citizens elected for a year in order to manage public finances, also helps judges and acts as a public prosecutor⁽¹⁹⁾.

Public Law, in Rome, was not automatically applied to the threads in the provinces; the crimes committed by non-citizens were left to the local judge (senior judicial official in the city) for judgment based on his discretion whether to follow the local law or The Roman one or to delegate the decision to others; the investigating judge was free to adopt the guidelines if necessary, also free in his rigor, militancy and abuse⁽²⁰⁾.

Judicial proceedings begin by bringing charges and determining sanctions then the acts committed by one of the involved parties, Enforcement of the law depends on an initiative, especially since the Roman system did not witness prosecutors rather than judges exercised the roles of prosecutors, judges and the jury all together, so they were enjoyed with wide discretion.

3) Discretionary power in some local jurisdictions

It is not easy to adapt to the concept of discretion in local jurisdictions, where It was born and merged within self-checks and balances to the newly developed field which is international criminal law, in which there are no such structures, added to that, global politics play a major role⁽²¹⁾.

In the organization of the discretionary power and authority exercised by local prosecutors, national systems balance between a variety of objectives of and seek to create and implement policy decisions on how best to address the various problems, including the growing number of cases examined.

3.1) In the USA system

Scholars disagree about the precise historical origins of the American Prosecutor; the modern version of this function is derived from European practices on the maturity of the Office to the ability to conduct criminal trials, in England, for example, till the eighteenth century, parties from private sector can sue other private parties, but English laws that created the Office of the Prosecutor existed before the mid-sixteenth century⁽²²⁾.

In colonial America, all the 13 colonies had established offices and the status of the public prosecutor for each colony to prosecute crimes committed inside them; private trials were sometimes carried out, but the private prosecution has been over since the beginning of the American Revolution in 1770; historians attributed the emergence of the Prosecutor to the costs associated with the private trials, where a small number of people in colonial America had the time or resources to prosecute alleged criminals.

Public prosecutor Priority has become well-established from the beginning of 1820 when the American public began to press for the introduction of democracy in criminal justice process, as a result States began to allow electing judges, and enacting laws to elect the Prosecutor shortly thereafter.

Originally, the public prosecutor was considered just a symbol in the criminal justice system because the local mayor "sheriff" and even the coroner were more practical than the prosecutor, but the situation has changed by mid-19 century as more members of the public prosecution were elected by the public rather than appointed by the government.

Prosecutor's powers gradually increased in the twenties, and most of the US established regular offices and increased the power of the OP over the years to the very beginning of the second

millennium when prosecutors became having the largest ever power in investigations, granting immunity to witnesses and accused criminals, also the appeal to bargain with defendants and working in absolute immunity in the courtroom without stark override to their positions.

From a comparative perspective, the most distinctive feature of the United States system is the infrastructure, democratically monitored and deliberately fragmented, of the prosecution authority, and the very broad discretion granted to members of the public prosecution in all aspects of the charge and petitions to negotiate, most of this power is exercised within the US by key prosecutors generally elected at the county level responding to the local conditions and to the attitudes of society; this led to wide variations in priorities, procedures, policies and practices of individual prosecutors' elected offices and these differences and features raised many concerns, including:

- Possibility of political influences on the public prosecution decision-makings, and
- Asymmetric deal with similar cases because of differences in priorities and proceedings between prosecutorial regions⁽²³⁾.

3.2) In the French system

In the process of prosecution in France, there are three actors: the judicial police, the prosecutor and the investigating judge all working as managers who oversee the judicial police activities and the prosecution, but an investigation cannot be initiated unless under an order by the Attorney General or the victim.

French prosecutors are a part of the Judicial functional power and the judiciary body; the latter is divided into two bodies: Permanent judiciary (including prosecutors) and Sitting judges (include Trial judges and investigating magistrates); enrollment a judiciary is determined after a competitive examination followed by training in the National School for Magistrates making the joint training of the two bodies creates Collective and ideological ties and an alternation on the positions "the new nobility".

Unlike the American system, in France, the public prosecution is considered a well-defined civilian service and career; the selection and training procedures are unified and non-political, but despite the fact that these common features enhance the public prosecutor experience, the independence and the professionalism,

the French systems diverge that they have distinctive ways to respond to the concerns of accountability, impartiality, efficiency, accuracy and equal treatment; they also differ in the availability of mechanisms to develop and implement the policies; More importantly, they respond differently to the challenges of the number of cases dealing with⁽²⁴⁾.

In France, the function of the public prosecutor at the national level is regulated as part of the judiciary power; the standardized training for prosecutors and the central bureaucratic structure promote consistency in standards and practices; the development of its prosecutorial function within the judiciary power enhances the independence and neutrality strong standards because the discretionary power granted to the members of the French prosecutors includes the charge and management of cases, conversion to non-criminal alternatives and negotiated plea; the system has the ability to adapt to the increasing number of cases, however, this attribute has generated considerable controversy, in that:

- The executive branch has broad powers of control on the job the public prosecution and despite the fact that this structure provides a degree of political accountability as well as a mechanism for the development of policies and priorities, it also raises concerns about the possibility of political interference.
- 2013 Reforms on the independence of the prosecution, which has raised considerable controversy.

The organization and function of the public prosecutor at the national level reflect the continuous effects of Napoleon reforms which adopted the military model in the civil service, including the hierarchy and the unified enforcement of rules; although it is understood that prosecutors have great discretion in charge, there are also mechanisms to identify the national priorities, to promote the unified practices, to develop expertise and to set up a specialized authority for certain types of cases.

And thus in civil law countries, the discretionary power of the prosecution is limited, restricted and subject to judicial review; France provides a good example on the role of the public prosecutor in the context of civil legal traditions⁽²⁵⁾.

Chapter Two: Discretionary power under the temporary and permanent courts

There is a great progress in the international criminal law field over the last decade, both in terms of tools and institutions, and since the establishment of the and military and ad hoc international criminal tribunals then the International Criminal Court in Rome, amazing changes have occurred, especially when considering the powers vested to prosecutors and the limits imposed on them which primarily concern their discretionary power.

I- Within the scope of military courts

When Nuremberg Tribunal was created, the Allies provided it with a prime judge and an alternative one as well as a prosecutor without any mentioned power due to their implementation of the so-called "victor's justice" which is the same thing that is said about the Tokyo Military Tribunal established later, a matter threatening the effectiveness and credibility of this new international bodies.

1.1) Military Tribunal of Nuremberg

At the beginning, and through the content of the Treaty of Versailles, cases falling under the courts' jurisdiction were determined at the time of its inception, allowing the General prosecutor to select from the cases in this narrow range, and in 1919 Peace Treaty, the Allies and Partners publicly accused the former German Emperor, Guillaume II, for supreme offense against International morality and sanctity of treaties⁽²⁶⁾, even though the proposed tribunal was set up in the aftermath of the First World War, its prosecutor had no discretionary power whatsoever, whether in the selection of "cases" or the identification of "defendant".

After World War II, the four Allies tried to conduct trials against the military and political senior Nazi as well as the business leaders⁽²⁷⁾, so trials were held in the Justice Palace in Nuremberg, Germany, this attempt was important in international law as Nazis High level officials appear before the judges of the International Military Tribunal represented by a judge and an alternate for each state of the four Allied Powers⁽²⁸⁾ while the public prosecutor was represented by a special prosecutor for each ally of the four-party and all acting as the chief prosecutor, but the US special prosecutor, "Robert Jackson" played a central and active role in the organization and design of the trial in the preparatory stages; the four prosecutors were free to select the accused persons accused and bring them under the description of "major war

criminals of the European Axis countries," a phrase that was used in the Charter of Nuremberg⁽²⁹⁾.

As one team, the prosecutors were responsible for investigations and trials; the rules of procedure of the Court did not precisely draw the powers and duties of the General prosecutor⁽³⁰⁾, thus when considering the acceptance of documents or certain certificates, the international military were not bound by the Technical rules of Anglo-American justice systems Joint evidence; the Court kept the discretion to assess the forms of hearing and other evidences⁽³¹⁾.

The provisions of the IMT was often criticized as a practice from "victor's justice"; The charges have had two dimensions different to some extent, procedural shortcomings in trials, and the application of objective criteria, including flexible approach rather than the rule against the non-retroactivity of criminal law, secondly, more fundamentally, it's the breach of the basic principles of justice because it punished only one party⁽³²⁾.

1.2) Military Tribunal of Tokyo

Political considerations also entered the debate over the Tokyo tribunal; thus according to Rowling, the Dutch judge in the Tribunal, "In Tokyo, Public prosecution relied on governments more than it was in Nuremberg since the US General MacArthur, the Supreme Commander of the Allied forces played a dominant role in proceedings as he had absolute power in reducing, approving or changing any imposed sanctions"⁽³³⁾.

As was the case in Nuremberg, the main objective of the allies was to punish the Japanese for what it was viewed the most serious crime: to waging a war of aggression as a crime against peace, rather than punishing them for the real war crimes and crimes against civilians⁽³⁴⁾.

Americans, and in hope that the Japanese emperor would play a central role in the political reconstruction process, the Commission ordered not to try The Supreme Commander despite of his responsibility for waging a war of aggression, this decision, made by General MacArthur and the supported by President Truman, was against the wishes of the chief prosecutor that he had sufficient grounds to prosecute The Emperor, Mark Arthur also forbade the prosecutor for investigation or calling the emperor as a witness.

As in Nuremberg, in Tokyo, prosecutors hardly tried to maintain a balance between the legal and illegal considerations, and finally, the members of local prosecutors chose defendants from a list of 250 people; The intention was to make that operation being more than "representative" segment of those who are considered by the Allied forces collectively responsible for Japanese policy before and during the war in the Pacific.

The bottom line, as in Nuremberg, in Tokyo trials, the political conditions had an impact on the choice of the accused⁽³⁵⁾, and despite the fact that the responsibility of the suspects did not play a role, several factors have undermined the consistency of the selection process but at the same time, the lessons learned from the Tokyo Tribunal formed and clarified prosecution strategies in the nineties, although the situation was very different, what was first a project of prosecution by victors in the war, it became a personal responsibility for the Prosecutor individually to avoid past errors³⁶.

II- Within the scope of the ad hoc tribunals

It was said that both Tribunals for the former Yugoslavia and Rwanda established by the UN Security Council, developed the Jurisprudence to the point that the discretionary power of prosecutors became not only qualified but also subject to judicial review without departing from the mandate established by the Council⁽³⁷⁾, and on this key aspect, the International Criminal Court represents an example in the exit from the previous models⁽³⁸⁾.

2.1) Tribunal for the former Yugoslavia and Rwanda⁽³⁹⁾

Procurators of the Tribunals for the Former Yugoslavia and Rwanda were not entrusted a great deal of discretion in prosecution power decisions like their counterparts in the national jurisdictions; thus the provisions of the Statute and the Rules of Procedure and Evidence, under which they worked, left them little room for appreciation, perhaps because those courts were established by a at great cost specifically to punish "serious violations" or persons who bear "the greatest responsibility for serious violations" of international humanitarian law⁽⁴⁰⁾.

The discretion of prosecutors included the determination whether there are grounds to justify an investigation and if so to initiate it⁽⁴¹⁾; so if investigations yielded sufficient or reliable evidence of violations, the prosecutor had to determine again whether the violations were "grave" and if so, who bears the "responsibility" for such violations⁽⁴²⁾, however, in light of the

statute, after solving these preliminary matters and determining that the case is at first glance against an individual or individuals, the prosecutor "should prepare a list of the accused."

This peremptory language refers to the existence of a duty rests with the prosecutor and not a discretion to charge⁽⁴³⁾. In addition, while the prosecutor has the authority to amend the indictment by adding new charges, omitting others or in any other way, the statute and the rules of evidence have provisions protecting against this kind of abuse, so any amendments at any time before the confirmation of the indictment would be only with the permission of the judge who confirmed the Regulations or by the sitting judge⁽⁴⁴⁾. Similarly, the prosecutor has the authority to withdraw the charges for immunization against arbitrariness and always in parallel with a confirmation by the judge or the sitting judge⁽⁴⁵⁾.

Another check to the powers of the Prosecutor is in relation to his report on the existence of a case at first glance, if this report is unfounded or unjustified, the court can review and reverse it, so the review may lead to emphasize on the ground that it does not reveal an existence of a case at first glance, **or exchange considered by the innocence of the accused**, and thus reconsideration or review procedures help to check the exercise of the prosecutor of his discretionary powers in order to protect from wanton, malicious and oppressive prosecution as well as save time and resources of the Court⁽⁴⁶⁾; this practice under the statute to be without requesting or receiving instructions from any government or from any other sources⁽⁴⁷⁾.

2.2) Special Court for Sierra Leone

The establishment of the Special Court for Sierra Leone was in 2000 after a decade of civil war in this country, and in consultation with the Government of Sierra Leone, the UN Secretary-General appointed the prosecutor while governments appointed his Deputy; the Prosecutors were independent with a commitment to perform their functions without acceptance or seeking instructions from any government or from any source, as there was a code of conduct for advisers before the court requires that the prosecutor, during the trials, should be fair, firm and impartial and avoid any conflict of interests.

The negotiations on the establishment of that Court that it had to rely heavily on ad hoc tribunals experience in their efforts to

better define and limit the exercise of the prosecutor of his power to select cases, it was also suggested reducing the jurisdiction of the Court on the "most responsible people", adding that the prosecutor should be guided by this wording in the adoption of his trial strategy.

The final wording adopted by the Security Council was "to prosecute persons who bear the greatest responsibility", then the goal of "reducing the focus on those who played a leading role," was explicitly stated.

This time, the viewer has been modified to provide greater control of the prosecutor's discretionary powers to limit their exercise and ensure a court's jurisdiction in a reasonable time frame.

However, this new wording was not devoid of risks, in the context of judicial review in **Fofana** case, thus the judges refused the appeal of the prosecutor who cited the report of the Secretary-General, to the effect that the words "bear the greatest responsibility" was just an instruction to the prosecutor in the adoption of the prosecution strategy that does not exclusively express discretion.

The unique nature of the jurisdiction of the court is located on the need to prosecute "persons who bear the greatest responsibility" for serious violations of humanitarian law and Sierra Leonean law Unlike the tribunals for Yugoslavia and Rwanda which did not mention "humanitarian law" but included it in serious violations; this framing intentionally aimed to direct the prosecutor to focus on those in leadership roles, for instance, Article 15 of the Court Statute authorized the prosecutor with an absolute discretion to determine who meets the requirement of "great responsibility".

III- Within the scope of the International Criminal Court

In ICC, the trials are directed by an independent prosecutor rather than investigating judge, however, he is subject to **judicial scrutiny** by the Pre-Trial Chamber, while that Rome Statute does not in itself explore the objectives of the public prosecution with any great details, the Basically it is crime prevention and put an end to impunity and thus prevent these crimes⁽⁴⁸⁾.

3.1) The problem of discretion

Creating a permanent international criminal court with jurisdiction in all parts of the world received a set of political

difficulties quite different from those that surrounded the birth of its predecessors, which were limited to specific conflicts, so it was not surprising that the Prosecutor of the International Criminal Court authorities consisted an issue of great debate in Rome Conference rising **disappointing and hopes**; thus most countries firmly opposed to the idea of the existence of an overly strong "independent" prosecutor; they eventually approved this suggestion but until ensuring the ability to control and limit his powers; one of the means to achieve this is to subject the first phase in "the opening of the investigation" process to judicial review by the Pre-Trial Chamber.

It had been resorting to the requirement that in the exercise of his discretionary powers, the prosecutor must consider the "what if ... there are serious reasons to believe that an investigation would not serve the interests of justice" ⁽⁴⁹⁾, and likewise, upon investigation, the prosecutor may decide not to prosecute because the "trial is not in the interests of justice" and the latter is subject to judicial review to be better to allow exercising discretionary powers in the selection of cases by the prosecutor.

The Prosecutor's powers had been traced and observed at more stringent, because the Office of the Prosecutor is independent from the Court and the UN Security Council; and because it has the right to start investigations *proprio motu* which had been one of the most controversial issues in the Rome Diplomatic Conference, the opponents were afraid that such Office would inappropriately intervene in the internal affairs of States and therefore violate their sovereignty ⁽⁵⁰⁾; they also fear that this grant of authorities to the Prosecutor would be a "loose cannon" and he might begin trials politically motivated ⁽⁵¹⁾.

3.2) Guarantees to limits of discretion

To reduce the concerns mentioned above, a Pre-Trial Chamber was created enabling it to exercise control and review over the prosecutor and his powers of discretion; and as the International Court is also Conscious about the most serious offenses of international concern ⁽⁵²⁾, it put a duty on the prosecutor, as an initial step, to determine whether any of the available information meets the "gravity" to justify the initiation of the investigation, then he must determine whether "there is a reasonable basis to proceed with an investigation" ⁽⁵³⁾, and If he concludes that this reasonable basis to proceed exists, he submit to

the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected, so like ad hoc tribunals Prosecutor, he has no discretion in this regard⁽⁵⁴⁾.

There is no parallel version of that one in the ad hoc tribunals related to the promotion of the charges after an investigation, however, and after investigations, if the prosecutor determines that there were not "sufficient evidence to establish a substantial ground grounds to believe" that the suspect has committed a crime within the jurisdiction of the court, he must proceed in the preparation of the appropriate charges and get confirmed by the Pre-Trial Chamber; the latter shall, on the basis of the hearing, determine whether there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged⁽⁵⁵⁾.

The prosecutor could also modify the indictment at any time before confirmation with the necessity of the permission of the PTC, in addition to that, if the amendment is linked to the endeavor of the prosecutor to add additional charges or to replace the most grave, he must hold a hearing for that; restrictions on the powers of the prosecutor discretion also reflected with respect to his decision not to try⁵⁶.

Overall, while the prosecutor's decision not to investigate or prosecute is solely based on his impressions about the gravity of the crime, the interests of victims, age, health, and the role of the suspect in the commission of the alleged crime, such decision wouldn't be effective unless and until it is confirmed by the Pre-Trial Chamber, so unlike his counterparts before the national courts or, to a lesser extent, the ad hoc tribunals, the ICC prosecutor does not seem to have a wide field of arbitrary decisions on the strengthening of the charges because the PTC was established to ensure transparency and accountability in the exercise of powers and to review most **of in-discretionary-nature decisions** .

3.3) Estimation of discretion

Unlike ICTY and ICTR, the ICC lack urgency and is not subject to deadlines to complete the consider in the case despite the fact that there is a convergence in policies where the International Criminal Court seeks to target those who bear the most responsibility, and when it comes to the exercise of discretion, Powers of prosecutor looks much more restrictive than those

exercised by the prosecutor in the national systems or ad hoc tribunals although some scholars insist that he still enjoys a wide discretion in some cases due to an excessive borrow of legal approach in determining what is fair and reasonable in the exercise of discretion in the international justice system.

Evaluation and Conclusion:

There is a common agreement on the broad discretion exercised by prosecutors nationally and internationally in the manufacture of justice decision-making process, where this principle almost became universal and without any supervisory authority over these decisions, especially if practice is demonstrated of justice, fairness and equality, as well as the lack of arbitrariness.

Surely, the most important side of the prosecutor discretion is the decision on the charges, and what the charges are, and who to charge; in this way, he has almost unlimited discretion not to proceed with a case, for any reason it deems to him appropriate, and often this authority is too exercised, especially in minor cases, where it's often decided that particular incident, or a class of crimes do not justify spending resources or a criminal trial sanction.

In older systems, the concept of the term "prosecutor" had not the same sense that it has now in national justice or international systems, and therefore it had to say that discretion which was exercised at the time is considered in varying degrees of diverse judicial supervision including emperors, czars, judges and priests.

In domestic legal systems, prosecutors have a basic authority to choose and pursue criminal cases when the access to one of the principal legal systems required many centuries to create a cohesion and an essential balance between civil law and common law, as a result we can see significant differences, such as the American system which is the only one in the world that elects the prosecutor.

In international criminal justice systems, it was difficult to borrow from domestic legal systems, though this discretionary power could be seen in entitling indirectly the UNSC itself by the same powers of the prosecutor, who alone will decide the interest in the establishment of tribunals such as the ICTR and that of Sierra Leone, which were not direct tools to the victors as in Nuremberg and Tokyo, but in the International Criminal permanent Court, the

nature of the discretion was a combination of the two investigative and indictment approaches, with the subordination of Prosecutor to judicial scrutiny by the Pre-Trial Chamber, which is not generally the same in common law systems.

Finally, the discretionary power lies between dual demands concerning prosecution decisions individualization and protection from arbitrary acts, and it could provide a significant efficient benefits; since crime almost goes beyond the capacity of the criminal justice system for adjudication, it must be that prosecutors would be able to exercise their discretionary powers to pursuit or to reject certain cases in order to maintain the order and its priorities.

References:

- (1) M. Cherif Bassiouni, "Historical Survey: 1919-1998," in the Statute of the International Criminal Court: A Documentary History, ed. M. Cherif Bassiouni, Transnational Publishers Ardsley, N.Y., 07 (1998).
- (2) Bergsmo M. and J. Pejic., Commentary on the Rome Statute of the International Criminal Court. Nomos Verlagsgesellschaft, Baden-Baden, in Otto Triffterer Ed., 360 (1999).
- (3) O. Russbach, ONU contre ONU, Le droit international confisque, Editions de la Découverte Paris (1994).
- (4) The preamble to the Rome Statute, paragraph 3.
- (5) As stated in the speech of the Prosecutor of the International Criminal Tribunals for the former Yugoslavia and Rwanda, the work of the Preparatory Committee on the Establishment of the International Criminal Court, New York, United States, Monday, December 8, 1997, a document of the International Criminal Court No.: CC / PIO / 271-E
- (6) Alexander K.A. Greenawalt, Justice without politics: prosecutorial discretion and the international criminal court. 39: 583 International law and politics journal 599 (2007).
- (7) Peter Krug, Prosecutorial Discretion and Its Limits, 50 AM. 643 comparative law journal 650-656 (2002).
- (8) Jingbo Dong, Prosecutorial Discretion at the International Criminal Court: A Comparative Study. 2:2 Journal of Politics and Law 109 (2009).
- (9) Lynch Gerard E., Prosecution: Prosecutorial Discretion, Encyclopedia of Crime and Justice, (2002), retrieved October 23, 2014, from: <http://www.encyclopedia.com/doc/1G2-3403000210.html>
- (10) Davis Kenneth C., Discretionary Justice: A Preliminary Inquiry. Baton Rouge La.: Louisiana State University Press (1999).
- (11) La Fave, Wayne R., The Prosecutor's Discretion in the United States. 18 American Journal of Comparative Law 532-548 (1970).
- (12) Lynch Gerard E., Our Administrative System of Criminal Justice. Fordham Law Review 2217 (1998).
- (13) Lynch Gerard E., *ibid*.
- (14) Christopher, law enforcement in Ancient Greece, Xenopoulos Janus, date 14 August 2006.

- (15) Izzat horny, Plato. The trial of Socrates, second edition. Egypt. Quba house for printing, publishing and distribution 13 (2001) [my translation].
- (16) Bryan C. McCannon, Homicide trials in Classical Athens. 30:1 International Review of Law and Economics 46-51 (2010).
- (17) A hunger strike, Wikipedia, the free encyclopedia, last entry 09 December 2014 [my translation].
- (18) Eric A. Posner, the constitution of the Roman Republic: A political economy perspective. The law school. The University of Chicago 08 (2010).
- (19) Eric A. Posner, op.cit, p.5.
- (20) Christopher, op.cit.
- (21) Eric A. Posner, ibid. p.113.
- (22) Definition of the Prosecutor, upholstered free on the site:
<http://legal-dictionary.thefreedictionary.com/prosecutor>
- (23) Sara Sun Beale, Prosecutorial Discretion in Three Systems: Balancing Conflicting Goals and Providing Mechanisms for Control 02 (2014).
- (24) Sara, ibid. p.10.
- (25) Jingbo, op. cit, p.109.
- (26) Article 227 of the Treaty, issued on June 28th, 1919.
- (27) St James' announcement January 13th, 1942, issued in London.
- (28) The Prosecution and punishment of the major war criminals of the European Axis agreement, and the Charter of the International Military Tribunal, 82 UNTS 280, entered into force on August 8th, 1945, the London Convention, Article 14.
- (29) William A. Schabas, Victor's Justice: Selecting "Situations" at the International Criminal Court. 43:3 the John Marshall Law Review 22 (2010).
- (30) Rules of Procedure of the Court of Nuremberg, adopted in accordance with Article 13 of the Charter in the October 29, 1945.
- (31) Nuremberg Trials, West's Encyclopedia of American Law (2005). Last entry September 2nd.
- (32) Schabas, op.cit, p.537.
- (33) Frederiek de Vlaming, the Yugoslavia Tribunal and the selection of Defendants. 90 Spring Issue 06 (2012).
- (34) Article II of the Law of the Board of Control on Germany issued by the Allies in December 20th, 1945.
- (35) Khalil Hussein, international crime and courts in international criminal law. 66 the Lebanese parliamentary Life Magazine, Lebanon 45(2007). [my translation].
- (36) Frederiek de Vlaming, op.cit, p.91-92.
- (37) Rule 28(a) of the Rules of Procedure and Evidence of the ad hoc International Criminal Tribunal for the former Yugoslavia, as amended on April 06th, 2004.
- (38) Schabas, ibid. p.539.
- (39) The International Criminal Tribunal for Rwanda was established by the UN Security Council Resolution 955 in November 1994 .
- (40) Article 1 of the Statute of the Tribunal for the Former Yugoslavia, Article 1 of the International Criminal Tribunal for Rwanda system, and Article 1 of the Statute of the Special Court for Sierra Leone.
- (41) The final report submitted to the former prosecutor of the Court of the former Yugoslavia by the committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia, International Criminal Court docs, on the court-mail site.

- (42) Article 16 of the Statute of the Tribunal for the Former Yugoslavia, Article 15 of the International Criminal Tribunal for Rwanda statute, and article 15 of the Statute of the Special Court for Sierra Leone.
- (43) Daniel D. Ntanda Nsereko, Rules of Procedure and Evidence of the Former Yugoslavia. 5: 507 Criminal Law Forum 519 (1994).
- (44) Article 50 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, and Article 50 of the Rules of Procedure and Evidence of the International Criminal Court of Rwanda.
- (45) Article 51 of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia.
- (46) Prosecutor v Mladic, No. IT-95-5 / 18-1, 8 November 2002. paragraph 22, documents of the International Criminal Court.
- (47) Article 15, paragraph 2 of the Rwanda court statute and Article 15, paragraph 1 of the Sierra Leone Special Court statue.
- (48) Rome Statute of the International Criminal Court, the preamble.
- (49) Article 53 of the Statute of the International Criminal Court.
- (50) Khalil Hussein, *ibid.* p.12.
- Editorial comment in the Detroit News, 28th July 1998, on the site:
<http://www.detroitnews.com>
- (51) Fred Hiatt, The trouble with the War-Crimes Court. 07 THE WASHINGTON POST July 26th, (1998).
- (52) Article 01 of the Statute of the International Criminal Court.
- (53) Articles 15 and 53(1) of the Statute of the International Criminal Court.
- (54) Morten Bergsmo and Jelena Pejic, Commentary on the Rome Statute. Otto Triffterer article15 margin 22 (1999).
- (55) Article 61 (7) of the Statute of the International Criminal Court.
- (56) Article 53 (2) of the Statute of the International Criminal Court.