

International criminal justice: tightening up the rules of the game

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Abstract

Although much has been said and written about the creation of the international criminal tribunals and their contribution to the development of international humanitarian law, there have been very few studies of the international prosecutor per se. In this article the author briefly surveys recent developments in the international criminal justice institutions, focusing particularly on the limits recently imposed on the discretionary powers of international prosecutors.

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We have seen major advances in international criminal law over the past decade in terms of both instruments and institutions. Since the creation of the ad hoc International Criminal Tribunals for the former Yugoslavia (ICTY) in 1993 and Rwanda (ICTR) in 1994, followed by the surprising adoption of the Statute of the International Criminal Court (ICC) in Rome in 1998 and, most recently, the experiment of the Special Court for Sierra Leone set up in 2002, bodies administering international criminal justice have wrought stunning and irreversible changes in the world of international criminal law. International humanitarian law has suddenly emerged from the state of hibernation into which it slid after Nuremberg and Tokyo. Over the past decade, judges in the various international criminal courts have been reworking and breathing new life into international humanitarian law, and one of the sources on which they have drawn in order to do so is international customary law. Whereas for many years international humanitarian law had been confined within diplomatic, political and

military circles, circumscribed and “confiscated” by the states,¹ the opening up of these new international judicial avenues, accessible to non-state actors, is a real revolution in international law. For ten years now we have been seeing international humanitarian law reclaimed by new actors who, thanks to these new international judicial bodies, now regularly subject it to a judicial control it has all too often eluded in the past.

When the United Nations Security Council set up the two first ad hoc international criminal tribunals, the move was fast and spectacular and, I would venture to suggest, somewhat impromptu. As a result, it escaped the control of the states to some degree, at least at the outset. Since then the states have seized the reins, and some of the key features of the bodies administering international criminal justice have been overhauled. This is particularly true of the powers vested in international prosecutors. In this article I shall briefly survey recent developments in the international criminal justice institutions, focusing particularly on the limits recently imposed on the powers of these new judicial bodies. These developments primarily concern the discretionary powers of international prosecutors. This choice of focus is not fortuitous. The discretionary exercise of the prosecutor’s powers is at the very heart of international criminal justice; the prosecutor decides, for example, whether or not to conduct an investigation and whether or not to charge particular individuals, and, if he decides to charge them, what the charges will be. Whether or not the prosecutor exercises his discretionary powers judiciously determines to a large degree the success or failure of international criminal tribunals. The prosecutor’s choices as to how many people will be accused, who they are and what their status will be, can jeopardize both the efficacy and the credibility of these new international judicial bodies. According to the well-known claims of its advocates, this “new international criminal justice” is supposed to put an end to impunity and give victims of serious violations of international humanitarian law access to justice. However, it is not exercised in a vacuum. Rather, it is one strand in the pursuit of “peace, security and well-being”² for the world that is one of the most crucial *raison d’être* of international relations. If we bear this in mind, we can grasp more easily why states perceive it as important to exercise better control over international criminal justice and, if necessary, to limit its uses and abuses.

The powers of the international prosecutor: one man’s warranty is another man’s wild card

Although much has been said and written about the creation of the international criminal tribunals and their contribution to the development of international

1 O. Russbach, *ONU contre ONU, Le droit international confisqué*, Éditions de la Découverte, Paris, 1994.

2 “Recognizing that such grave crimes threaten the peace, security and well-being of the world”, Preamble to the Statute of the International Criminal Court, para. 3.

humanitarian law, there have been very few studies of the international prosecutor per se. And yet, of all the “organs” of the tribunals, the prosecutor is the best known to the man in the street; he or she is the public face of this new international criminal justice system. It is the prosecutor who knocks at the door of various states, various international organizations, to request their aid. And the voice that addresses public opinion through the media is most often that of the prosecutor. It is the prosecutor the most notorious “war criminals” have to fear. The prosecutor’s power over individuals is considerable and, as a result, the international criminal prosecutor has emerged as a major new figure in international politics.

On the international judicial stage the prosecutor plays a leading role; he has a say in every debate. By pressing charges on the basis of the investigations carried out under his authority, the prosecutor sets the international judicial machinery in motion. Similarly, the prosecutor’s decision to complete all inquiries and file the past charges will be the most determining factor in the court’s ability to end its mandate. In the context of the International Criminal Court (ICC), it is the prosecutor’s decision whether or not to press charges in a given situation that generally triggers or extinguishes international criminal proceedings, even though the decision is subject to judicial review.

Notwithstanding the fact that the source of their powers is to be found in the law, enshrined in the very statutes of the tribunals, prosecutors hold the most political office in international criminal justice. In determining who will be charged, when proceedings will be set in motion and what crimes the accused will be charged with, prosecutors cannot ignore the political dimension of their decisions, which lie at the heart of international relations and, in some cases, of the peaceful settlement of conflicts. The political importance of this role is illustrated³ by the somewhat laborious “appointment” of the first prosecutor of the ICTY by the UN Security Council, which dragged out over a period of more than eighteen months, thereby effectively preventing the tribunal from doing its job during that time. Likewise, the powers of the prosecutor were at the very heart of the negotiations in Rome in the summer of 1998 that culminated in the creation of the ICC.⁴ What troubled some, including a number of states involved in the negotiations on the ICC, was the discretionary power of the prosecutor to initiate investigations and bring prosecutions *proprio motu*, that is, without any control by states or the judges. They were wary of a powerful and uncontrollable prosecutor

3 See G. B. Bass, *Stay the Hand of Vengeance – The Politics of War Crimes Tribunals*, Princeton, Princeton University Press, 2000, p. 217. See also C. Bassiouni, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, Transnational Publishers, New York, 1996, pp. 210–13.

4 “The ability of the ICC Prosecutor to initiate investigations *proprio motu* was the most controversial aspect of the Court’s trigger mechanism and was one of the main political/legal issues that had to be resolved before the Statute could be assured of adoption. Both opponents and proponents of the Prosecutor’s *proprio motu* powers – and the chasm was very wide – agreed that their inclusion or absence would fundamentally affect the Court’s structure and functioning”, M. Bergsmo and J. Pejic, in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 360.

in whom “overreaching power”⁵ was be vested, perceiving in this an imminent threat to the fragile balance of international relations and to peace talks which were already difficult enough. In short, the states feared the advent of this new, “independent” entity on which they would be unable to bring pressure to bear in the traditional manner. At the other end of the spectrum, the discretionary powers that put some on their guard were, for others, the very cornerstone of the international prosecutor’s independence. As Amnesty International put it, “the most important way to ensure that the prosecutor will be independent is to provide that the prosecutor has the power on his or her own initiative to initiate investigations and seek the approval of the appropriate judicial chamber of the court to begin a prosecution, without interference by any political body”.⁶ This clearly illustrates the fact that the prosecutor’s independence and the discretionary power he needs in order to be able to exercise it are two sides of the same coin.

The discretionary powers at issue here are well known in common-law accusatorial systems: they are governed by the principle of “expediency of prosecution”, which leaves the prosecutor the final choice on whether or not to bring charges. Whereas this principle does not cause too many difficulties in domestic judicial systems, where it is mostly applied to the least serious crimes, it raises far more problems on the international scene. As Louise Arbour pointed out, “domestic prosecution is never really seriously called upon to be selective in the prosecution of serious crimes. In the ICTR, prosecutor has to be highly selective before committing resources to investigate and prosecute”.⁷ It is therefore the transposition of these discretionary powers of selection on to the international scene that gives rise to questioning and anxiety. As the experience of the past ten years has shown, in the contexts of both the genocide committed in Rwanda and the violations of international humanitarian law perpetrated in the former Yugoslavia and in Sierra Leone, the number of potential suspects – people who are to some degree or another criminally “liable” for the atrocities committed – runs into thousands. As the first prosecutor of the ICTY and the ICTR, South African judge Richard Goldstone, put it, we are witnessing “the biggest criminal investigations ever undertaken in history; the number of potential suspects is significant, the number of witnesses runs into tens of thousands and the number of victims into millions”.⁸ From a pragmatic viewpoint, it is not hard to imagine why the rule adopted in international criminal law should be that of “expediency

5 “Let me state unequivocally at the outset that there is more to fear from an impotent than from an overreaching Prosecutor. It is trite to recognize that an institution should not be constructed on the assumption that it will be run by incompetent people, acting in bad faith for improper purposes”, Statement by Justice Louise Arbour to the Preparatory Committee on the Establishment of an International Criminal Court, 8 December 1997, in *ICTY Yearbook*, 1997, p. 229.

6 Amnesty International, *The international criminal court: Making the right choices - Part II*, p. 9, IOR 40/01/97.

7 L. Arbour, “Progress and challenges in international criminal justice”, *Fordham International Law Journal*, Vol. 21, No. 2, 1997, p. 531.

8 See “Le Tribunal des tragédies” in *Politique Internationale*, No. 67, Spring 1995, p. 291, interview conducted by Florence Hartmann.

of prosecution”.⁹ As the ICTY’s Appeals Chamber has acknowledged, in view of the limited resources at the disposal of each of the international criminal tribunals, the prosecutor will necessarily have “a broad discretion in relation to the initiation of investigations and in the preparation of indictments”.¹⁰

Although the number of crimes committed in connection with internal and international conflicts and the number of people suspected of committing them constitute a reality that calls for a degree of selection, the exercise of this discretionary power on the international scene must be sufficiently circumscribed to avoid all appearance of injustice and partiality. In general, the mandate of a body administering international criminal justice will be to examine conflicts of a political or ethnic nature in regions where there is great mistrust between different population groups who are often themselves involved in the crimes perpetrated against civilians. In this context the prosecutors must exercise their discretionary powers in the most transparent way possible so as to establish quickly the credibility and independence not only of the prosecutor’s office as such but also of the international judicial institution as a whole.

How the focus of the tribunals’ mandates has been narrowed from “persons responsible” to “those who bear the greatest responsibility” without jeopardizing the “interests of justice”

The ad hoc tribunals (International Criminal Tribunals for the former Yugoslavia and Rwanda): “persons responsible”

In setting up the first two international criminal justice bodies since Nuremberg and Tokyo, the United Nations Security Council took a pioneering step. The jurisdiction of these two ad hoc institutions was carefully limited to the conflict that had continued to affect the former Yugoslavia since 1991 in the case of the ICTY, and all matters relating to the genocide committed in Rwanda in 1994 in the case of the ICTR. By choosing to take action over specific conflicts, “the Security Council indirectly vested in itself the powers of a prosecutor – who alone would decide on the expediency of creating special tribunals. [The TPIs are therefore] tainted with this original sin”¹¹ that has made them the instrument of a selective international criminal justice. Although they are not directly instruments of the

9 Statute of the International Criminal Tribunal for Yugoslavia (SICTY), Article 18(1) and Statute of the International Criminal Tribunal for Rwanda (SICTR), Article 17(1), *in fine*: “[The Prosecutor] shall assess the information received or obtained and decide whether there is sufficient basis to proceed.”

10 See *Prosecutor v. Delalić, Mucić, Delić and Landžo*, IT-96-21 Appeals Chamber, ICTY, 20 February 2001, para. 602: “In the present context, indeed in many criminal justice systems, the entity responsible for prosecutions has finite financial and human resources and cannot realistically be expected to prosecute every offender which may fall within the strict terms of its jurisdiction. It must of necessity make decisions as to the nature of the crimes and the offenders to be prosecuted. It is beyond question that the Prosecutor has a broad discretion in relation to the initiation of investigations and in the preparation of indictments.”

11 See P. Hazan, *La justice face à la guerre*, Stock, Paris, 2000, p. 69.

victors – as were Nuremberg and Tokyo – the ad hoc tribunals are nevertheless perceived as a tool of the powerful who use them to mask their indifference (Rwanda)¹² or their lack of commitment (former Yugoslavia)¹³ and to salve their consciences.¹⁴ If we look at the question from this angle, we can better understand the problems of credibility that hovered over the first incumbents of the prosecutor's office. In order to restore the faltering credibility of these fledgling international judicial institutions, the first prosecutors had to demonstrate quickly that it was possible to administer justice on the international scene efficaciously and in full independence. This may explain why at the outset the choice of people to be indicted seemed to be guided as much by considerations of the survival and credibility of the institution as by a clearly established prosecution strategy.¹⁵

What is more, in contrast to the Nuremberg Statute, which provided for the indictment of “major war criminals” only, the Statutes of the ad hoc tribunals mandate the prosecutor to investigate and prosecute “persons responsible for serious violations of international humanitarian law”¹⁶ with no further restrictions. In criminal law the unqualified use of the word “responsible” leaves the door wide open to thousands of individual cases. In the absence of further qualifications or restrictions in the Statutes, the prosecutors of the ICTY and the ICTR have indicted over two hundred people.¹⁷ Very quickly proceedings proliferated and the whole system became clogged up. This caused major delays which drew criticism from many different quarters. The costs of the two institutions, which were already high, skyrocketed with no sign of abatement. After

12 “The events in Rwanda and Burundi also confirm this pattern of indifference: only minimal efforts were made by the international community to protect the target of genocide or to punish the main perpetrators. No strategic interests were at stake”, R. Falk, *Human Rights Horizons – The Pursuit of Justice in a Globalizing World*, Routledge, New York, 2000, p. 180.

13 “Les gouvernements voulaient cacher leur impuissance politique derrière l'existence d'un tribunal”, Judge Cassese, and “Le TPI a été créé comme une catharsis, comme un exécutoire moral par un Conseil de sécurité qui se refusait à intervenir à fond politiquement et militairement dans l'ex-Yougoslavie”, another ICTY judge, quoted by Hazan, above note 11, p. 89.

14 “En réalité, l'objectif est moins de “dissuader” et de “réconcilier” ...que de reconforter l'opinion publique occidentale, par le jugement de quelques criminels”, *ibid.*, p. 77.

15 Re *Tadić*: “In the fall of 1994, mindful of the importance of our being able to present evidence as soon as possible in a public trial, we asked the Tribunal judges to request that German prosecution defer to our investigation”, M. Schrag, “The Yugoslav Crimes Tribunal: a Prosecutor's View”, *Duke Journal of Comparative & International Law*, Vol. 6, 1995, p.192. In the case of Jean Paul Akayezu, “he was arrested by the Zambian authorities following a Security Council Resolution (S/RES/978, 27 February 1995) requesting states “to arrest and detain persons ... against whom there is sufficient evidence of responsibility for acts of violence within the jurisdiction of the ICTR”. The Prosecutor was taken by surprise when he received a request for assistance by Zambia in late 1995 while his office was still not fully operational. He nevertheless decided to follow up on the Zambian demand and request the deferral of Akayezu and others much more to encourage other African states to collaborate with the ICTR than for the relative importance of the suspects in the Rwandan genocide. Two other persons arrested by the Zambian authorities were not requested by the prosecutor and were released without charges”, L. Côté, “Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law”, *Journal of International Criminal Justice*, Vol. 3 (2005), pp. 162–86.

16 SICTR, Article 15, and SICTY, Article 16.

17 At the start of 2006, over 150 people had been indicted by the ICTR and over 70 by the ICTY.

barely ten years, the combined budget of the two ad hoc tribunals has swollen to over 10 per cent of the entire regular budget of the United Nations.¹⁸

The first to sound the alarm was ICTY President Claude Jorda. In 2000 he pointed out publicly that justice had a price and that he considered it essential that a timeframe be established for the completion of the tribunal's mandate, in co-operation with the prosecutor, "who initiates prosecution".¹⁹ It would have been more reassuring to see an initiative of this kind originate with the Security Council, which created the body, or the prosecutor, who, as the initiator of all the tribunal's judicial acts, is the sole architect of the investigation and prosecution strategy. No such initiative was forthcoming, however, a fact that in itself reflects a certain malaise.²⁰ This proposal, which was to develop into a fully fledged completion strategy over the months that followed, met with only grudging support from the prosecutor, who pointed out the dangers of cut-price justice and the problem of non-co-operating states. In several respects, the prosecutor and the judges did not share the same vision of a completion strategy.²¹ Ultimately, the Security Council intervened on two occasions. First of all it asked the prosecutor and the judges to concentrate on the prosecution and trial of "the most senior leaders suspected of being most responsible" (Security Council Resolution 1503 of 23 August 2003).²² In so doing, it proposed a restrictive interpretation of the more open-ended notion of "person responsible", but stopped short of amending the Statute. Already, as we shall see, the UN had adopted similar wording in the case of the Special Court for Sierra Leone, where the prosecutor's powers of selection were limited to the "persons who bear the greatest responsibility".²³

Subsequently, in view of the patent lack of enthusiasm evinced by the prosecutor of the ICTY, who announced the intention to press ahead with thirty fresh indictments,²⁴ the Security Council adopted Resolution 1534 (26 March 2004),²⁵ in which it addressed the judges directly in these terms:

18 "From modest beginnings in 1993 and 1994, the ICTY and ICTR have grown into enormous and extremely costly bureaucratic machines ... The total number of posts exceeds 2,200 and the combined budgets exceed \$250 millions per annum and are rising, representing more than 10 per cent of the total annual regular UN budget." R. Zacklin, "The Failings of Ad Hoc International Tribunals", *Journal of International Criminal Justice*, Vol. 2 (2004), page 543.

19 D. Raab, "Evaluating the ICTY and its Completion Strategy", *Journal of International Criminal Justice*, Vol. 3 (2005), p. 84.

20 It is interesting to note that the first Security Council resolution that addressed the duration of the mandates of the ad hoc Tribunals was dated 30 November 2000, and followed the report by President Jorda. In it, the efforts of the Tribunal's judges are clearly highlighted in these terms: "Taking note with appreciation of the efforts of the judges of the International Tribunal for the former Yugoslavia, ... to allow competent organs of the United Nations to begin to form a relatively exact idea of the length of the mandate of the Tribunal", UN doc. S/RES/1329/2000, 30 November 2000.

21 In his report to the Security Council on 10 October 2003, President Meron of the ICTY "noted the Prosecutor's intention to indict approximately 30 additional individuals and, acknowledging the Prosecutor's prerogative in this regard, stated that these cases could not be completed within the existing Completion Strategy time frame. He concluded that "the matter is clearly one between the Council and the Prosecutor"". Raab, above note 19, p. 87.

22 UN doc. S/RES/1503 /2003, 28 August 2003.

23 Statute of the Special Court for Sierra Leone, Article 1 (2000), available on SCSL website at <<http://www.sc-sl.org/>> (last visited 20 February 2006).

24 Raab, above note 19, p. 87.

25 UN doc. S/RES/1534 /2004, 26 March 2004.

5. Calls on each Tribunal, in reviewing and confirming any new indictments, to ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the relevant Tribunal as set out in resolution 1503 (2003).

The ICTY judges immediately responded by introducing a mechanism limiting the prosecutor's discretionary powers to select the suspects to be charged. This amendment to Rule 28 of the Rules of Procedure and Evidence assigned the judges the duty to determine whether "the indictment, *prima facie*, concentrates on one or more of the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal", failing which it will be returned to the prosecutor without being put forward for confirmation. Here, we recognize once more the familiar language of the Security Council resolutions, which restrict indictments to the "most senior leaders suspected of being most responsible". This amendment drew sharp objections from the prosecutor, who took the view that it was *ultra vires*.²⁶ Although its purpose was laudable and in line with what the Security Council wanted, it nevertheless raises serious questions of competence.²⁷ Were the judges competent to introduce a new selection criterion not provided for in the Statute? And would not the amendment adversely affect the independence of the prosecutor? After all, the prosecutor's discretionary powers could now be restricted by judges whose authority to restrict them derived from a rule they themselves had adopted. One thing at least is certain, namely that this approach by the judges of the ICTY is one more illustration of the differing views taken by them and the prosecutor of the matter of the completion strategy.

At the ICTR, meanwhile, the new prosecutor quickly adopted and made public a completion plan in which he undertook to concentrate on those alleged to have been "in positions of leadership" and those who bore "the greatest responsibility for genocide", in the spirit of Resolution 1534. In a display of transparency more or less unprecedented where discretionary powers are concerned, the ICTR prosecutor listed in this document the various criteria he meant to apply to determine who "the most senior leaders" were before reassessing the pending cases and selecting those who would be indicted.²⁸

This narrowing of the mandate of the ICTY and the ICTR was a reminder to everyone of the ad hoc nature of these bodies. The prosecutors of what were, after all, originally intended as ephemeral instruments now had to take this into account when drawing up their strategies, failing which they would be taken to

26 See L. D. Johnson, "Closing an International Criminal Tribunal while maintaining International Human Rights Standards and Excluding Impunity", *American Journal of International Law*, Vol. 99 (2005) p. 158.

27 D. A. Mundis, "The Judicial Effects of the Completion Strategies on the *Ad Hoc* International Criminal Tribunals", *American Journal of International Law*, Vol. 99, (2005), p. 142.

28 See Annexe to UN doc. S/2004/341, 30 April 2004, Completion Strategy of the International Criminal Tribunal for Rwanda, para. 14. See also H. B. Jallow, "Prosecutorial Discretion and International Justice", *Journal of International Criminal Justice*, Vol. 3 (2005), pp. 145–61.

task by the judges first of all and then by the Security Council. The negotiations for the establishment of the Special Court for Sierra Leone were to draw heavily on the experience of the ad hoc tribunals in their efforts to better define and limit the exercise of the prosecutor's power to choose.

The Special Court for Sierra Leone: "those who bear the greatest responsibility"

At the very moment when questions were starting to be asked about the cost of the ad hoc tribunals and the duration of their mandates, the Security Council received a letter from the president of Sierra Leone in which he asked for assistance in setting up a Special Court to judge the crimes committed during the armed conflict that had ravaged his country. Drawing on the lessons of the past, the UN Secretary-General proposed that a judicial body be set up with a very limited mandate, a three-year lifespan and a total budget of less than US\$60 million.²⁹ He further proposed to limit the Court's jurisdiction to the "persons most responsible", specifying that the prosecutor was to be guided by this wording in the adoption of his prosecution strategy.³⁰ The final wording adopted by the Security Council was "to prosecute persons who bear the greatest responsibility", and the aim of "limiting the focus of the Special Court to those who played leadership role"³¹ was stated explicitly. This time then, the sights were adjusted to provide for greater control of the prosecutor's discretionary powers in order to limit their exercise and ensure that the Court's judicial mandate would come to an end within a reasonable timeframe.

Nevertheless, this new wording was not without its dangers. In the course of a judicial review in the *Fofana* case, the judges rejected the prosecutor's motion, in which he cited the Secretary-General's Report, to the effect that the terms "bear the greatest responsibility" were merely a guide to the prosecutor in adopting a prosecutorial strategy.³² The Court took the opposite view, seeing them as the expression of a key element in the personal jurisdiction of the judicial body under review: "[The issue of personal jurisdiction is a] jurisdictional requirement, and while it does of course guide the prosecutorial strategy, it does not exclusively articulate prosecutorial discretion, as the Prosecution has submitted".³³ The explicit inclusion of the wording "bear the greatest responsibility" in the first article of the Statute that lays the foundations of the

29 "On the 14 June 2001, the UN Secretariat presented to the group of interested States revised budget estimates amounting approximately to \$57 million for the first three years of operation of the Court." See Letter dated 12 July 2001 from the Secretary-General addressed to the President of the Security Council, S/2001/693/.

30 *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, UN Doc. S/2000/915 (4 October 2000), para. 30. See also note 44 *infra*.

31 Letter dated 22 December 2000 from the President of the Security Council to the Secretary-General, S/2000/1234, para. 1.

32 *Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana*, SCSL Trial Chamber, 3 March 2004, SCSL-2004-14-PT, para. 3. See note 44 below.

33 *Ibid.*, para. 27.

Court's jurisdiction³⁴ made it more than probable that that wording would be seen as a key element of personal jurisdiction, despite the difficulty of determining its precise scope. But is this not tantamount to giving the judges a more political role generally much better suited to the prosecutor, namely that of determining who bears the greatest responsibility for the crimes committed? The Security Council, when it intervened in the completion strategy of the two ad hoc tribunals, did, after all, stop short of amending the constitutive Statutes, preferring to issue guidelines that have their place first and foremost in the political sphere.

The International Criminal Court and the “interests of justice”

The creation of a permanent International Criminal Court with worldwide jurisdiction was attended by a set of political difficulties quite different from those that surrounded the birth of its predecessors, which were limited to specific conflicts. It is hardly surprising, therefore, that the ICC prosecutor's powers formed the issue most keenly debated in Rome and one that raised both fears and hopes. The states most firmly opposed to an overly “independent” and powerful prosecutor finally gave in, but not until they had ensured that they would be able to control and limit that prosecutor's powers. One of the ways in which they did so was to subject the very first stage in the process – the opening of an investigation – to judicial review by a pre-trial chamber.³⁵ This notwithstanding, it must be admitted that the principle of expediency of prosecution continues to hold sway, as the judges' task is limited to ensuring that the available evidence provides a “reasonable basis to proceed”.³⁶

In exercising his discretionary powers, the prosecutor is bound to consider, in accordance with the provisions of Article 53 of the Statute of the ICC, “whether ... there are serious reasons to believe that an investigation would not serve the interests of justice”.³⁷ Likewise, upon investigation, the prosecutor can decide not to prosecute because “a prosecution is not in the interests of justice”.³⁸ This Statute marked the remarkable entry of the concept of the “interests of justice”, well known in domestic legal systems, into positive international criminal law. In the context of international criminal justice, which is at the very heart of international relations, conflicts and wars, this obligation to consider the interests of justice confers on the prosecutor a real – and inescapable – political

34 The first paragraph of Article 1 of the Statute of the Special Court for Sierra Leone reads as follows: “The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.”

35 Statute of the ICC, Article 15.

36 “Like in paragraph 3, the “reasonable basis” standard in paragraph 4 is purely evidentiary and not one of appropriateness”, Bergsmo and Pejic, above note 4, pp. 360–70.

37 Statute of the ICC, Article 53 (1)(c).

38 *Ibid.*, Article 53 (2)(c).

responsibility.³⁹ Although Article 53 lists a number of criteria for determining whether or not the interests of justice will be served by an investigation or a prosecution (namely “the gravity of the crime, the interests of the victims and the age or infirmity of the alleged perpetrator, and his or her role in the alleged crime”) this list is not exhaustive and cannot relieve the prosecutor of the duty he has, in certain cases, to “set off the obligation to serve interests of justice against the obligation to serve interests of peace”.⁴⁰ However, the way in which the prosecutor took the interests of justice into consideration when deciding not to investigate or prosecute will be subject to a judicial review⁴¹ which, as a result, will find itself thrust into the very heart of international politics. This solution, however problematical it may be, was considered by states to be preferable to allowing the discretionary exercise of powers of selection by the prosecutor to stand alone.

Conclusion

Over the past decade, the advent of new judicial institutions has ushered in a whole new phase in international criminal law. The Security Council’s first experiments in the form of the ICTY and the ICTR, followed by the adoption of the Rome Statute setting up the ICC and the appearance of new “hybrid” institutions, soon gave rise to a malaise among states referred to as “tribunal fatigue”. Portrayed initially as a financial malaise among the principal donor countries,⁴² it can also be read as an attempt to dampen the zeal that fired the first institutions, and particularly their prosecutors. This is certainly strongly suggested by the saga of the completion strategies of the two ad hoc tribunals, which were pushed along by two strongly exhortative Security Council resolutions. Although these completion strategies concern the judicial bodies as a whole, they are primarily aimed at their prosecutors and impose a definite limit on the exercise of their discretionary powers. And yet, in view of the ad hoc nature of the first tribunals, it was rather to have been expected that the prosecutors would themselves adopt such strategies well before the Security Council saw fit to intervene. Furthermore, it would seem desirable for prosecutors to adopt a transparent strategy for the exercise of their powers in order to avoid any semblance of partiality, particularly in international criminal law that deals with

39 “... the term “in the interests of justice” also requires the Prosecutor to take account of the broader interests of the international community, including the potential political ramifications of an investigation on the political environment of the state over which he is exercising jurisdiction”, M. R. Brubacher, “Prosecutorial Discretion within the International Criminal Court”, *Journal of International Criminal Justice*, Vol. 2 (2004), p. 81.

40 “En effet déterminer si une enquête sert ou non les intérêts de la justice, compte tenu des intérêts des victimes et/ou de la gravité du crime, pourra le conduire à faire un choix entre la nécessité d’ouvrir une enquête et celle de ne pas compromettre des négociations sur le point d’aboutir à la signature d’un accord de paix”, W. Bourdon, *La Cour pénale internationale*, Seuil, Paris, 2000, p. 165.

41 Statute of the ICC, Article 53, para. 3.

42 See Zacklin, above note 18.

crimes committed by organized groups in the context of political or ethnic conflicts.⁴³

The Security Council can, in all legitimacy, define and limit the powers of the prosecutors of the judicial institutions it has set up, by means of resolutions (ICTY/ICTR) or bilateral agreements (Special Court for Sierra Leone).⁴⁴ Although it did so with a degree of success in the resolutions approving the completion strategies, its approach with the Special Court led to a somewhat unexpected outcome. By directly limiting the Court's jurisdiction in the very terms of the Statute that defines it, the Security Council opened the door to judicial review of a markedly more political question, namely who are the leaders "who bear the greatest responsibility"? There are those who would have liked to see this type of question remain the prerogative of the prosecutor, deeply embedded in his discretionary powers.⁴⁵

Failing more direct control over the prosecutor by the Security Council along the lines of the ad hoc tribunals' model, as some would have liked to see, the states party to the Rome Statute favoured the option of assigning the judges greater control over the exercise of the prosecutor's discretionary powers, right from the initial, opening phase of an investigation. For its part, the Security Council received the right to defer decisions of the Prosecutor of the ICC in the interests of the obligation to "maintain or restore ... peace".⁴⁶ However, the most determining element here seems to me to be the arrival on the international criminal law scene of the concept of the interests of justice. This concept, which will quickly become the key element in the prosecutor's prosecution strategy, will necessarily be subjected to judicial review; its limits, if not its substance, will therefore be rapidly defined. Although judicial review of the prosecutor's most "political" decision should serve to reinforce its legitimacy, it nevertheless remains a perilous judicial exercise which, unbridled, could easily jeopardize the integrity of the International Criminal Court as a whole.

43 "Guidelines reduce the scope for arbitrariness...They provide a transparent standard by which prosecutors' decisions can be evaluated...They ultimately protect prosecutors, particularly those of the international tribunals, of accusations of initiating politically motivated prosecutions", D. D. N. Nsereko, "Prosecutorial Discretion Before National Courts and International Tribunals", *Journal of International Criminal Justice*, Vol. 3, (2005), 124, p.143. See also A. Marston Danner, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court", *American Journal of International Law*, Vol. 97 (2003), p. 510.

44 "The Security Council, in the exercise of its responsibility under the UN Charter for the maintenance of international peace and security, as well as being the creator of the Tribunals, can legitimately prescribe general prosecutorial policy for the Tribunals. The Prosecutor is duty bound to implement such policy but exercises independent judgment in such implementation through the cases", H. B. Jallow, "Prosecutorial Discretion and International Justice", *Journal of International Criminal Justice*, Vol. 3 (2005), 145, p. 151.

45 Taking a different view from that of the Special Court's judges, the UN Secretary-General stated in his report that the wording "persons most responsible" was suggested not as a test criterion or a distinct jurisdictional threshold, but as a guide to the Prosecutor in the adoption of a prosecution strategy." *Report of the Secretary-General on the establishment of a Special Court for Sierra Leone*, 4 October 2000, S/2000/915, para. 30.

46 See Statute of the ICC, Article 16.