Guest Lecture Series of the Office of the Prosecutor

"PROSECUTORIAL DISCRETION BEFORE NATIONAL COURTS AND INTERNATIONAL TRIBUNALS"

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I. INTRODUCTION

According to the *Oxford Companion to Law*, "discretion" is "the faculty of deciding or determining in accordance with circumstances and what seems just, right, equitable, and reasonable in those circumstances." Discretion allows for flexibility and enables the decision maker to choose between two or more permissible courses of action and to adapt his or her decision to existing circumstances. All professional actors in the administration of justice need discretion to resolve the many issues that need to be resolved in the course of their work, as these issues cannot be resolved by hard and fast rules. Defence counsel need discretion to be able to exercise their independent professional judgment in the course of their duties. It enables them to choose between a wide range of courses of action and to advise their clients accordingly: to plead guilty or not guilty, to testify or not to testify, to admit certain facts or not to, to appeal or not to appeal. Judges also need discretion to resolve a multitude of issues that confront them throughout the proceedings over which they preside: whether or not to release an accused person on bail, to determine the conditions of bail, to adjourn cases, to grant leave to the prosecution to amend or withdraw charges, to allow children to testify, to admit or to exclude evidence on certain questions, to grant leave to appeal or to condone late appeal and, very important, to determine the sentence to impose.[1]

The prosecutor, too, needs a good measure of discretion if he or she is to discharge his or her functions effectively. He or she must have freedom to decide whether to commence investigations. When such investigations reveal commission of any crime or crimes the prosecutor must also decide whether or not to initiate proceedings and, if so, in respect of what crime or crimes and against which perpetrator. It is important to note that even when sufficient evidence exists to justify prosecution the resources available to the prosecutor may not permit him or her to prosecute in all cases. He or she must set priorities and pick and choose which cases to proceed with or to abandon according to those priorities.[2] Even after the trial has started the prosecutor still has to make some critical decisions. For example, he or she must decide what evidence to lead, what witnesses to call, what questions to ask, what interlocutory applications to make, and what objections to raise. He or she may also have to decide whether or not to drop some of the counts charged in return for a plea of guilt by the accused and, some times, whether to withdraw the charges altogether.

As long as different professional people are vested with power to make these choices so also are their choices bound to be different. Occasionally some decisions may turn out to be ill advised in the circumstances. Nevertheless power to make decisions involves the possibility to make mistakes. Provided that the choice made is not unreasonable or outrageous in the circumstances the decision maker cannot be faulted nor sued for negligence. It is for this reason that appellate courts are often loath to reverse decisions of trial courts on factual issues or issues involving the exercise of discretion merely because they would have made different decisions. They reverse them only in exceptional cases such as when the decisions are wrong in principle or where the court failed to exercise its discretion judicially.

While other actors involved in the administration of justice may make mistakes and get away with it, this is not so for the prosecutor, particularly in matters concerning the decision to prosecute or not to prosecute. In relation to this issue *The Statement of Prosecution Policy and Practice* for the Hong Kong Department of Justice reads as follows:

> The decision whether to prosecute is among the most important decisions the prosecutor has to make. Great care must be taken in each case to ensure that the right decision is made. A wrong

[1] On the judges' discretion in sentencing matters see generally Daniel D. Ntanda Nsereko, "Minimum Sentences and their Effect on Judicial Discretion", 31 *Crime, Law and Social Change* 363 (1999).

[2] This is particularly significant with respect to the Prosecutor of the International Criminal Court who, if he or she decides to investigate, must "investigate incriminating and exonerating circumstances equally". See the Rome Statute, article 54(1), para. (a). This suggests that the cost involved in the investigation is enormous.

> decision to prosecute, as well as a wrong decision not to prosecute, has the potential to undermine public confidence in the criminal process. There is little margin for error.[3]

This statement applies with even greater force to the prosecutor of an international tribunal, handling cases that are "infused with political implications",[4] and serving a constituency that is diverse in ideology, political interest and legal outlook. Whether national or international, the prosecutor's responsibilities are awesome.

In this paper I focus on prosecutorial discretion: the authority of the prosecutor to decide whether to enforce the law against someone and all the ancillary decisions incidental to the exercise of such authority. I endeavour to show how this discretion is exercised before both national courts and international tribunals: the *ad hoc* tribunals and the International Criminal Court. As with all discretionary power in the hands of fallible human beings, prosecutorial discretion is liable to abuse. When abused discretion becomes persecution and the prosecutor becomes a persecutor. In this respect I discuss some of the mechanisms that need to be in place to control prosecutorial discretion and to guard against its abuse.

II. BEFORE NATIONAL COURTS

(1) Scope of the discretion

Under the doctrine of separation of powers governmental functions are assigned to the executive, legislature and to the judiciary. The enforcement of the criminal law and the initiation of criminal proceedings is an executive function. This is so because protecting the public from crime and from other social ills ideally falls within the mandate of the executive. The judiciary's role is simply to adjudicate the cases so initiated by the executive. The executive, usually through an independent officer – the Attorney General, Solicitor General, Procurator General, Chief Prosecutor, or Director of Public Prosecutions – investigates allegations of crime, arrests the suspects and produces them in court for arraignment and trial.[5] This same officer or a member of his or her department conducts the prosecution on behalf of the State.

In some civil law jurisdictions the officer in charge of public prosecutions is duty bound to prosecute as long as there is sufficient evidence to justify the prosecution. He or she has little or no choice in the matter. Germany is a good example. Inspired by the principle of legality, *Legaliteatsprinzip,* section 152(2) of the German Code of Criminal Procedure provides that: "Except as otherwise provided by law, the public prosecution office *shall be obliged* to take action in the case of all criminal offences which may be prosecuted, provided there are sufficient factual indications." A public prosecutor apparently commits an offence for failing to prosecute when the criteria to prosecute exist.[6] The Code of Crimes against International Law has recently extended the public prosecutor's obligation to prosecute

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[3] Department of Justice, THE STATEMENT OF PROSECUTION POLICY AND PRACTICE (Department of Justice, Hong Kong Special Administrative Region. 2002).

[4] Allison Marston Danner, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court", 97 AM.J. INT'L. L. 510 (2003). According to Danner, at p. 511, "The Court will face serious challenges that will question its independence from political institutions, its legitimacy as an authentic interpreter of international norms, and its accountability to the states that created it and whose nationals face prosecution within its courtrooms".

[5] The practice varies from country to country as to who does what. In some countries, such as the United States, Netherlands and Germany the prosecuting authority is responsible for the investigation as well as the decision to prosecute and the actual prosecution itself in the courts. However, in most Commonwealth countries, such as Australia, Canada, Cyprus, South Africa and the United Kingdom, the police are responsible for the investigation while the prosecuting authority is responsible for the decision to prosecute and for the prosecution itself. This is also true in Austria, Denmark, Finland, Ireland and Norway. In Argentina, China, Czech Republic, France [the investigating magistrate, the juge d'instruction], Germany, Italy, Japan, Romania, the Russian Federation and Sweden the prosecutor or the prosecutor and the police jointly conduct the investigation. Generally see Tony Krone, "The Prosecutor's Authority Over Investigations in Common Law Jurisdictions", a paper presented at the 17th Annual Conference of the International Society for the Reform of Criminal Law, The Hague, Netherlands, 24 – 28 August 2003.

[6] See John Langbein, *Comparative Criminal procedure: Germany* 91 (1977).

to the international crimes of genocide, crimes against humanity.[7] However, the prosecutor is free to prosecute or not to prosecute where the crimes are committed outside Germany by a non-German against a non-German national and the perpetrator is not expected to enter Germany. The discretion given to the prosecutor in this respect was designed to save the German State from the financial burden and the heavy workload that the obligation to prosecute in all cases would engender.[8]

The position is different in jurisdictions operating under the common law. In many of these jurisdictions the officer charged with public prosecutions has absolute discretion whether to prosecute or not to prosecute. The prosecutor also has power to withdraw or discontinue any prosecution irrespective of who initiated it. It is here apropos to mention that in some countries when the pubic prosecutor declines to prosecute, a private citizen may initiate the prosecution under certain conditions as a private prosecutor.[9] The rationale for permitting private prosecutions is to prevent aggrieved members of the public from taking the law in their own hands. Nevertheless, in conducting such prosecutions private prosecutors are beset with so many obstacles that their right to initiate proceedings is virtually illusory. For instance, the public prosecutor has power to take over and continue private prosecutions in the name of the State.[10] The prosecutor can do so at any stage of the proceedings. When the prosecutor does so he or she assumes full and exclusive control over the case. He or she conducts it in any manner he or she judges best. Indeed when the prosecutor takes over the prosecution he or she may do so with the sole purpose of aborting it.[11] Moreover in doing so he or she is not obliged to consult the private prosecutor or to seek leave of the court. He or she is also not obliged to give any reasons.[12] To require the giving of reasons is, apparently, to diminish the prosecutor's discretion. The prosecutor is said to be *dominus litis.*[13]

Discretionary power involves some degree of independence in the exercise of that power. The extent of the independence varies from jurisdiction to jurisdiction and from one legal system to another. In some jurisdictions, notably Austria, Japan, the Philippines, and Romania the prosecuting authorities are both institutionally and functionally subordinated to the Ministry of Justice.[14] The Minister has power to give them both general and specific orders. In other jurisdictions prosecuting authorities are strictly independent of the political wing of the executive when exercising their powers. Jamaica is a good example. Article 94(6) of her Constitution provides that "In the exercise of the functions conferred on him or

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[7] Federal Gazette I (2002), at p. 2254. Generally see Gerhard Werle and Forian Jessberger, "International Criminal Justice is Coming Home: The New German Code of Crimes Against International Law", 13 *Criminal aw Law Forum* 191 (2002).

[8] See Werle and Jessberger, *ibid.*

[9] See, for example, the Botswana Criminal Procedure and Evidence Act, Chapter 08:02, section 14, which provides as follows: "In all cases where the Attorney-General declines to prosecute for an alleged offence, any private party who can show some substantial and peculiar interest in the issue of the trial, arising out of some injury which he individually has suffered by the commission of the offence, may prosecute in any court competent to try the offence, the person alleged to have committed it".

[10] For example, the Constitution of Botswana, section 51, subsection (3) reads as follows: "The Attorney-General shall have power in any case in which he considers it desirable to do so-

(a) to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offence alleged to have been committed by that person;

(b) *to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority;* and

(c) to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority." [Emphasis added]

[11] For example see *Raymond v. Attorney-General* [1982] 1 Q.B. 839.

[12] See the English case of *Gouriet v. Union of Post Office Workers* [1978] A.C. 435 at p. 487 where Viscount Dilhorne said, "The Attorney-General has many powers and duties. He may stop any prosecution on indictment by entering a *nolle prosequi. He merely has to sign a piece of paper saying that he does not wish the prosecution to continue. He need not give any reasons.* He can direct the institution of a prosecution and direct the Director of Public Prosecutions to take over the conduct of any criminal proceedings and he may tell him to offer no evidence. In the exercise of these powers he is not subject to direction by his ministerial colleagues or to control and supervision by the courts". [Emphasis added]

[13] See the South African case of *R v. Sikumba* [1955] 3 S. A. 125, at p. 127 where De Villiers, J. said, "The prosecutor, as the representative of the Solicitor-General, is the *dominus litis*. It is within his powers to withdraw the charge at any stage of the proceedings and no court can prevent him, just as no court can force him to prosecute". Some countries do, however, require the prosecutor to seek and obtain leave of the court where a private party instituted the proceedings. For example see the Constitution of Uganda, article 120, para 3(d), which empowers the Director of Public Prosecutions to discontinue at any stage before judgment proceedings instituted by himself or any other person or authority, save that he "shall not discontinue any proceedings commenced by another person or authority except with the consent of the court".

[14] Generally see Directory of Prosecution Services, published by the International Association of Prosecutors, 1999.

her by this article, the Director of Public Prosecutions shall not be subject to the direction and control of any person or authority."[15] The rationale for this provision, which is common in many constitutions of the former British dependencies, is the need to give the prosecutor latitude and freedom to enforce the law without fear, favour or ill will.[16] The provision also assures the prosecutor that should he or she take a decision that displeases the powers that be he or she will not thereby be jeopardizing his or her career. Some constitutions go even further to bolster the prosecutor's position by guaranteeing the holder of the office security of tenure in the same way as they do to the judges.[17]

(2) The public interest

As public officers prosecutors must use their powers to advance the public interest.[18] Public interest, more than anything else, is the most important consideration that the prosecutor must take into account in deciding whether to prosecute or not to prosecute.[19] It is also the most reliable compass whereby the prosecutor makes the decision. Thus using that compass it would clearly be in the public interest that where substantial, cogent, credible and admissible evidence exists suggesting reasonable prospects of a conviction the prosecutor should commence proceedings against a perpetrator. On the other hand, it would not be in the public interest to commence proceedings where the evidence is weak and the prospects of a conviction remote. To commence proceedings under such circumstances would amount to an abuse of process and would be to fritter away meagre public resources and to squander valuable time.[20] It would also be in the public interest to prosecute where the alleged offence is serious, the degree of harm or damage caused extensive and the need to deter a reoccurrence of such an offence pressing. The need for deterrence would be even more pressing where the offence were committed by persons who hold offices of trust, such as public officials, than by ordinary citizens.[21] It would, however, not be in the public interest to prosecute where the offence is minor or the harm or damage occasioned minimal. It would similarly not be in the public interest to commence proceedings where the public is indifferent and does not raise any hue and cry, or where there exist alternative modes of disposition, such as compensation, reconciliation and satisfaction. While it is thus in the public interest to prosecute where the offence in question is serious, the harm and damage occasioned extensive and the prospects of a conviction high, such prosecution may, under certain circumstances, be counter-productive and therefore not in the public interest. This would be true of offences committed in a country that is bedevilled by civil conflict and where there are efforts afoot to restore peace and to promote reconciliation. Another

[15] See also section 51(7) of the Constitution of Botswana, and article 120(7) of the Constitution of Uganda.

[16] Wilcox J., underscored this point in the Australian case of *Clyne v. Attorney-General* (1984) 55 A.L.R. 92 at 99 when he said that "Parliament has given to the Director [of Public Prosecution] the power to determine for himself whether an indictment shall be filed and whether a prosecution shall be discontinued. The evident intention was to divorce the Government, and the Attorney-General in particular, from day-to-day decision making in those areas."

[17] See for example section 113 of the Constitution of Botswana, articles 95 and 96 of the Constitution of Jamaica and article 120 of the Constitution of Uganda.

[18] Article 13 (b) of the United Nations Guidelines on the Role of Prosecutors specifically provide that in the performance of their duties, prosecutors shall "Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect." (*Report of the Eighth United Nations Congress on the Prevention of Crime and Treatment of Offenders.* U.N. Doc. A/CONF.144/28 (1990), at p. 117)

[19] In some jurisdictions the constitutions provide broad guidelines under which the discretion is to be exercised. For example the Constitution of Uganda, article 120 subsection (5) provides that "In exercising his or her powers under this article, the Director of Public Prosecutions shall have regard to the public interest, the interest of the administration of justice and the need to prevent abuse of legal process". The Constitution of Ghana is not specific on prosecutorial discretion. It nevertheless provides general principles that repositories of discretionary power ought to exercise it. Article 296 provides in part as follows: "(a) Discretionary power shall be deemed to imply a duty to be fair and candid: (b) the exercise of discretionary power shall not be arbitrary, capricious or biased either by resentment, prejudice or personal dislike and shall be in accordance with the due process of law." These provisions are addressed to public authorities vested with discretionary power. This writer sees no reason why they cannot be applied to the Attorney General when he or she is exercising his or her prosecutorial discretion.

[20] Article 14 of the United Nations Guidelines on the Role of Prosecutors provides that "Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded." See note 18, supra.

[21] Article 15 of the United Nations Guidelines on the Role of Prosecutors provides that "Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences." See note 18, supra.

situation where prosecution would be counter-productive is when it might injure the country's relations with other countries.

In all these instances the prosecutor is the sole judge as to what is "in the public interest." The prosecutor must evaluate both the short-term and long-term effects on the public interest of a decision to prosecute or not to prosecute. In doing so the prosecutor must undertake a balancing exercise between the various competing interests. Such an exercise is difficult and requires great wisdom. In general, at least in a democracy, the prosecutor cannot afford to make a wrong decision. Further more, and unfortunately for the prosecutor, whatever decision he or she makes he or she is bound incur the displeasure and criticism of some sections of the public.

An example of the prosecutor's difficulty is the case involving Mr. Jacob Zuma, the Deputy President of South Africa. In 2003 at the conclusion of an investigation into a multi-billion Rand arms deal between certain French companies and South Africa, the National Director of Public Prosecutions concluded that Zuma was implicated. He also concluded that there was a *prima facie* case against Zuma and that he had "a case to answer." In spite of these conclusions the Director declined to prosecute, ostensibly because he was not sure whether the prosecution's case was strong enough as to yield a conviction.[22] He said: "In a case of this nature, we can't prosecute if it is not sufficiently winnable. At the same time, given the public interest in the matter, we cannot continue with a prolonged investigation that casts a shadow over the deputy president of the country, whilst we are not sure of the outcome." The Director's decision generated a public furore and considerable controversy.[23]

(3) Giving reasons

As indicated earlier, some jurisdictions interpret prosecutorial discretion to include power to decide without having to give reasons or explanation to anyone, not even the victims that are most affected by the decision. However, the coming into force of the Rome Statute of the International Criminal Court and its emphasis on the principle of complementarity might, albeit to a limited extent, modify this stance. Some States are already making exceptions with respect to crimes within the jurisdiction of the Court. South Africa is one of those countries. In South Africa, unlike Germany, the law that domesticates the Rome Statute does not impose an absolute obligation on the National Director of Prosecutions to prosecute. It nevertheless requires the Director when deciding to prosecute to "give recognition to the obligation that the Republic, in the first instance and in line with the principle of complementarity ... has jurisdiction and responsibility to prosecute persons accused of having committed a crime [under the Rome Statute]."[24] The Act also requires the Director, when he or she declines to prosecute, to provide the Director-General of Justice and Constitutional Development with "the full reasons for his or her decision."[25] The Director-General must in turn forward that decision together with the reasons to the Registrar of the International Criminal Court in The Hague. These provisions show that the South African Parliament takes the country's obligation under the Rome Statute seriously. They also reveal Parliament's keen awareness of and sensitivity to the interest of the rest of the international community in the decisions of the National Director and in the way he or she arrives at those decisions.[26]

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[22] On deciding not to prosecute Zuma, Mr Bulelani Ngcuka, the National Director of Public Prosecutions, said: "We have concluded that, whilst there is a prima facie case of corruption against the deputy president, our prospects of success are not so strong enough. That means that we are not sure if we have a winnable case. Accordingly, we have decided not to prosecute the deputy president." See Mariette le Roux, "Zuma case unwinnable, says Scorpion boss" IOL South Africa 23 August 2003. www.iol.co.za (web site).

[23] The Prosecutor's stance created controversy as to what the effect of a *prima facie* case is. Has Visser, an expert in private law at the University of Pretoria stated: "If a prosecutor has genuine *prima facie* evidence, he goes to court. If his evidence would not stand up in court, it is not a *prima facie* quality." "Ngcuka spoke in 'riddles' about Zuma"; MAIL & GUARDIAN online Wednesday, September 3, 2003. Another lawyer remarked that the Director's decision smacked of "a political decision" and not a legal one. See Fikile-Ntsikelelo Moya, "Selective prosecution a bad precedent"; MAIL & GUARDIANONLINE Wednesday, September 3, 2003.

[24] Implementation of the Rome Statute of the International Criminal Court, Act No. 27 of 2002, section 5, para. 3.

[25] *Ibid.* section 5, para. (5).

[26] Section 5, para (3) of the Act also vests the South African courts with universal jurisdiction in the following circumstances: "In order to secure the jurisdiction of a South African court for the purpose of this Chapter, any person who commits a crime [within the ICC Statute] contemplated in subsection (1) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if –

South Africa is also exemplary, at least in the Southern African region, in another respect. Its constitution authorizes the National Director of Prosecutions to review decisions to prosecute or not to prosecute after consulting the provincial director in whose jurisdiction the decision was made. In doing so, however, he or she must call for representations from the accused, the complainant and any other person that the Director considers relevant.[27] This procedure is salutary. It lends transparency to the prosecutor's decision-making process. It also accords with the standards set by the United Nations for its Member States.[28]

(4) Role of the courts

Under the civil law or the inquisitorial system the courts, through an investigating judge, work closely together with prosecuting authorities to construct the dossier or case file, containing all the relevant information on a case. The courts in civil law countries do thus participate in the investigative or pre-trial phase of a case. They exercise oversight and control over the prosecution process. They are thereby able to check possible abuses of the prosecutorial discretion. The situation is generally different under the common law or adversary system. Under this system there is a clear division in the roles of the prosecuting authorities and the courts. The former investigate and prosecute. The latter, acting as impartial and detached arbiters, merely adjudicate and do not get involved in the prosecution process.[29] Yet, as has been noted, the law in the common law countries tends to give prosecuting authorities extensive powers. The authorities often abuse those powers. In some extreme cases prosecutors make decisions that are motivated by ill will. They manipulate their powers in such a way that on the surface they are acting "legally" but in reality unjustly toward the accused or the general public. They may base decisions to prosecute or not to prosecute on factors other than the availability of evidence or the need to enforce the law.[30]

Although the courts in the common law countries thus do not control the prosecution process they do nonetheless play some limited role, albeit *ex post facto*, in protecting accused persons from the consequences of its abuse. They do so through the application of the abuse of process doctrine.[31] In justifying the application of this doctrine to criminal proceedings Lord Griffiths, of the English House of

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(a) that person is a South African citizen; or
(b) that person is not a South African but is ordinarily resident in the Republic; or
(c) that person, after commission of the crime, is present in the territory of the Republic; or
(d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic".

[27] Article 179(5).

[28] See article 13 (d) of the United Nations Guideline on the Role of Prosecutors, which provides that in the performance of their duties, prosecutors shall "Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power." See note 18, supra.

[29] Generally see Nico Jorg, "Convergence of Criminal Justice Systems: Building Bridges – bridging the Gaps", a paper presented at the 17th Conference of the International Society of the Reform of Criminal Law. The Hague, Netherlands, 24 – 28 August 2003.

[30] Generally see the Uganda case of *In the matter of habeas Corpus and in the matter of an Applicant Joyce Lwebuga wife of Lwebuga an Unconvicted Prisoner at Njabule Prison.* H.Ct. Misc. Cause No. 11 of 1963 (unreported). Eriyaabu Lwebuga was the leader of the *Bawejjere* (Common Men's) Party. On 21 January 1963 he appeared before the Buganda Principal Court charged with sedition and with inciting the public against the Buganda Government, then led by *Katikkiro* (Premier) Michael Kintu. The Central Government Director of Public Prosecutions ordered the Principal Court to drop the charges against Lwebuga and to release him forthwith. The Principal Court ignored the order. Thereupon Lwebuga's wife applied to the Uganda High Court for a writ of habeas corpus, seeking his release. For the Principal Court and for the Buganda Government it was contended that the Director of Public Prosecutions did not exercise his discretion properly. For example, he did not give reasons for his order. He also did not take the elementary step of calling for and perusing the Buganda Government police docket to satisfy him whether there were merits in the case against Lwebuga. To the Buganda Government the Director of Public Prosecutions to be acting under the influence of the Central Government which was at the time wooing Lwebuga to join the ruling (Uganda People's Congress) party. Rejecting the these contentions, the High Court held that it was not open to anyone, not even the courts, to question the way the Director of Public Prosecutions exercised his discretion. It accordingly ordered that Lwebuga be released forthwith.

[31] Generally see David Corker and David Young, *Abuse of Process and Fairness in Criminal Proceedings* (Butteworths, London. 2000). See also Laura Davidson, "Quashing convictions for pre-trial abuse of process: breaching public international law and human rights." 58 *Cambridge Law Journal* 461 (1999)

Lords, opined that the courts must "accept a responsibility for the maintenance of the rule of law that embraces a willingness *to oversee executive action* and to refuse to countenance behaviour that threatens either basic human rights or the rule of law."[32] Lord Griffiths also asserted that in the same way as the courts have power to review executive action in administrative law, "[so] also should it be in the field of criminal law and if it comes to the attention of the court that there has been a serious abuse of power it should ... express its disapproval by refusing to act upon it."[33] Three cases from Uganda, Tanzania and Botswana will illustrate this point.

In the Ugandan case of *Musoke v. Uganda*[34] the accused appeared before a magistrate on 16 June 1971 charged with simple [as opposed to aggravated] robbery. He was remanded in custody until 10 August 1971 when he applied for release on bail. As the prosecutor did not object, he was released and admonished to appear in court on 27 August 1971. When he appeared on that date the prosecutor tendered an amended charge, charging the accused with aggravated robbery, which carried the death sentence. Given the seriousness of the new charge the prosecutor asked the court to cancel the bail. The magistrate conceded, taking the view that he had no choice in the matter. He cancelled the bail and remanded the accused in custody till 10 September 1971. On that date the magistrate further remanded the accused to 24 September 1971. On 24 September he further remanded the accused to 8 October 1971 and on that day to 22 October 1971. Feeling aggrieved by these incessant adjournments the accused applied to the High Court for release on bail. On 10 November 1971 when he appeared before the High Court to prosecute the application, the application was adjourned to 17 November at the request of the prosecution. There was reportedly a practice in Uganda at the time where, after prisoners were released on bail, the police amended the charges with the sole motive of putting the cases beyond the powers of the magistrates' courts and then asking for the cancellation of the prisoners' bail. The High Court suspected this to be the motive in this case. The suspicion was based on the fact that the only difference between the old and new charge sheets was the insertion of the phrase "a deadly weapon to wit a panga." Commenting on this fact Kiwanuka, Ag. C.J. said:

> Following what Mr. Ghelani [Counsel for the accused] said I began to doubt the sincerity of the police in this case. Who now told them that the accused used a panga? If, indeed, he used one he must have used it on the complainant, Mr. Isake Kaberuka. But Mr. Isake Kaberuka must have made a statement to the police a long time ago, at least long before the case was fixed for hearing. And if any such violence was used on him he must have told the police so. Now the question is: Did he? If he did why was the applicant charged with a lesser offence in the first place? If he did not, then is it not an afterthought? Can we allow a citizen's liberty to be juggled with in this form?
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> I do not deny that the Director of Public Prosecutions has every right to alter charges as he sees fit. But as a judge of this court I am bound to come to the rescue of our citizens where *I detect an attempt on the part of those who have power to prosecute others to abuse the powers in their hands*. This, in my view is one of those cases.[35]

Another irregularity in the charge sheet that the High Court found was that the accused was alleged to have robbed the complainant of "household properties" – an uncertain and vague and undefined term that did not give the accused reasonable information as to what property he was alleged to have taken.

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[32] *R v. Horseferry Magistrates' Court:* Ex Parte *Bennett* [1994] 1 A.C. 42, at p. 62. Emphasis added. An American judge similarly declared "This court has inherent supervisory power to dismiss prosecutions in order to deter illegal conduct. The 'illegality' deterred by exercise of our supervisory power need not be related to a constitutional or statutory violation." (Cited by the International Criminal Tribunal for Rwanda in *Jean-Boscoe Barayagwiza v. Prosecutor,* infra, at para. 76). A Canadian court in *R v. Conway* [1989] 1 SCR 1659 at1667 also stated that "The prosecution must be set aside not on merits, but because it is tainted to such a degree that to allow it to proceed would tarnish the integrity of the court. The doctrine is one of the safeguards designed to ensure that repression of crime through the conviction of the guilty is done in a way, which reflects our fundamental values as a society. I acknowledge that courts must have the respect of and support of the community in order that the administration of justice may properly fulfill its function ... where the affront to fair play and decency is disproportionate to the societal interest in the effective prosecution of criminal cases, then the administration of justice is best served by staying the proceedings."

[33] *Ibid.*

[34] [1972] E.A. 137.

[35] *Ibid.* at 139. [Emphasis added]

Moreover, after amending the charge sheet the prosecuting authorities shelved the case for several months with no attempt to complete their investigation and to bring the accused to trial within a reasonable time. Based on these irregularities and the prosecution's lackadaisical attitude the Court ordered the release of the accused on bail.

In the Tanzanian case of *Director of Public Prosecutions v. Mehboob Akbar Haji & Another*[36] the prosecuting authorities thought that their powers were not subject to review by the courts. The accused appeared before the District Court at Illala on 25 October 1991 charged with possession of dangerous drugs, cannabis sativa. On 8 November 1991 they applied for bail. The prosecutor objected. The magistrate adjourned the case to 20 November 1991 when he would deliver his ruling on the application. On that date just when the magistrate was about to read the ruling, the prosecutor produced a certificate from the Director of Public Prosecutions under section 35(2) of the Organized Crime Control Act objecting to the grant of bail. Under the section the Director of Public Prosecutions has power to issue the certificate informing the court that if the accused is admitted to bail there is likelihood that the safety or interests of the Republic would be prejudiced. According to an earlier decision of the High Court the issue of the certificate is a bar to the grant of bail. So in this case it would appear that the object of producing the certificate was to forestall the granting of bail. But the Defence objected to the filing of the certificate. The magistrate upheld the objection and proceeded to admit the accused to bail. Six days afterwards the Director of Public Prosecutions entered a *nolle prosequi* and the accused were discharged. However, they were soon thereafter re-arrested and arraigned again before another court, the Kivukoni District Court on the same charges. The Director filed a fresh certificate under section 35(2) of the Organized Crime Control Act objecting to the release of the accused on bail. The court admitted the certificate and remanded the accused in custody. Undaunted, their counsel filed an application before the Tanzania High Court challenging the Director's actions. He contended that they were aimed at defeating the previous District Magistrate's order releasing the accused on bail. The High Court agreed with counsel, granted the application and quashed the Kivukoni District Court's proceedings, including the *nolle prosequi*, the admission of the certificate as to bail and the order remanding the accused to custody. In so doing the High Court said "there was impropriety in the exercise by the DPP of his powers under the law. *The impropriety amounted to an abuse of the process of the Court...* "[37]

Unhappy with the High Court's ruling the Director of Public Prosecutions appealed to the Tanzania Court of Appeal, contending that his powers were absolute and could not be challenged in any court even when they were exercised *mala fide*. To this contention the Court of Appeal responded thus:

> We are surprised because we did not think anyone in our country could be vested with such absolute and total powers. It would be terrible to think that any individual or group of individuals could be empowered by law to act even *mala fide.* As it turned out to our great relief the exercise of the powers by the DPP under the Criminal Procedure Act is limited by the Act. Although the powers of the DPP appear to be wide, the exercise is limited by three considerations. That wherever he exercises the wide powers he must do so only in the public interest, in the interest of justice and in the need to prevent abuse of the legal process.[38]

The Court dismissed the appeal, holding that, "The DPP acted *mala fides* and not in public interest, not in the interest of justice but in abuse of the legal process which he was required to prevent."[39]

A more extreme example of prosecutorial abuse is the Botswana case of *Sejammitlwa & Anor. v. Attorney General.*[40] Here the appellants were arrested on 17 December 1993. Eighteen months later on 21 June 1995 they were formally arraigned on several counts of theft and conspiracy to defraud. They appeared in court for mention on at least 13 occasions when the hearing of the case was postponed due to the non-availability of State witnesses or documentary evidence and the absence of the prosecutor.

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[36] Cr, App. No. 28 of 1992 (unreported).
[37] *Ibid.* [Emphasis added]
[38] *Ibid.*
[39] *Ibid.*
[40] Civ. App. No. 9 of 2002 [C.A.] (unreported).

On 5 May 1997, 24 months after the arraignment, the State withdrew the charges but without prejudice. In October 2000, three and half years thereafter, the State charged the appellants again with the same offences. The appellants were brought before the court on 26 January 2001 and their trial was set for 17 April 2001. On 28 March 2001, over seven years after their initial arrest, the appellants filed an application before the High Court seeking relief on the ground that their constitutional right to be tried within a reasonable time had been violated. The High Court dismissed the application, holding that once the initial charges were withdrawn on 5 May 1997 time had stopped to run; that the period to be considered in determining whether there was unreasonable delay was the time of the second arraignment in October 2000 to the time when they filed the application; that during the period after the charges were withdrawn the appellants were not "persons charged with an offence" in terms of the Constitution of Botswana;[41] and that they had not established that the period between the second arraignment and their application was unreasonable. On appeal the Court of Appeal reversed the High Court decision. Relying, inter alia, on the Zimbabwe case of *re Mlambo*,[42] it held that:

1. In cases involving complaints of unreasonably delayed trials time starts to tick at the very time the accused is arrested and that the withdrawal of the charges does not affect the time frame;[43]

2. That there was an inordinately long delay in bringing the appellants to trial for offences allegedly committed more than 8 years earlier; that on the facts the delay was unreasonable and no adequate explanation for the delay was given by the State;

3. That the appellants had not waived their rights nor forfeited them by their conduct and would be prejudiced; and

4. That though the Court was mindful of the public interest to have the alleged crime prosecuted, the State had more than ample time to do so in this case. As the State had not shown any real concern to pursue the prosecution or to expedite it the Court ordered a permanent stay of the case.

These three decisions delineate the importance of the courts remaining vigilant to ensure that prosecuting authorities do not abuse their discretion, however wide it may be, to deprive accused persons of the protection afforded them under the law. Such abuse does not serve the public interest.

III. BEFORE INTERNATIONAL TRIBUNALS

(1) Before the ad hoc Tribunals

(a) Scope of the discretion

[41] Section 10(1) of the Constitution of Botswana provides that "If any *person is charged with a criminal offence*, then, unless the charge is withdrawn, the case shall be afforded a fair hearing *within a reasonable time* by an independent and impartial court established or recognized by law". [Emphasis added]

[42] [1999] S. 4 Afr. L.Rep. 144. See also the Jamaican case of *Bell v. D.P.P. of Jamaica* [1985] 2 All E R 585, at589 (PC). In this case the appellant was arrested on 17 April 1977 and charged with the illegal possession of firearms, aggravated robbery, shooting with intent and burglary. He was convicted as charged on 20 October 1977. On appeal the conviction was quashed on 7 March 1979 and a retrial was ordered. On 10 November 1981 the Crown withdrew the charges because of the unavailability of witnesses. The appellant was accordingly discharged. But he was re-arrested on 12 February 1982 and charged again. The Privy Council held that the 32-month delay, operative from the date when a retrial, was ordered was unreasonable and violated his constitutional rights. It permanently stayed the proceeding, holding that to allow them to continue would be oppressive.

[43] The Court cited the case of *Ntwa v. State* Misc. Appl. F39 of 2001 (unreported) in which Marumo, J. while interpreting the word "charged" in section 10(1) of the Constitution opined that "It is clear that it cannot simply refer to the formal process by which the person is arraigned before the court. It is entirely conceivable that the mental anguish, the inconvenience, the social stigma, the detrimental pressure and a whole array of other ills sought to be avoided by the constitutional guarantee can be visited upon an individual long before the formal process of filing of a case at a court registry..."

The Statutes of the three *ad hoc* Tribunals of the former Yugoslavia, Rwanda and Sierra Leone set up an office of Prosecutor for each Tribunal. They assign to the Prosecutors the duty to investigate and prosecute persons responsible for committing the crimes within the Tribunals' jurisdiction.[44] In carrying out their duties the Prosecutors are enjoined to act independently as separate organs of the Tribunals.[45] To emphasize their independence the Prosecutors, as is the case with some of their national counterparts, are forbidden to seek or receive instructions from any Government or from any other source.[46]

Unlike their national counterparts, particularly in the common law countries, the Prosecutors of the *ad hoc* Tribunals have limited discretion, particularly with respect to the decision to prosecute. They have power to determine whether there are grounds to warrant an investigation. If the grounds are there then they initiate the investigation. If the investigation yields sufficient or credible evidence of violations the Prosecutors must again determine whether the violations are "serious." If they are then the Prosecutors must identify what persons bear "the greatest responsibility" for such violations.[47] They must also satisfy themselves that the persons they have identified have a *prima facie* case against them. Once they have made these preliminary determinations then they "*shall* prepare an indictment."[48] This peremptory language suggests a duty and not discretion on the part of the Prosecutors to indict. This is so probably because the *ad hoc* Tribunals were set up, at great cost, specifically to try "serious violations" or persons with "the greatest responsibility for serious violations" of international humanitarian law.[49] Moreover, as I have argued elsewhere in respect of the Yugoslav Tribunal, "Given the widespread media coverage of the atrocities committed in the territory of the former Yugoslavia it would be an outrage to the international community were the prosecutor to decline to go forward with a case for reasons other than insufficiency of evidence."[50]

Further more, while the Prosecutors have power to amend indictments to add new charges, drop others or in any other way deal with the charges, the Statutes and Rules of Evidence have in place provisions that guard against the kind of abuse that is revealed in the Ugandan case of *Musoke*, discussed above. The Prosecutors may effect such amendments any time before the confirmation of the indictment. Thereafter, however, they may amend only if permitted to do so by the Judge who confirmed the indictment or, during trial, the trial Judge.[51] Similarly, the Prosecutors have power to withdraw the charges. Nevertheless to guard against abuse of the type manifested in the Tanzanian and Botswana cases of *Mehhoob* and *Sejammitlwa,* referred to above, they can withdraw the indictment only before and not after its confirmation. Thereafter, they may do so only with leave of the confirming Judge or, during trial, the trial Judge.[52]

(b) Role of the Tribunals

The Tribunals perform further supervisory functions over the Prosecution process. This is in respect of the Prosecutors' determination as to the existence of a *prima facie* case.[53] If that determination is un-

[44] See article 20 of the Statute the International Tribunal for the Former Yugoslavia (hereinafter "the Yugoslav Statute"), article 15 of the Statute of the International Criminal Tribunal for Rwanda (hereinafter "the Rwanda Statute") and article 15 of the Statute of the Special Court for Sierra Leone (hereafter the "Sierra Leone Statute").
[45] *Ibid.*
[46] *Ibid.*
[47] See article 16 of the Yugoslav Statute, article 15 of the Rwanda Statute, and article 15 of the Sierra Leone Statute.
[48] Article 18(4) of the Yugoslav Tribunal and article 17 of the Rwanda Tribunal.
[49] See article 1 of the Yugoslav Statute, article 1 of the Rwanda Statute, and article 1 of the Sierra Leone Statute.
[50] Daniel D. Ntanda Nsereko, "Rules of Procedure and Evidence of the Former Yugoslavia", 5 *Criminal Law Forum* 507 (1994), at p. 519.
[51] See Rule 50 of the ICTY Rules of Procedure and Evidence and Rule 50 of the ICTR Rules of Procedure and Evidence.
[52] See Rule 51 of the ICTY Rules and Rule 51 of the ICTR Rules.
[53] As for the meaning of this term see ICTY, Decision on the Review of the Indictment, *Prosecutor v. Kordić*, Case No. IT-95-14-4, 10 November 1995, p.3 where Judge McDonald defined the term as "a credible case, which would (if not contradicted by the Defence) be a sufficient basis to convict the accused on the charge." This definition was followed in ICTY, Decision on Review of Indictment and Application for Consequential Orders, *Prosecutor v. Milošević, Milutinović, Šainović, Ojdanić and Stojiljković*, Case No. IT-99-37-I, Judge Hunt, 24 May 1999, Klip/ Sluiter ALC-III-35. For other variations see ICTY, Decision on Application to Amend Indictment and on Confirmation of Amended Indictment, *Prosecutor v. Milošević, Milutinović, Šainović, Ojdanić and Stojiljković*, Case No IT-99-37-I, Judge Hunt, 29 June 2001, par. 3 and ICTY, Order Granting Leave to file an

founded or unjustified, the Tribunals may quash it on review. It is mandatory that a Judge reviews and confirms the indictment before an accused person is tried on it. The Judge may decline to confirm it on the ground that it does not disclose a *prima facie* case, dismiss it and discharge the accused.[54] Review proceedings help to check the Prosecutors' exercise of their discretionary powers, protect members of the public from frivolous, mischievous and oppressive prosecutions,[55] and save the Tribunals' time and resources.

However, while the Tribunals may, on review, thwart the Prosecutors' efforts to prosecute, they cannot review or change their decisions not to prosecute. To do so would amount to a repudiation of the Prosecutors' independence. Moreover, the Statutes of the three Tribunals enjoin the Prosecutors not to "seek or receive instructions from any Government or from any other sources."[56] The "other source" that must not give instructions to the Prosecutors apparently includes the Tribunals. Again, as is the case at the national level, only public opinion can be brought to bear on the Prosecutors' unpopular decisions.

It should be noted, however, that while the Statutes of the *ad hoc* Tribunals thus forbid the Prosecutors from seeking or receiving instructions they do not forbid them to seek or to receive assistance or advice. The Yugoslav Tribunal's Prosecutor did receive expert advice before she decided against instituting investigations against individuals that were responsible for the NATO bombing of the Federal Republic of Yugoslavia.[57]

It is apposite to point out, too, that while the Prosecutors may initiate investigations on the basis of information obtained from Governments, United Nations organs, intergovernmental and non-governmental organizations, they alone assess that information and decide whether there is a sufficient basis to proceed.[58] The providers of the information cannot dictate to them. This is also generally true of the International Criminal Court. However, as we shall see presently, the involvement of that Court's Pre-Trial Chamber in the decisions of its Prosecutor makes a big difference between the Court and the *ad hoc* Tribunals.

2. Before the International Criminal Court

(a) Scope of the discretion

The Rome Statute of International Criminal Court follows in the footsteps of the Statutes of the *ad hoc* Tribunals. It sets up an Office of the Prosecutor and assigns to it the responsibility of receiving referrals and any substantiated information on crimes within the jurisdiction of the Court and conducting investigations and prosecutions before the Court.[59] Like the Statutes of the *ad hoc* Tribunals the Rome Statute enjoins the Office of the Prosecutor to act independently of the Court.[60] Again, as is the case with

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Amended Indictment and Confirming the Amended Indictment, *Prosecutor v. Mladić*, Case No. IT-95-5/18-1, Judge Orrie, 8 November 2002, para. 26.

[54] See Rule 47 (D) of the ICTY Rules of Procedure and Evidence, and Rule 47 of the ICTR Rules of Procedure and Evidence.

[55] As Judge Orie of the International Criminal Tribunal for the former Yugoslavia observed, "standing trial is a difficult experience and an accused should not be put on trial if, from the outset, a conviction is unlikely" (Order granting leave to file an amended indictment and confirming the amended indictment, *Prosecutor v. Mladic*, Case No. IT-95-5/18-1, 8 November 2002, Para. 22.)

[56] See article 16(2) of the Yugoslav Statute, article 15(2) of the Rwanda Statute, and article 15(1) of the Sierra Leone Statute.

[57] On 14 May 1999, following the NATO bombing campaign against the Federal Republic of Yugoslavia the Prosecutor appointed a Committee to assess the allegations and materials accompanying them, and to advise the Prosecutor whether or not there was sufficient basis to proceed with an investigation into some or all the allegations or into other incidents related to the NATO bombing. The Committee recommended that no investigation be commenced. The Prosecutor accepted the recommendation. See *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia.* (Reproduced in Andre Klip and Goran Sluiter, *Annotated Leading Cases of International Tribunals,* Vol. V (Itersentia, Antwerp. 2003). For a criticism of the Committee's findings see Paolo Benvenuti, "The ICTY Prosecutor and the Review of the NATO Bombing Campaign Against the Federal Republic of Yugoslavia", 12 *European Journal of International Law* 507 (2001).

[58] Article 18 of the ICTY Statute, and article 17 of the ICTR Statute.

[59] Article 42(1).

[60] *Ibid.*

ad hoc Tribunals a member of the Office is forbidden to "seek or act on instructions from any external source."[61] Given the powers of the Pre-Trial Chamber, one would be tempted to say that reference to "external source" is limited to Governments, intergovernmental and nongovernmental organizations or individuals. That is apparently not true. It extends to the Court as well.[62] However, when it comes to the exercise of discretionary powers one finds that the Prosecutor is much more restricted than his or her counterparts under the *ad hoc* Tribunals. The reasons for this are historical. The issue of an independent Prosecutor that possesses *proprio motu* powers to initiate investigations and prosecutions without a referral from the Security Council or a complaint from a State proved to be one of the most controversial issues at the Rome Conference of Plenipotentiaries.[63] States that opposed such a Prosecutor feared that the Prosecutor would unduly intrude into their internal affairs and thereby infringe upon their sovereignty.[64] They also feared that a Prosecutor with such powers would be a "loose cannon" and might initiate politically motivated prosecutions.[65] To allay their fears the Rome Statute set up a Pre-Trial Chamber and empowered it to exercise oversight over the exercise of the Prosecutor's discretionary powers.[66]

(b) Role of the Pre-Trial Chamber

Like the *ad hoc* Tribunals, the International Criminal Court is concerned with "the most serious crimes of international concern."[67] However, unlike the Prosecutors of the *ad hoc* Tribunals, the Prosecutor of the Court cannot commence investigations without authorization by the Pre-Trial Chamber.[68] To get the authorization he or she must satisfy the Chamber that there is a reasonable basis to proceed with an investigation.[69] In this writer's view this is not an onerous burden. The Prosecutor may discharge it by merely showing that "there is smoke"; and there can be no smoke without fire! Representations of States and credible reports from reputable intergovernmental and nongovernmental organizations and media houses should suffice to provide the necessary basis for the investigations.

On receiving authorization the Prosecutor must "investigate incriminating and exonerating circumstances *equally.*"[70] In practical terms this means that where, in the course of the investigation, a member of the Prosecutor's staff comes across any piece of information that provides a lead toward evidence suggesting the innocence of a suspect then the staff member must pursue that lead to its logical conclusion. He or she must not abandon it merely because it does not assist in establishing the guilt of the suspect. The Prosecutor of the International Criminal Court is a seeker of truth and justice and not merely an accuser interested solely in the conviction of the suspect. It is for this reason, too, that the Prosecutor is obliged to disclose to the accused any evidence and material tending to favour the accused.[71] He or she must not hide it from the accused, because it is public property that must be used to

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[61] *Ibid.*

[62] See Morten Bergsmo and Frederik Harhoff, "The Office of the Prosecutor" in O. Triffterer, *Commentary on the Rome Statute* (1999) article 42, margin Nos.7 – 9.

[63] Generally see Silvia A. Fernandez de Gurmendi, "The Role of the International Prosecutor" in Roy S. Lee (ed.) *The International Criminal Court: the Making of the Rome Statute* Kluwer Law International, The Hague 1999).

[64] See, for example, the editorial comment of the DETROIT NEWS, 28 July1998, p. A6, asserting that "the international criminal court is an extremely bad idea that would work only to the extent that it is able to breach national sovereignty".

[65] See, for example, Fred Hiatt, "The trouble with the War-Crimes Court", THE WASHNGTON POST, 26 July 1998, p. C07, criticizing supporters of the Court for "cheering the creation of not just a court but a powerful prosecutor's office that will be accountable to almost none of the checks and balances that restrain law enforcement in a democracy and empowered to punish people who have virtually no say over its operation."

[66] Generally see Daniel D. Ntanda Nsereko "The International Criminal Court: Jurisdictional and Related Issues", 10 *Criminal Law Forum* 87-120 (1999). See also Daniel D. Ntanda Nsereko, "Preliminary ruling regarding admissibility" in O. Triffterer (ed.), *Commentary on the Rome Statute* (1999), article18.

[67] Article 1 of the Statute of the International Criminal Court (hereinafter referred to as the ICC Statute).

[68] Article 15.

[69] *Ibid.*

[70] Article 54(1) of the Rome Statute. [Emphasis added].

[71] Article 67(2) of the Rome Statute provides as follows: "In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide". For comparison with the *ad hoc* tribunals generally see Elizabeth Nahamya and Rokhayatou Diarra, "Disclosure of Evidence Before the International Criminal Tribunal for Rwanda", 13 *Criminal Law Forum* 339 (2002).

assist the Court to arrive at a just decision.[72] The Prosecutor's obligations in this respect are a salutary improvement on those of his or her counterparts before the *ad hoc* Tribunals and even more so of the national courts.[73]

At the conclusion of the investigation the Prosecutor must then determine whether the investigation yields any commission of any crime within the jurisdiction of the Court. If so the Prosecutor must determine whether that crime meets the "seriousness" threshold to warrant filing charges against the suspects. If the Prosecutor decides not to prosecute his or her decision must be justifiable under any of the grounds spelt out in the Statute.[74] Perhaps one ground that gives the Prosecutor the freest reins is one to the effect that "a prosecution is not in the interest of justice," taking into account all the circumstances including those spelt out in the Statute.[75] While the Prosecutor appears to have a good measure of discretion in this respect, he or she exercises it with the Pre-Trial Chamber looking "over his or her shoulder." When he or she concludes that there is insufficient basis for prosecution the Prosecutor must inform the Pre-Trial Chamber and the State or the Security Council that might have made the referral to him or her, together with the reasons for the conclusion. The Pre-Trial Chamber, acting *mero motu* or on the application of either the State or the Security Council, may review the decision of the Prosecutor and may "request" the Prosecutor to reconsider the decision.[76] Indeed, where the Prosecutor's decision not to investigate or to prosecute was based solely on his or her impressions about the seriousness of the offence, the interests of victims, the age, health and the role played by the suspect in the commission of the alleged crime, the decision is not effective unless and until the Pre-Trial Chamber confirms it.[77]

If, after the investigation, the Prosecutor determines that there exists "sufficient evidence to establish substantial ground to believe" that a given suspect committed a crime within the Statute of the Court he or she must proceed to prepare the appropriate charges. The Pre-Trial Chamber must also confirm them.[78] Here, again, the resources available to the Prosecutor will dictate what violations he or she should seek to prosecute and which perpetrators should be indicted. Bearing in mind the need for deterrence the Prosecutor will most likely prosecute the most serious violations and indict individuals who bear the greatest responsibility for those violations. On the top of the Prosecutor's list will be individuals who held leadership positions in the Government, security organisations and society generally. Backed with sufficient evidence the Prosecutor must satisfy the Chamber that there exist "substantial

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[72] See *Edward v. United Kingdom* 15 E.H.R.R. 417 (1993) at para. 36 where the European Court of Human Rights said, "it is a requirement of fairness ... that prosecution authorities disclose to the defence all material evidence for or against the accused." See also the Canadian case of *R v. Sticombe* [1991] 3 S.C.R. 326, 332 where Sopinka, J of the Supreme Court of Canada said that "the fruits of the investigation which are in the possession of counsel for the Crown are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done".

[73] Some national courts already require the prosecution to disclose all relevant information in its possession to the accused. In the English case of *Reg v. Ward* [1993] 1 W.L.R. 619 the court stated that the prosecution's duty to disclose such information existed irrespective of any request for it by the defence. See also *Reg. v. Davis* 1 [1993] W.L.R. 613, and *Practice Note (Criminal Evidence: Unused Material)* [1982] 1 All ER 734. For a similar holding see the South African case see *S v. Xaba* [1983] 3 S. Afr. L. Rep. 717. For a restricted approach to the prosecutor's duty of disclosure see *Kenosi v. State* [1993] B.L.R. 268 at 273. Here the Botswana Court of Appeal stated as follows: "Where there is a material discrepancy between a statement made by a witness and his evidence given in the stand, there is a positive duty upon the prosecutor to make the statement available to the defence for cross-examination. Of course this will only apply in cases where the discrepancy is material, in the sense that it may have a direct bearing on the guilt or innocence of the accused. *The decision of materiality must perforce be left to the prosecutor's discretion."* [Emphasis added]

[74] Article 53(2) of the Statute provides as follows:

> If, upon investigation, the Prosecutor concludes that there is not a sufficient basis for a prosecution because:
> (a) There is not a sufficient legal or factual basis to seek a warrant or summons under article 58;
> (b) The case is inadmissible under article 17; or
> (c) A prosecution is not in the interest of justice, taking into account all the circumstances, including the gravity of the crime, the interests of victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime;
>
> the Prosecutor shall inform the Pre-Trial Chamber and the State making a referral under article 14 or the Security Council in a case under article13, paragraph (b), of his or her conclusion and the reasons for the conclusions.

[75] *Ibid.*

[76] Article 53(3). It is inconceivable that the Prosecutor would decline to reconsider his or her decision and refuse to investigate.

[77] Article 53 (3) (b)

[78] Article 61.

grounds to believe" that the person named in the indictment committed each of the crimes charged.[79] This is the equivalent of the *prima facie* standard used by the *ad hoc* Tribunals.[80]

Like his or her counterparts of the *ad hoc* Tribunals, the Prosecutor may amend the indictment at any time before confirmation. Thereafter, however, the Pre-Trial Chamber must grant him or her leave to amend.[81] Additionally, if by the amendment the Prosecutor seeks to add additional charges or to substitute more serious charges, then a hearing must be held to confirm those charges.[82] But leave to amend may not be granted after the trial has commenced. Regarding the withdrawal of charges, the Prosecutor can do so only with the permission of the Trial Chamber where it is sought to be done after the trial has started. Needless to say, the Chamber will not automatically grant the permission.[83] The Prosecutor must satisfy it on a balance of probabilities that there are good reasons to warrant the withdrawal.

Mention should also be made in passing of the Prosecutor's power to impugn a State's efforts to investigate or to prosecute alleged violators under the complementarity regime and to seek to take over the investigation or prosecution.[84] This power, which is also discretionary, calls for the utmost caution, tact and sensitivity. The Prosecutor's decision in such cases might evoke criticism of overzealousness or undue invasion of State sovereignty.[85] Yet if the Prosecutor does not exercise the power he or she might be charged with timorousness.

Generally speaking, the Prosecutor has ample discretion to effectively discharge his or her mandate. However, compared to his or her counterparts before the national courts and the *ad hoc* Tribunals, the Prosecutor's discretion is considerably circumscribed, particularly by the powers of the Pre-Trial Chamber. The Chamber was put in place and empowered to review virtually all the Prosecutor's decisions of a discretionary nature. To those used to prosecutors with absolute or untrammelled discretion the restrictions placed on the Prosecutor may appear intrusive and obstructive. Nevertheless, given the volatile political environment in which the Court operates, the interests of States that may be at stake and the profile of the individuals that are likely to appear before the Court, the restrictions are justified. They ensure transparency and accountability in the exercise of the Prosecutor's powers. They serve to shield the Prosecutor from accusations of initiating politically motivated prosecutions. They make his or her decisions much more easily acceptable and palatable to States and other stakeholders. They ultimately help to win for the Prosecutor and the Court public support and cooperation without which they would be paralyzed.

IV. CONCLUDING REMARKS

Prosecutors, both at the national and international levels, need discretion to effectively carry out their functions. It has been noted that the degree of discretion enjoyed by prosecutors varies from jurisdiction to jurisdiction and from legal system to legal system. It has also been noted that the discretion enjoyed by that the Prosecutors of the *ad hoc* Tribunals and even more so of the International Criminal Court is considerably more restricted than that enjoyed by their counterparts at the national level. Nevertheless, whether at the national or international levels, for discretion to be meaningful it must be exercised independently. At the national level independence ensures that the executive does not use the prosecutor to persecute its opponents or to shield its supporters from justice. At the international level

[79] Article 61 (7)
[80] See note 53, supra.
[81] Article 61(9).
[82] *Ibid.*
[83] Article 61(9).
[84] Articles 17 and 18 of the Rome Statute.
[85] This is one of the arguments that the detractors of the Court used to oppose the Court. See, for example, the editorial opinion of the DETROIT NEWS, 28 July 1998, p. A6 where the editor fulminated as follows: "If the tribunal is able to invalidate national trials by deciding what constitutes an 'effective' trial, the tribunal will be able to exercise a kind of extra-territorial judicial review power over national courts, seriously undermining the principle of national democracies. The Clinton administration's decision to withhold the United States' signature from the Rome folly will significantly weaken the tribunal. Given how glowingly the administration had talked about such a tribunal until recently, this is a welcome – though belated – show of sanity".

independence serves to insulate prosecutors from undue influence from the political organs of the international community and from Governments whose motives may be anything but the ends of justice.[86] For this reason, the constitutions of many countries safeguard the independence of the office of prosecutor by equating it to that of judges. For example, they require that prosecutors be appointed, remunerated and disciplined in much the same way as the judges.[87] This is also generally true of the Prosecutors of both the *ad hoc* tribunals and the International Criminal Court.[88]

It has also been observed that either deliberately or through human error prosecutorial discretion is liable to abuse. There is therefore a need to put in place mechanisms and practices to minimize error or to check abuse. This is the more necessary because, as it has been noted, a wrong decision by the prosecutor, particularly to prosecute or not to prosecute, has the potential to erode public confidence in his or her office and in the administration of justice. Enhancing transparency and accountability in the prosecutor's decision-making process is a major way of minimizing error and checking abuse. Some civil law jurisdictions accomplish this desideratum by involving the judges at the investigation phase of a case. The review Judge of the *ad hoc* Tribunals and the Pre-Trial Chamber of the International Criminal Court serve the same purpose at the international level.

Other techniques that are applicable to both national courts and international tribunals include prosecutorial guidelines. The United Nations Guidelines on the Role of Prosecutors provide as follows:

> In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations *shall* provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.[89]

Guidelines reduce the scope for arbitrariness. They ensure consistency and predictability in the decision-making process. They provide a transparent standard by which prosecutors' decisions can be evaluated.[90] They ultimately protect prosecutors, particularly those of the international tribunals, of accusations of initiating politically motivated prosecutions. Now, as important as guidelines are, who should be responsible for drawing them up? Ideally it should be the prosecuting authorities. This is so because inherent in discretionary power is the ability of the decision makers to establish the criteria that they follow in their decisions.[91]

The giving of reasons, particularly for the decision not to prosecute, does also serve to enhance the transparency and accountability in the prosecutors' decision-making process. It helps to ensure that all prosecutorial decisions are carefully thought through and are founded on sound and rational bases. Coupled with this is the possibility of permitting stakeholders, particularly the accused, complainants or victims and others affected by the decision, to make representations. Commissions of inquiry also often help prosecutors to establish bases for investigation and prosecution or declining to do so.[92]

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[86] For an example of the problems that the Prosecutor may encounter in this respect see the experience of the Yugoslav/Rwanda Tribunal Prosecutor Carla Del Ponte in the *Barayagwiza* Case. Prosecutor v. Jean Bosco Barayagwiza, (Case No. ICTR-97-19-I.), Decision of the Appeals Chamber 3 November 1999. For a detailed discussion of the case see William A. Schabas, BARAYAGWIZA v. PROSECUTOR 94 AM. J. INT'L L. 563 (2000), and Daniel D. Ntanda Nsereko, "Genocidal Conflict in Rwanda and the ICTR", 43 *Netherlands International Law Review* 31 (2001).

[87] See note 17, supra.

[88] As for the qualifications and methods of appointment of the prosecutors of the *ad hoc* tribunals see article 16 of the Yugoslav Statute, article 15 of the Rwanda Statute and article 15 of the Sierra Leone Statute. As for the qualifications of the Prosecutor and methods of election and removal from office see articles 42 and 46 of the Rome Statute.

[89] Note 18, supra, article 17. Emphasis added.

[90] Generally see Danner, note 4, supra. See also Roscoe B. Starek, III, "Prosecutorial Discretion: A View From the Federal Trade Commission." http:www.cato.org/pubs/regulation/reg20n4d.html (website)

[91] See for example, THE STATEMENT OF PROSECUTION POLICY AND PRACTICE (Department of Justice, Hong Kong Special Administrative Region, 2002). PROSECUTION POLICY OF THE COMMONWEALTH: Guidelines for the making of decisions in the prosecution process (Prepared by the Office of the Director of Public Prosecutions, Canberra 1986). U.S Department of Justice, IMMIGRATION AND NATURALIZATION SERVICE FACT SHEET: Prosecutorial Discretion Guidelines, 28 November 2002. FLRA GC's Prosecutorial Discretion: Memorandum from the General Counsel to Regional Directors, 25 May 1994. http:www.flra.gov/gc/pdd.html (website).

[92] See for example note 57, supra.

The courts of law, as guardians of justice and the rule of law, do also have a major role to play in checking abuse of prosecutorial powers. In some jurisdictions the courts have effectively played that role by applying the abuse of process doctrine. In doing so they invoke their inherent powers to supervise the executive or to regulate conduct before them. The *ad hoc* Tribunal for Rwanda has also done so,[93] while that for the former Yugoslavia has indicated willingness to do so in appropriate cases.[94] It is hoped that the International Criminal Court will also be willing to do the same.

Ultimately, however, at least in a democracy,[95] it is public opinion, nurtured by a free and independent press, which is probably the most effective weapon for checking abuse of power, including prosecutorial discretion.

[93] See the *Barayagwiza* Case, supra. at para106.
[94] *See Prosecutor v. Dragon Nikolic,* (Case No IT-94-2-PT), Decision on the Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, at para. 74.
[95] Generally see Daniel D. Ntanda Nsereko, "Rules of Procedure and Evidence of the Former Yugoslavia", 5 *Criminal Law Forum* 507 (1994), at p. 519.