

Prosecutorial Discretion: Institutional or Professional Reform?

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The Hague Institute for the Internationalisation of Law and the Amsterdam Center for International Law co-organized a concluding conference of their three-year research project ‘the International Expert Framework on International Criminal Procedure’ (IEF) in The Hague on 27-28 October 2011. In that connection they released the publication ‘General Rules and Principles of International Criminal Procedure and Recommendations of the International Expert Framework’.¹ The purpose of the document is to provide an inventory of ‘the general rules and principles of international criminal procedure identified by the Expert Framework in ten major areas of the international tribunals’ procedural law and practice’.² The rules, principles and recommendations are in turn extracted from the book ‘International Criminal Procedure: Towards a Codification of General Rules and Principles’.³

The General Rules and Principles document defines international criminal procedure as ‘the body of international law that has as an objective the effective and fair enforcement of substantive international criminal law and has been developed for operation in the context of the international legal order’.⁴ It then suggests that ‘the existence in the law of international criminal procedure of multiple legislative solutions that address the same procedural issues somewhat differently *might call in question the coherence and authority of that body of law*’.⁵ Is that really so? Is international criminal procedure a *coherent* body of law? Can it, at this stage of institutional evolution, be a coherent body of law?

The reasons why the procedural regimes of, for example, the International Criminal Tribunal for the Former Yugoslavia (ICTY), the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the International Criminal Court (ICC) differ can be explained by facts linked to the creation of each jurisdiction. The procedural choices made at that time can be chronicled with relative ease. And the international criminal jurisdictions are not about to become *one* – they co-exist with distinct procedural regimes. For the purposes of this paper they fall into two distinct classes: those jurisdictions that will go away, and the ICC which will stay. Comparing the broader impact of the procedural regimes of *ad hoc* jurisdictions with that of the ICC makes limited sense. The provisions on procedure and evidence of the former will cease to exist as positive law in the near future. There is therefore no obvious argument for procedural coherence inherent in the current co-existence of multiple international criminal justice institutions.

In a different world there *should* perhaps have been a larger degree of coherence in the procedural regimes of these jurisdictions. But given the realities of internationalized criminal justice since 1993, the question ‘should there be more coherence?’ begs a second question, namely, ‘for whom (should there be more coherence)?’. Does it matter for practitioners operating in each of these international criminal jurisdictions whether there is more coherence? If the answer is ‘yes’ for practitioners in temporary international criminal jurisdictions, their concern is about to expire as these courts end their work. But what is the answer for those involved in and around the ICC?

First, for those who constructed the ICC’s procedural regime, the plurality of international solutions

¹ See <http://www.legal-tools.org/doc/245a90/> (hereinafter referred to as the ‘General Rules and Procedures document’).

² *Ibid.*, p. 5.

³ This book was not yet published at the time of writing.

⁴ ‘General Rules and Procedures document’, *op. cit.*, p. 4.

⁵ *Ibid.* (italics added) (sic).

functioned more as a resource than as a problem. It was possible during the ICC negotiations to point to weaknesses in existing international procedures.

Secondly, for the current guardians of the ICC's procedural order, such diversity may continue to be useful for some more years. Given the substantial challenges confronting international criminal prosecutions – the length and cost of such proceedings – it may be helpful to have a plurality of co-existing procedural regimes which generate different solutions that can be compared and assessed against each other. This *smörgåsbord* of procedural diversity will last a few more years before we will probably be presented with a fixed menu of international criminal procedure, in the form of the Rules of Procedure and Evidence and Regulations of the ICC.

Moreover, the General Rules and Principles document also suggests that the law of international criminal procedure may lose its *authority* due to the existence of multiple legislative solutions to the same procedural needs. Again we need to ask *for whom* this might be the case. 'Authority' in positive law is defined by – and limited to – the specific jurisdiction in question, so it must be a wider notion of 'authority' that the document refers to. Indeed, it falls back on 'national criminal justice systems' and how they have 'increasingly turned, and may be expected to continue doing so in the future, to the seminal experience of international courts'. It goes on to note that 'the guidance they could draw from the latter is on many essential matters too contradictory, unprincipled or inconclusive to be useful'.⁶

In some cases originality or creativity has indeed been displayed by international criminal jurisdictions, but *should* the procedural provisions and practice of international criminal jurisdictions sow the seeds that gradually develop in national criminal justice for core international crimes? Is *procedure* a part of international criminal justice that should be promoted at the national level? How many national criminal justice systems can afford to investigate, prosecute and adjudicate war crimes in the manner done by, for example, the ICTY? Can Canada or Norway afford to work as the ICTY Office of the Prosecutor has? What about Bangladesh, Colombia or Bosnia-Herzegovina?

The IEF Project Leader, Professor Goran Sluiter, suggests that '[i]nternational criminal tribunals are more and more expected to function as role models, also in respect of the procedures they put in place. Critical and creative thinking on international criminal procedure does not only serve the direct purpose of im-

⁶ *Ibid.*

proving the international criminal justice systems, but can also contribute to better national war crimes trials'.⁷ I agree that they *can* contribute in that way, in some areas, on the terms of national legal cultures and what is economically feasible, as determined specifically for each national jurisdiction and its procedural need.

With such caveats, international criminal procedure should interest national criminal justice actors who work on core international crimes. They may get some useful ideas. The prime audience for the General Rules and Principles document would therefore seem to be ICC and national practitioners of criminal justice for atrocities, more so than the *ad hoc* international criminal jurisdictions. This is important to keep in mind.

The specific section of interest for our purposes in the General Rules and Principles document is called 'Initiation of Investigations and Selection of Cases'. In the 'Principles' category, the document lists 'Equality', 'Non-discrimination', 'Impartiality', 'Independence' and 'Sufficiency of Evidence'.⁸ This is a brief but sound list of principles. Its content does not come as a surprise to anyone in the ICC system or in national criminal jurisdictions.

The document offers only one 'Rule', entitled 'Criteria for exercising discretion'. It provides that, '[w]hen exercising discretion concerning whether to prosecute and what charges to bring, prosecutors should consider the gravity of offense and the extent of [the] perpetrator's culpability'.⁹ So this rule puts forward 'gravity' and the suspect's level of culpability – or the seriousness of the responsibility of the suspect – as the two criteria that should guide prosecutorial discretion. Both are incorporated in the ICC Office of the Prosecutor's language on the topic. And neither add something new for relevant national criminal justice officials.

As a matter of fact, the Principles and Rules on case selection have all migrated *from national* criminal justice to international criminal jurisdictions, rather than the other way around. They are well-established features of decent, well-functioning domestic criminal justice systems, rather than international innovations.

The 'Recommendations' part on case selection in the General Principles and Rules document corresponds to the final section of the expert paper prepared for the IEF by Professors Margaret M. deGuzman and William A. Schabas. It confirms the view that only 'a small number of general principles and one rule currently constrain the discretion of international prosecu-

⁷ Quoted from a statement on the IEF web pages.

⁸ General Rules and Principles document, *op. cit.*, pp. 8-9.

⁹ *Ibid.*, p. 9 (sic).

tors to select cases for investigation and prosecution’,¹⁰ and continues: ‘[n]or are there obvious principles or rules that could be developed to narrow the scope of this discretion. As such, the success or failure of international courts currently hinges substantially on how prosecutors exercise their discretion’.¹¹

The authors ask ‘whether the current system of broad prosecutorial discretion should be reconsidered – especially for the ICC’.¹² They proceed to offer the following options:

1. That a ‘college of prosecutors’ makes selection decisions jointly. This is a radical but serious proposition that is receiving further attention and is under elaboration. I believe the idea was first put forward by Gilbert Bitti.
2. That ‘the judges could be granted a more active role in the process’, by, for example, reviewing all prosecutorial decisions not to proceed with investigations or prosecutions. This view has been argued by Gilbert Bitti with respect to international criminal prosecutions, and it was suggested for the national level a few years ago in the books ‘The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina’¹³ and ‘Criteria for Prioritizing and Selecting Core International Crimes Cases’.¹⁴
3. And the document suggests that the ‘responsibility for selection decisions could be reallocated outside the court, in whole or in part’, as remarked by Louise Arbour in 1997 during the ICC negotiations. The authors make reference to (a) the Security Council, General Assembly, or Assembly of States Parties as regards the selection of ICC situations; and (b) with regard to *case* selection, they suggest that ‘a greater role could be given to civil society in the affected territory, perhaps with a particular emphasis on including victim groups’. The authors opine that ‘the prosecutor¹⁵ could be required to explain his strategy in detail to such groups and to take their input into consideration’.

As formulated by the authors, the suggestion in 3(a) places significant political checks on the prosecutor’s discretion. At this stage, such an institutional reform

proposal provokes. Given the resistance of States to independent prosecutorial discretion during ICC negotiations, such a suggestion could find support in capitals. It would, however, be very difficult to reverse in the future in favour of prosecutorial discretion. States should not proceed with this suggestion prior to comparative analysis spanning more than one prosecutorial term.

The civil society suggestion with regard to case selection in item 3(b) is novel and would benefit from further elaboration. Would it involve the ICC Prosecutor consulting with civil society groups in territorial States? Would this weaken rather than ensure independent prosecutorial decision-making? Victim groups are not exactly ‘spontaneous matter’. They can be instrumentalized, just as victims often are in territories directly affected by the crimes. How would such consultation take place and would it always be clear to whom the Prosecutor is explaining himself?

The Recommendations conclude by assuming that it is when ‘no structural change is undertaken’ that ‘a number of commentators have argued that the prosecutor should issue public guidelines concerning how selection decisions are made’.¹⁶ The document is not clear on this point. The last source cited – ‘Criteria for Prioritizing and Selecting Core International Crimes Cases’ – does not argue for structural changes, but for a technocratic, professional approach to enhance quality in the exercise of prosecutorial discretion by the use of technical criteria. The consideration of guidelines should not be held hostage by what seems to be a preoccupation with the need for structural change.

The Recommendations continue by proposing that ‘[p]rosecutorial guidelines are generally not binding but lower-level prosecutors are accountable to their superiors if they fail to implement them appropriately’.¹⁷ Is this an adequate statement? Which sampling is it based on? Would not such guidelines function *de facto* as binding for the subordinates in question?

When the authors try to restate the arguments in favour of guidelines, they mention two. First, that they ‘would enhance perceptions of legitimacy by bringing to light the factors that influence selection decisions rather than leaving them clouded in secrecy’.¹⁸ Which notion of ‘legitimacy’ is being referred to here? Is it a transparency about selection factors that generates legitimacy, or can it also be that the quality of decisions may increase by basing them on tested, objective factors? Can the use of binding criteria discipline prosecutorial decision-making processes? If judges are to play

¹⁰ *Ibid.*, p. 9.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ See M. Bergsmo, *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina*, Torkel Opsahl Academic EPublisher, Oslo, 2010, Second Edition (see <http://www.legal-tools.org/doc/688146/>).

¹⁴ See M. Bergsmo, *Criteria for Prioritizing and Selecting Core International Crimes Cases*, Torkel Opsahl Academic EPublisher, Oslo, 2010, Second Edition (see <http://www.legal-tools.org/doc/f5abed/>).

¹⁵ Presumably the ICC Prosecutor.

¹⁶ *Ibid.*, p. 10.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

a role in reviewing whether prosecutorial criteria are met – for example in connection with confirmation of indictments – could that not have a very significant effect on the will of prosecutors to comply with criteria?

Secondly, the authors record that guidelines ‘would encourage consistency in decision-making, which would contribute to positive perceptions of the court’s work’.¹⁹ What does such consistency refer to? Does it refer to the four of five principles mentioned above: ‘equality’, ‘non-discrimination’, ‘impartiality’ or ‘independence’? And is the main function of such ‘consistency in decision-making’ to contribute to public perceptions of the jurisdiction concerned, as suggested by the authors, or more importantly to ensure and enhance the quality of the decisions?

The authors suggest that in *national* jurisdictions the ‘overarching goal is to punish all serious wrongdoing’, whereas ‘[i]nternational courts generally can prosecute only a tiny fraction of the serious crimes over which they have jurisdiction’.²⁰ However, the number of core international crimes cases in countries like Argentina, Bosnia-Herzegovina and Colombia far exceeds the capacity of these criminal justice systems. Even some WEOG States, such as the Netherlands, may have more cases than their criminal justice systems can realistically handle. I therefore wonder if the way the national – international distinction is made is accurate.

Generally speaking, the ‘Recommendations’ part on case selection in the General Rules and Principles document is directed more at the ICC than national criminal justice for atrocities. That is understandable. But Professor Sluiter’s above-quoted words give the impression that the IEF seeks to contribute to better national war crimes trials, an eminently reasonable objective.

Will it be the ICC that will face the biggest challenges linked to the selection and prioritization of core international crimes cases in the upcoming years or will it be national criminal jurisdictions? Do we still have a problem of expectation-management with regard to the number of cases that the ICC Office of the

Prosecutor is able to pursue in any one situation? Or has Mr. Moreno-Ocampo succeeded in reducing expectations by following a clear, consistent line on this question from the start of his term? I would like to caution against broad negative assumptions in this area.

I think case selection – and even more so, case prioritization – will be a more significant challenge at the national level than at the ICC’s level in the years to come. The potential gap of impunity between the few cases that the ICC is able to do in any given situation and all those that may not be taken on at the national level, may come down most heavily on national systems.

Equipping national prosecutors with tools to perform better – not necessarily more like their counterparts in international tribunals – is important. Against that background I am encouraged by the adoption by the Council of Ministers of Bosnia-Herzegovina of an Annex on prioritization criteria in its National War Crimes Strategy. I am also encouraged by the working group on criteria in the context of the ongoing co-operation between the Nordic national war crimes prosecution services. I note the initiative to have the issue raised in the Eurojust Genocide Network. These processes are practical and important. They are interconnected and go back to the expert seminar in September 2008 on ‘Criteria for Prioritizing and Selecting Core International Crimes Cases’ and the publication that it produced.²¹

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²¹ See <http://www.fichl.org/activities/criteria-for-prioritizing-and-selecting-core-international-crimes-cases/> and <http://www.fichl.org/publication-series/>.

¹⁹ *Ibid.* By ‘court’ is presumably meant the ICC.

²⁰ *Ibid.*