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SELECTION OF DEFENDANTS BEFORE THE ICC: BETWEEN THE PRINCIPLE OF OPPORTUNISM AND LEGALISM

Abstract:
International criminal tribunals had to make a choice between the principles of opportunism and legalism or decide to use a mixture of these both. They had to decide whether a prosecutor should become "the minister of justice" (as in the principle of legalism) or "the first judge" (evaluating in the frames of principle of opportunism the reasonable basis for prosecuting). This article addresses prosecutorial discretion before the ICC with respect to selecting defendants. Firstly, it analyzes the main differences between opportunism and legalism of prosecution. It also presents models of accusation functioning before the historical and existing international criminal tribunals – which usually opted for opportunism of prosecution. Before the ICC the conditions on which the Prosecutor may initiate an investigation are set in Art. 53(1) of the Statute: "The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute." It is interesting to observe that this phrase may be interpreted in many various ways, depending on the model of accusation the author belongs to: those coming from the Anglo-Saxon tradition have tendency to search for elements of opportunism; those from civil law states assume that the model of accusation operates according to the principle of legalism. There is also a number of mixed options presented, according to which the ICC operates according to a mixture of these two principles. Finally, the article presents different rules adopted by the ICC Prosecutor (or proposed), which govern the choice of the defendants.

Keywords: ICC, International Criminal Court, principle of legalism, principle of opportunism, Prosecutor

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1. PROSECUTORIAL DISCRETION V. MANDATORY PROSECUTION

The power to decide whether to prosecute or not is one of the basic powers of every prosecutor.[1] This power is often referred to as "prosecutorial discretion". This notion means that it is up to a prosecutor to decide whether a specific case and certain defendant (defendants) will be brought to criminal trial. Most authors refer to a dictionary definition of discretion that is broadly described in the common law states' and international criminal law books. Prosecutorial discretion can be defined as "the power of a prosecutor to make autonomous (independent or impartial) choices as to whom to incriminate, on which charges, on the basis of which evidence and at which moment in time, within a given legal framework". It also implies that "a prosecutor is entitled to take relevant decisions autonomously and without any imposition."[2] In such a model of prosecution the mere commission of an offence and probable guilt of a named offender do not necessarily trigger the formal legal procedure of prosecution and trial.[3] In consequence a prosecutor is not obliged to prosecute any case simply because it can be prosecuted. Therefore we can see that prosecutors have powers to set the boundaries of a coherent criminal justice policy. This power allows them to decide about intensification of criminal reaction they choose to apply in a given case. In the literature it is stated that discretionary non-prosecution arises out of practical policies – "if the rule of compulsory prosecution were strictly applied, the growth of new categories of minor crime in the statutes and the increase of reported crimes of all types would submerge the prosecution of serious crime in a sea of less important cases."[4] In the Anglo-Saxon doctrine it used to be believed, that it is simply not possible to prosecute all the criminal acts: "as the volume of crime increases and offense categories proliferate, even serious crimes are not fully prosecuted because it might be unduly time consuming to conduct a full investigation." Discretion was seen as a positive achievement of the systems of common law states as it "can individualize the implementation of the law, softening the harshness or injustices that sometimes arise from rules dispassionately applied."[5]

The prosecutor's discretion may include many factors. Firstly, he has to decide if there was a crime: if a certain human act or omission fulfills all the elements of a crime. It relates also to a decision as to whom to prosecute: the prosecutor has the power to select defendants from all the people possibly involved in a criminal conduct. Moreover,

[1] Such notions are used by M. Rogacka-Rzewnicka, *Oportunizm i legalizm ścigania przestępstw w świetle współczesnych przeobrażeń procesu karnego* (The principles of mandatory prosecution and prosecutorial discretion in the perspective of ongoing transformations of the criminal proceedings), Zakamycze, Kraków: 2007, p. 46.

[2] A. Cassese (ed.), *The Oxford Companion to International Criminal Law*, Oxford University Press, Oxford: 2009, p. 471.

[3] J. Fionda, *Public Prosecutors and Discretion*, Oxford University Press, Oxford: 1995, p. 9.

[4] J. H. Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 University of Chicago Law Review 439 (1973-74), p. 459.

[5] P. Cane, J. Conaghan (eds.), *The New Oxford Companion to Law*, Oxford University Press, Oxford: 2008, p. 330.

he also chooses what criminal behavior to accuse the defendant of (both referring to factual and legal borders of the behavior expressed in a form of the legal characterization of facts). He also decides about the timing of an indictment – when to initiate an investigation. Last but not least, he decides whether to engage in the plea bargaining process: whether to apply his discretion in order to stop criminal reaction in exchange for a guilty plea and quick termination of the proceedings. This leads to the problem of prosecutor's powers to intensify criminal prosecution in general; whether to initiate criminal proceedings against a certain behavior or to restrain from bringing the social conflict to the court and limit the judicial influence on a situation to negotiating a plea bargain between the suspect and the prosecutor. Therefore, the result of using discretionary powers by the prosecutor may be selectivity of prosecution: meaning not only selective choice of persons that are brought to justice but also the law to be enforced. It may lead also to obvious disadvantageous results: the same crimes are not treated alike. As it allows an individual to act as that individual chooses, the choice of that method must accept the consequences: the individual may act on basis of improper considerations, substituting personal standards for public, legal standards.

In the continental legal doctrine the principle of prosecutorial discretion is often identified with the principle of opportunism (*opportunité des poursuites*) associated with the common law states (mostly Anglo-Saxon).[6] Both principles are based on a presumption that it is only for the prosecutor to decide which offences and offenders should be prosecuted and on which counts. As opposed to that principle, *Legalitätsprinzip* or the principle of *legalité de poursuites* prevails in the civil (continental) legal systems, where all those who infringe the law must be prosecuted (the so-called principle of mandatory prosecution). In such a model there is no prosecutorial discretion – all offenders must be equally prosecuted. The model of prosecution based on this principle requires prosecution of all offences where sufficient evidence exists of the guilt of the defendant. Discretion is minimized and limited by the frames of the law and the prosecutor is precluded from taking a pro-active diversionary role. However, at the same time, it cannot be denied that discretion can also function as well within the system of legalism of prosecution – although in certain limits provided by the law and in smaller quantities.[7] "Claims that prosecutorial discretion has been eliminated, or is supervised closely, are exaggerated", as discretion is exercised in each of the systems for reasons similar to those supporting it in the United States. Although through different means – e.g. manipulating the legal

[6] Cassese, *supra* note 2, p. 471. In more detail these models are described in H. Kuczyńska, *Model oskarżenia przed Międzynarodowym Trybunałem Karnym* (The model of accusation before the International Criminal Court), C.H. Beck, Warszawa: 2014, pp. 66 ff., and the revised and updated version of this book entitled *The Model of Accusation before the International Criminal Court*, Springer, Cham: 2015.

[7] *See generally* Langbein, *supra* note 4, p. 443; J. Herrmannt, *The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany*, 41 University of Chicago Law Review 468 (1973-4); M. Cieślak, *Polska procedura karna* (Polish criminal procedure), PWN, Warszawa: 1984, p. 291; Rogacka-Rzewnicka, *supra* note 1, p. 46; T. Weigend, *Anklagepflicht und Ermessen. Die Stellung des Staatsanwalts zwischen Legalitäts- und Opportunitätsprinzip nach deutschem und amerikanischem Recht*, Nomos Verlagsgesellschaft, Baden-Baden: 1976, pp. 17 ff.

qualification (through so-called correctionalisation) or extending the notion of minor guilt or lack of social interest or changing the definition of a socially dangerous act – the result also leads to excluding certain acts from the category of crimes.[8]

It seems that currently none of the legal systems remains faithful to these ideal concepts. It can hardly be said that a certain system of criminal procedure is "opportunist" or "legalist" anymore. Although the two models can still be isolated: states where the principle of opportunism is the legal rule and in which the principle of legalism is the main rule.[9] States that traditionally adopt one legal principle, introduce several exceptions to this principle, which leads to the creation of mixed systems. On the one hand, common law states introduce numerous legal tests that should be followed by the prosecutor when making a decision to initiate proceedings. Sometimes, even the representatives of the common law doctrine also question the very idea of giving to the prosecutor discretion to decide whom to prosecute: "if caseloads can be managed in Western European countries without prosecutorial discretion or with discretion carefully controlled, if full judicial inquiry can be made into every offense formally charged – then perhaps we have conceded too much power to the prosecutor."[10] On the other hand, we observe the proliferation of exemptions that favour the principle of opportunism in continental systems. This tendency is related to the gradually growing emphasis on the pragmatism of prosecution and the desired cost-effectiveness of the administration of justice.[11] Another argument for giving more discretion to the prosecutor is that social life is too complex and fluid to insist on absolute fidelity to norm under any circumstances. Legal standards have to be confronted with a case – a life situation. In consequence, even within the principle of legalism prosecutors should be left some discretion which would enable them to make subtle distinctions.[12]

2. INTERNATIONAL MILITARY TRIBUNALS IN NUREMBERG AND TOKYO AND VICTORS' JUSTICE

Before the International Military Tribunals (IMT) in Nuremberg and Tokyo there was no doubt that selection of defendants from all the potentially involved in crimi-

[8] *E.g.* A. S. Goldstein, M. M. Marcus, *The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany*, 87 Yale Law Journal 240 (1977), p. 280.

[9] *See* K. Ambos, K. Status, *Role, Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview on the Basis of 33 National Reports*, 8 European Journal of Crime Criminal Law and Criminal Justice 89 (2000), pp. 98-101; J. Tylman, *Zasada legalizmu w procesie karnym* (The principle of legality in criminal procedure), Wydawnictwo Prawnicze, Warszawa: 1965, pp. 112, 42; Rogacka-Rzewnicka, *supra* note 1, pp. 19, 129; M. Andrzejewska, *Adaptacja koncepcji Thomasa Kuhna dla postępowania karnego* (Adaptation of the Thomas Kuhn conception to criminal procedure), 3 Prokuratura i Prawo 141 (2013).

[10] Goldstein, Marcus, *supra* note 8, p. 244. *See also* Herrmannt, *supra* note 7, p. 481.

[11] *See* Rogacka-Rzewnicka, *supra* note 1, pp. 96 and 127; K. Volk, *Grundkurs. StPO*, 5th ed., C.H. Beck, München: 2006, p. 113; C. Safferling, *Towards an International Criminal Procedure*, Oxford University Press, Oxford: 2001, p. 174.

[12] M. Damaška, *The Faces of Justice and State Authority*, Yale University Press, New Haven: 1986, p. 22.

nal regimes was indispensable. In Nuremberg, each Signatory of the London Treaty appointed a Chief Prosecutor for the investigation of the charges against and the prosecution of major war criminals. The Chief Prosecutors acted as a committee. The Statute gave to the Committee of Chief Prosecutors a wide discretion as to the choice of defendants. According to Art. 15 of the Nuremberg Charter, the Chief Prosecutors were to, acting individually and in collaboration with one another, undertake the preparation of the indictment for approval by the Committee. Art. 14(b) indicated only that the Committee would "settle the final designation of major war criminals to be tried by the Tribunal." However, the notion of "major war criminals" was understood differently: "at the 1943 Teheran Conference, Stalin proposed the execution of between 50.000 and 100.000 Germans, while Churchill envisioned the execution (without trial) of between 50 and 100 German war criminals."[13] Finally, 24 officials of the Nazi regime were sent to trial in Nuremberg (and seven so called "organizational defendants") and 28 in Tokyo. However, two observations come to mind when analyzing the method of selection of defendants.

First, if we assume that the IMT in Nuremberg acted on the basis of the principle of opportunism it was collective opportunism: the decision to approve the indictment and the documents to be submitted therewith had to be agreed by all four prosecutors. The Committee of Prosecutors was to act by a majority vote and appoint a Chairman "as may be convenient" and in accordance with the principle of rotation. In a case where there was equal division of vote concerning the designation of a defendant to be tried by the Tribunal, or the crimes with which he shall be charged, the proposal which was made by the party which proposed that the particular defendant be tried, or the particular charges be preferred against him, was to be adopted.

Second, in practice, although the Chief Prosecutors were responsible for "designation of the defendants", the decisions were taken by the governments of the victorious states. They were directly involved in the selection of defendants. The procedure before the IMT did not offer prosecutors any guarantees of independence.[14] The list of German war criminals to be prosecuted was prepared by a special commission (so-called UNWCC – United Nations War Crimes Commission), which was established in 1943 and designed to engage in investigating war crimes that were to be tried in Nuremberg.

[13] F. de Vlaming, *Selection of Defendants*, [in:] L. Reydams, J. Wouters, C. Ryngaert (eds.), *International Prosecutors*, Oxford University Press, Oxford: 2012, p. 544.

[14] As to this fact agree: L. Coté, *Independence and Impartiality*, [in:] L. Reydams, J. Wouters, C. Ryngaert (eds.), *International Prosecutors*, Oxford University Press, Oxford: 2012, pp. 372-73; W. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 Journal of International Criminal Justice 731 (2008); M. Brubacher, *Prosecutorial discretion within the ICC*, 2 Journal of International Criminal Justice 71 (2004); K. Ambos, S. Bock, *Procedural Regimes*, [in:] L. Reydams, J. Wouters, C. Ryngaert (eds.), *International Prosecutors*, Oxford University Press, Oxford: 2012, p. 492; J. D. Ohlin, *Peace, Security, and Prosecutorial Discretion*, [in:] C. Stahn, G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden/Boston: 2009, p. 185; N. Boister, R. Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press, Oxford: 2008, pp. 51-52.

On the basis of the evidence gathered it was supposed to establish if a prima facie case existed that a certain person had committed war crimes. In such a case the defendant was added to the list of the accused. The Committee acted according to the belief that only the prominent suspects should face the trial, who rather ordered, than executed personally, war crimes. As a general rule the Committee agreed that the suspects should also be representative of the Nazi regime as a whole.[15] However, no official guidelines were prepared for the Commission. As a result of the work of the Commission, a list of 712 suspects was prepared. Later, the list was condensed, according to some new principles introduced by the governments. In the process of selection of the defendants, each state fulfilled its own interests and goals. Even if they agreed as to the main rule – that the victims of the war crimes committed by the defendants were supposed to be citizens of an Allied state – each government also acted according to a certain agenda. For instance, the United States assumed that one of the main crimes considered during the trial was to be crime of aggression – waging an aggressive war. Moreover, it wanted to ensure that high-ranking Nazis who had collaborated with the United States in the final months of the war were not prosecuted.[16] At the same time the American team was criticized (and not groundlessly) of a total lack of knowledge about the political structure of the Third Reich, which led them to inaccurate decisions as to whom to accuse. Furthermore, the United Kingdom stated that the defendants should be well known to the European society in order to achieve a more "dramatic impact".[17] In the end the selection of defendants was rather chaotic and led by unclear political reasons than made according to some established criteria.

The choice of defendants in Tokyo was not so chaotic solely thanks to one reason: only one government was responsible for creating the list of suspects. Nonetheless, the choice was also mostly political. The selection of defendants was many times criticized as "arbitrary"[18] and evaluated as "a process plagued by poor organization and consultation, and little information, knowledge and time."[19] The Supreme Commander of the Allied Forces, General MacArthur, not only drafted the Charter of this Tribunal, but also had a final say as to whom to prosecute. His decision not to prosecute the Emperor of Japan – despite the Emperor's central responsibility for waging an aggressive war – went against the wishes of the US Prosecutor, Chief Counsel J. Keenan. General MacArthur even instructed the investigators not to summon the Emperor as a witness during the proceedings.[20] As a result of this omission, prosecutors were tasked with almost an impossible task to prove the elements of conspiracy based on organizational structure,

[15] Ambos, Bock, *supra* note 14, p. 492.

[16] Schabas, *supra* note 14, p. 732.

[17] M. M. deGuzman, W. Schabas, *Initiation of Investigation and Selection of Cases*, [in:] G. Sluiter, H. Friman, S. Linton, S. Vasiliev, S. Zappala (eds.) *International Criminal Procedure: Principles and Rules*, Oxford University Press, Oxford: 2013, p. 134.

[18] Ambos, Bock, *supra* note 14, p. 497.

[19] Boister, Cryer, *supra* note 14, p. 73.

[20] de Vlaming, *supra* note 13, p. 546.

but without its main leader.[21] The final list of the defendants was prepared during negotiations that took ten weeks and "took place behind closed doors".[22] Just like in the case of the Nuremberg IMT, also before the Chief Counsel set to work, a special commission had been established. The Far Eastern Commission (FEC) – accompanied by the US State, War and Navy Department Coordinating Committee (SWNDCC), was chosen to be the forum for the decisions.[23] The selection was supposed to be based on a "representative cross-section of those whom the Allied powers collectively regarded as responsible for Japanese policy before and during the Pacific War."[24] However, neither the Commission, nor the Prosecutor had developed a theory as to the level of engagement in the crimes and the guilt of potential suspects and no clear criteria for selection. Art. 1 of the Proclamation of 19 January 1946 establishing the Tokyo IMTFE stated that "criminals" that should be held responsible before the Tribunal are to be "persons charged with offences which include crimes against the peace." This way it narrowed the scope of the persons eventually held responsible. Therefore, "once it was decided a war of aggression had occurred, there was 'a prima facie' case against any person who as the holder of any office, however humble, in the civil or military organization of Japan took part in the planning, preparing, initiating or waging." In the final selection it was decided however, that only the "principal leaders" with primary responsibility for the acts committed"[25] should be accused. The most significant factor was the membership of key Japanese organs, such as the Cabinet or the Supreme Command. Consequently the choice was criticized as being based mostly on the official position of the defendant and not on real contributions in crimes against peace. This "preconception" led to the result that prosecutors attributed the whole responsibility for all harm to those who conspired to start illegal war. Moreover, based on that assumption, the indictment did not target those responsible for crimes other than crimes against peace – crimes against humanity, crimes based on the bacteriological and chemical warfare program, nor crimes committed against the people of Japan.[26]

We can pose a question, if we can still speak of the principle of opportunism if the prosecutor has no power to base his decision on personal conviction. As we have seen the full discretion was not enjoyed by the prosecutors, but by other governmental institutions, who made the final choice of the defendants. According to the citation Chief Prosecutor R. Jackson made a comment: "The people at Potsdam (…) made this commitment to publish the list [of defendants] without consulting us."[27] Not only politics but a certain policy – to give priority to certain types of crimes over others –

[21] This opinion expressed by Boister and Cryer, *supra* note 14, p. 50.
[22] de Vlaming, *supra* note 13, p. 546.
[23] Boister, Cryer, *supra* note 14, p. 50.
[24] de Vlaming, *supra* note 13, p. 547.
[25] Cited after: Boister, Cryer, *supra* note 14, p. 53.
[26] *See generally* R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge University Press, Cambridge: 2005, pp. 199, 206.
[27] de Vlaming, *supra* note 13, p. 545.

influenced the process of selection of defendants. In Tokyo, the Prosecutor encountered all criticism by saying that more defendants will be tried later. However, there were no more trials at the international level. Several more representatives of the defeated regimes were tried before national (or quasi-national) courts in Poland and Germany.[28] These tribunals cannot be yet analyzed according to the principles governing the procedural analysis of a system of law. They became a tool designed to ensure that the idea of revenge was "taken in a proper legal context"[29] and a fair trial was conducted, but still under the control of the interested governments. Although some may claim that the prosecutors in Nuremberg and Tokyo "tried hard to keep a balance between legal and non-legal considerations",[30] a more accurate statement could be that the procedural regime consisted only of a guide on how to proceed with the trial but that the decisions about the trial were purely political. This type of international trial is commonly labeled as "victor's justice". The law was enforced only against the losing nations. They were both established by the victorious states that (moreover) occupied the territories of the states whose representatives were supposed to be tried.[31] The opportunist choices were made on the basis of purely political factors.

Moreover, the military nature of the tribunals should not be overlooked. It certainly influenced the lack of decisional independence of the prosecutors. "In military courts, prosecutors are subordinates, trained to accept orders from their superiors following established military hierarchy."[32] Prosecutors of these tribunals were state officials, acting on behalf of certain states and under their control. Also, indictments were formulated on behalf of the states against defendants.[33] The prosecutors received directions from their home states. The government decided about the person of the defendant and the charges, as well as about the way of conducting the case. As an often cited example, we could invoke the Soviet Union government's instructions to indict Nazis of committing war crimes in Katyń.[34] In consequence, there could be no doubt that the prosecutors of the military tribunals were not independent in their work and their decisions depended entirely from the will of the states.

However, even if the decision whether to prosecute did not belong to the prosecutors, it was taken on the basis of the principles of opportunism. Certainly it was not legalism

[28] Such as the Supreme National Tribunal of Poland (Najwyższy Trybunał Narodowy), which operated for a brief two-year period 1946-48. *See* M. A. Drumbl, *Stepping Beyond Nuremberg's Halo: The Legacy of the Supreme National Tribunal of Poland*, Draft 2015, which appears as chapter 38 in vol. 2 of the published conference documents: Historical Origins of International Criminal Law Conference (Hong Kong: 1-2 March 2014), available at: http://www.fichl.org/fileadmin/fichl/FICHL_PS_20_web.pdf (accessed 30 March 2015).

[29] de Vlaming, *supra* note 13, p. 544.

[30] *Ibidem*, p. 546.

[31] Coté, *supra* note 14, p. 372.

[32] *Ibidem*.

[33] "Indictment International Military Tribunal, The United States of America, The French Republic, The United Kingdom of Great Britain and Northern Ireland, and The Union of Soviet Socialist Republics – Against (…)."

[34] *E.g.* Coté, *supra* note 14, pp. 372-73.

and it seems that there is no third method – except for a mixture of these two. It is commonly assumed that the procedural system of initiating criminal proceedings in Nuremberg and Tokyo reflected the strong influence of adversarial procedural models known from common law systems.[35] Accordingly, as in these systems it was designed on the basis of the model of opportunism – and in this model selection of defendants according to various considerations was possible. However, "the question of prosecutorial discretion was largely absent at Nuremberg."[36] We can conclude that in this case there was a separation between the opportunism and prosecutorial discretion. While the first one was present in Nuremberg trials, there could be no trace of the other.

3. EVOLUTION OF THE CONCEPT OF PROSECUTORIAL DISCRETION: ICTY AND ICTR

The operation of the ad hoc International Criminal Tribunals for former Yugoslavia (ICTY) and Rwanda (ICTR) led to the first discussion about the issue of existence of prosecutorial discretion in the international justice system. There was no doubt that these tribunals would not be able to try all persons suspected of having committed crimes in their jurisdictions, especially in light of the principle of primacy of jurisdiction over national courts.

Art. 18(1) of the ICTY Statute provides that "[t]he Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and nongovernmental organisations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed."

According to the representatives of the prevailing theory, the content of this provision gives us grounds to assume that the Prosecutor acts on the principle of opportunism.[37] The assessment whether there is a "sufficient basis to proceed" belongs solely to the Prosecutor. His discretion as to the selection of cases that he prosecutes and persons he chooses to indict is limited only by the scope of jurisdiction of the tribunals.[38] The key

[35] Schabas, *supra* note 14, p. 731.

[36] C. Stahn, *Judicial Review of Prosecutorial Discretion: Five Years On*, [in:] C. Stahn, G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden/Boston: 2009, p. 185.

[37] *See generally* R. May, M. Wierda, *International Criminal Evidence*, Transnational Publishers, Ardsley, New York: 2002, pp. 328–29; A. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 NYU Journal of International Law and Politics 583 (2007), p. 636; Cryer, *supra* note 26, pp. 214-16; L. Coté, *Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law*, 3 Journal of International Criminal Justice 162 (2005), p. 166; H. B. Jallow, *Prosecutorial Discretion and International Criminal Justice*, 3 Journal of International Criminal Justice 145 (2005), p. 150; Schabas, *supra* note 14, p. 733; de Vlaming, *supra* note 13, pp. 548-71.

[38] Although it is said that the first area were the selection of persons subdued to prosecution is done at the stage of establishment of an international tribunal; defining the tribunal's jurisdictional ambit gives

significance for the analysis of the discretionary powers of the Prosecutor is related to his independent powers to start an investigation. It is only at the stage of bringing the indictment before the Trial Chamber that a judicial organ can analyze the Prosecutor's decision to indict a particular perpetrator. However, the judges of the ICTY have powers only to assess a decision, whether a prima facie case exists and it is reasonable to lodge an indictment. The decision not to prosecute cannot be controlled. The judicial organ has no powers to decide whether the prosecutor should prosecute any particular case or person for certain acts if he refuses to proceed with the case.[39]

We could also utilize contextual interpretation – meaning interpreting a certain legal provision as a part of a wider legal system and thus interpreting it according to the rules governing this whole system. In this context, a strong influence of the common law system on the model of accusation adopted before the ad hoc tribunals cannot be ignored. The model of investigation was designed on the basis of the principles established in these systems.[40] As in the case of other procedural solutions, also the standardisation of the reaction to information concerning committed crimes falling within the jurisdiction of a tribunal was based on the common law model. This model assumed the applicability of procedural opportunism. On this basis, we can assume that the notion "sufficient basis to proceed" should be given the same meaning as in Anglo-Saxon systems. In consequence, the content of these provisions suggests that the Prosecutor has discretionary powers to evaluate whether there is a "sufficient basis" to start an investigation and indict a certain person and is under no obligation to do it when he considers that there is no sufficient basis.

However, what to some scholars is a clear-cut example of opportunism, to others appeared to be the principle of legalism (i.e. the model of accusation before the ICTY resembles the principle of legalism known from the continental law systems). According to this theory, the gravity of crimes that the Tribunal deals with should lead to acceptance of the Prosecutor's obligation to prosecute their perpetrators in every case when he receives information about committing such a crime – and confirms it. Secondly, the formulation of Art. 18(4) – "Upon a determination that a prima facie case exists, the Prosecutor shall prepare an indictment" – is of a strict character and leaves no place for prosecutorial discretion.[41] The use of the "shall" notion signifies that the Prosecutor should always prepare an indictment when he obtains evidence leading to a conclusion that there is a reasonable basis to believe that crimes within the jurisdiction

ground for the further selection of accused – both in geography and in time. Despite many conflicts have been encountered, only two ad hoc tribunals have been created by the Security Council. *See* M. P. Scharf, *The Politics of Establishing an International Criminal Court,* 6 Duke Journal of Comparative and International Law 167 (1995).

[39] The same opinion expressed also on another occasion in Kuczyńska, *supra* note 6, p. 67.

[40] According to many authors, *e.g.* K. Ambos, *International criminal procedure: "adversarial", "inquisitorial" or mixed?*, 3(1) International Criminal Law Review 1 (2003), p. 6 or C. Schuon, *International Criminal Procedure: A Clash of Legal Cultures*, T.M.C. Asser Press, The Hague: 2010, p. 196.

[41] Arguments also presented in Kuczyńska, *supra* note 6, p. 68.

of the ICTY have been committed.[42] However, it seems that this approach is not widely represented. More often, we can encounter opinions accepting the operation of the principle of opportunism.

Moreover, the practice adopted the ICTY leaves no doubt that it operates on the basis of the principle of opportunism. The practice of the Office of the Prosecutor shows that it enjoys a wide discretion as to the decision whether to prosecute. Often the case of NATO's military intervention to stop ethnic cleansing in Kosovo in 1999 is mentioned as an example. In this case the Prosecutor refused to bring an indictment.[43] During the NATO operation airplanes launched a missile attack on state buildings in Belgrade killing sixteen civilians inside and damaging the building. Although in the beginning, the ICTY Prosecutor created a special committee to look into the allegations of NATO war crimes, the following year she declined investigating further, based on a NATO report , which stated that the buildings were used as military premises and the bombing was therefore justified. Although the decision was widely criticized, it was final. Even the explanation of this decision gave rise to suspicions that her decisions were based not purely on legal reasoning: "NATO bombing targets were authorized on the basis of consensus decisions following careful review by the highest-level military and government officials of each of the individual NATO states;" therefore, "this example presents a concrete scenario in which the heads of state of every NATO country might be charged with war crimes in the event that a Prosecutor disagreed with them about the legitimacy of the objective underlying a particular tactical decision."[44] In this case, apparently, she agreed with the tactical choice they had made. Another infamous case is the bombing of the Chinese Embassy in Belgrade. The ICTY did not initiate an investigation, observing in the report that the United States paid compensation and that the aircrew could not be held responsible.[45] In consequence, questions of criminal responsibility were dealt with by the way of a report and not in an investigation. There can be no doubt that the Prosecutor of the ICTY often found himself in a difficult situation: between the political agendas of powerful actors and on the other side – the interests of justice and an independence of the Office of the Prosecutor.[46]

Nonetheless, it is widely agreed that the prosecutorial discretion is not unlimited. Firstly, the discretionary powers of the ICTY Prosecutor are limited by Security Council resolutions. In the beginning of its operation, the ICTY Chief Prosecutor Richard Goldstone adopted a "pyramidal strategy" of indicting and prosecuting low-level per-

[42] D. D. Ntanda Nsereko, *Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia*, 5 Criminal Law Forum 507 (1994), pp. 518-19; Safferling, *supra* note 11, p. 176. *See also* Coté, *supra* note 37, p. 165, and deGuzman, Schabas, *supra* note 17, p. 137.

[43] *Cf.* Final report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, at: http://www.icty.org/sid/10052 (accessed 30 March 2015). *See also* Greenawalt, *supra* note 37, p. 636; Cryer, *supra* note 26, pp. 214-16; Ambos, Bock, *supra* note 14, p. 502; Coté, *supra* note 14, pp. 376-79.

[44] Greenawalt, *supra* note 37, p. 639.

[45] *Cf.* final report to the Prosecutor, *supra* note 48; para. 84, *see also* Cryer, *supra* note 26, p. 218.

[46] Coté, *supra* note 14, p. 376.

petrators as a means of laying the foundation for the prosecution of those thought to be most responsible for the crimes in question. However, this approach was criticized and the actions of the Prosecutor condemned. It was observed that such an attitude is resource-consuming and clogs the system, leading in consequence to a situation where many accused persons in custody have waited several years for trial, undermining perceptions of fairness: "the perception that the OTP had focused too much on the 'small fry' accused at the expense of neglecting the 'big fish' led directly to the ICTY's 2002 recommendation to the UN Security Council that the Tribunal adopt a formal 'completion strategy'."[47] In consequence, the Security Council Resolution no. 1534 called "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."[48] This appeal was combined with a demand from the Security Council to complete all cases; first by the end of 2008, and then by the end of 2014.[49] In practice, the ICTY's Rules of Procedure and Evidence enable the judges to refer cases that do not involve the most senior leaders responsible for very serious crimes to national authorities.

Secondly, in 2004, basing on the content of the above mentioned Resolution, Rule 28(A) of the ICTY Rules of Procedure and Evidence was adopted which requires that the Bureau shall determine whether an 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. Only, if the Bureau determines that the indictment meets this standard, the President can designate one of the Trial Chamber judges for judicial review of the indictment. If the Bureau determines that the indictment does not meet this standard, the President shall return the indictment to the Registrar to communicate this finding to the Prosecutor. The Rules do not mention what happens after such a communication but on the basis of the practice adopted by the ICTY we can conclude that the Prosecutor may introduce a necessary amendment to the indictment based on the indications of the Bureau. These provisions constitute indices for the Prosecutor how to proceed with the selection of the defendants. At the same time, it is becomes a powerful tool of exercising judicial control over the actions of the Prosecutor.[50]

Thirdly, it is the Chambers of the ICTY that have introduced judicial guidelines for the Prosecutor as to a choice of cases and defendants (and charges) that he could use. In *Prosecutor v. Delalić and Others* case, one of the accused (E. Landžo) stated that

[47] S. E. Smith, *Inventing the Laws of Gravity: The ICC's Initial Lubanga Decision and its Regressive Consequences*, 8 International Criminal Law Review 331 (2008), pp. 338-39.

[48] Resolution of the Security Council No. S/RES/1503 (2003), paras. 5-6, No. 1534 S/RES/1534 (2004), para. 5, and then No. 1966, S/RES/1966(2010), para. 3.

[49] *See* Schabas, *supra* note 14, p. 733; Ambos, Bock, *supra* note 14, p. 503; de Vlaming, *supra* note 13, pp. 548-71; K. J. Heller, *Completion*, [in:] L. Reydams, J. Wouters, C. Ryngaert (eds.), *International Prosecutors*, Oxford University Press, Oxford: 2012, pp. 901–902; M. M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 Michigan Journal of International Law 265 (2011-12), p. 286.

[50] Schabas, *supra* note 14, p. 733; Ambos, Bock, *supra* note 14, p. 503; de Vlaming, *supra* note 13, pp. 548-71; Heller, *supra* note 49, pp. 901-902.

he was the subject of a selective prosecution policy conducted by the Prosecution, by which he understood that "the criteria for selecting persons for prosecution are based, not on considerations of apparent criminal responsibility alone, but on extraneous policy reasons, such as ethnicity, gender, or administrative convenience." Specifically, he alleged that he was selected for prosecution on the grounds of being a Muslim camp guard, while indictments "against all other Defendants without military rank", who were all "non-Muslims of Serbian ethnicity", were withdrawn by the Prosecution on the ground of changed prosecutorial strategies. Therefore, this selective prosecution contravened his right to a fair trial as guaranteed by Art. 21 of the Statute, which should be understood to incorporate the principle of equality and that prohibition of selective prosecution is a general principle of customary international criminal law.

The Appeals Chamber rejected this accusation. First of all it stated that the Prosecutor enjoys a wide discretion as to the choice of the defendants:

> 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.[51]

Moreover, according to the Chamber the withdrawal of those indictments was based on the quite different consideration, viz., on insufficiency of evidence. At the same time, the Appeals Chamber stressed that the discretion of the Prosecutor at all times is circumscribed in a more general way by "the nature of her position as an official vested with specific duties imposed by the Statute of the Tribunal" and her obligation to discharge those duties with full respect of the law. She must abide by the recognized principles of human rights such as the principle of equality before the law and the principle of non-discrimination.[52] At the same time the ICTR Appeals Chamber went even further, by stating that in order to show that the Prosecutor is proceeding on a selective basis, the defendant must prove it, providing the evidence of discriminatory intent:[53] "as such, the burden on an accused alleging selective prosecution is a high one."[54]

In consequence of the practice adopted by the Prosecutor and approved by the Chambers there can be no doubt that the ICTY Prosecutor acts according to the principle of opportunism and has wide discretionary powers to select cases for investigation; he can indict only some of the alleged perpetrators. He acts according to the "prioritization" method based on indicting only "persons of authority and leadership".[55] This approach was necessary in view of the completion-of-cases strategy. We can observe that there is a

[51] *Prosecutor v. Delalić*, IT-96-21, judgment of the Trial Chamber, 20 February 2001, para. 601.
[52] *Ibidem*, paras. 603-605.
[53] *Prosecutor v. Akayesu*, ICTR-96-4-A, judgment of the Appeals Chamber, 1 June 2001, para. 96.
[54] Jallow *supra* note 37, p. 155.
[55] Cited after: R. Cryer, H. Friman, D. Robinson, E. Wilmshurst, *Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge: 2011, p. 443.

relation between the imposed obligation to end all the proceedings before a certain date and the necessity of a careful selection of cases leading to a growing "impunity gap". The same needs appeared before the ICTR where more than 100.000 suspects were held in Rwandan prisons.[56] However, prosecutors of the ad hoc tribunals have been frequently criticized for surrendering the selection of the defendants to their personal policy and unclear criteria.[57] On many occasions, it has been observed that indictments were not equally issued amongst the most responsible persons. On the other hand, we can encounter opinions, according to which the practice of the ad hoc tribunals has demonstrated that "the efficiency of the international Prosecutor – his capacity to investigate and prosecute in order to fulfill his mandate with limited resources and time – resides in the discretionary exercise of his powers"[58], or that "discretion is essential to the operation of any system of criminal justice for, without it, the system would grind to a halt – it would be paralyzed and would lack any flexibility or ability to adapt to particular circumstances."[59]

4. ICC – BETWEEN THE PRINCIPLE OF OPPORTUNISM AND LEGALISM

4.1. Powers to initiate an investigation

While designing the powers of the ICC Prosecutor during the negotiations stage his independent power to start an investigation became one of the most disputed and controversial problems.[60] Many states supported a solution where the Prosecutor could start an investigation only on demand of one of the State Parties to the Statute or the Security Council. Prosecutorial discretion has been seen as a danger in the ICC system. In particular, during negotiations many states strongly opposed granting the Prosecutor the power to initiate investigations *proprio motu*. The United States delegation in-

[56] de Vlaming, *supra* note 13, p. 570. *See also* G.-J. Knoops, *Theory and Practice of International and Internationalized Criminal Proceedings*, Kluwer Law International, The Hague/London/Boston: 2005, p. 116.

[57] *See* de Vlaming, *supra* note 13, p. 570 and the detailed analysis of all subsequent prosecutors of the *ad hoc* tribunals.

[58] *See* Coté, *supra* note 14, p. 165.

[59] Jallow, *supra* note 37, p. 145.

[60] Knoops, *supra* note 56, p. 112; W. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, Oxford University Press, Oxford: 2010, p. 317; M. Bergsmo, J. Pejić, Article 15, [in:] O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article*, 2nd ed., Hart Publishing and Verlag C.H. Beck, München/Oxford: 2008, p. 582; M. Płachta, *Międzynarodowy Trybunał Karny* (The International Criminal Court), Zakamycze, Kraków: 2004, pp. 283-86; R. Goldstone, N. Fritz, *In the interest of justice and the independent referral: The ICC prosecutor unprecedented power*, 13 Leiden Journal of International Law 655 (2000), p. 657; E. La Haye, *The Jurisdiction of the International Criminal Court: Controversies over the preconditions for exercising its jurisdiction*, 46(1) Netherlands International Law Review 1 (1999), p. 15; Brubacher, *supra* note 14, p. 73; Greenawalt, *supra* note 37, p. 585; Coté, *supra* note 14, p. 404.

dicated that his discretion to start an investigation will not allow him to proceed in an unbiased way, engaging his attention on political questions and problems and making him a political player. The delegation expressed the anxiety against "frivolous" or even "malicious" accusations made by the "unpredictable" prosecutor.[61] The final adoption of the *proprio motu* Prosecutor's powers to initiate an investigation supposedly became the main reason of the US refusal to ratify the Statute. However, both supporters and opponents of this solution agreed as to one thing: this power was to have a key significance for the powers of the ICC. It was to become a test of its independence.[62]

Finally the version promoted by the European states prevailed and on the basis of Art. 15(1) of the Rome Statute: "[t]he Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court." Art. 15(3) explains when and how an investigation may be initiated: "[i]f the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected."

He is the sole organ of the Court which decides who will be prosecuted and who will not be. It leads to the power of the Prosecutor to decide about the factual scope of jurisdiction of the ICC. This power was however surrendered to the control of the Pre-Trial Chamber, which – in order for the case to go to the investigation stage of the proceedings – must authorize initiation of an investigation. Upon examination of the request of the Prosecutor to start an investigation and the supporting material, the Pre-Trial Chamber considers whether there is a reasonable basis to proceed with an investigation, and only when the case appears to fall within the jurisdiction of the Court, it authorizes the commencement of the investigation. The wording of the Statute stresses that the Prosecutor has only the power to "initiate" investigations and not to "start" them. It is only the decision of the Pre-Trial Chamber that may become a basis to the "commencement" of the investigation.[63]

Moreover, the judicial control on this stage of the proceedings extends on cases where the Prosecutor refused to initiate or proceed with the investigation. The Pre-Trial Chamber may choose to force the Prosecutor to proceed with investigation in

[61] M. Płachta, *Prokurator Międzynarodowego Trybunału Karnego: między legalizmem a oportunizmem ścigania* (The Prosecutor of the International Criminal Court: Between legality and opportunity of prosecution), [in:] J. Menkes (ed.), *Prawo międzynarodowe. Księga pamiątkowa Profesor Renaty Szafarz* (International law. The book for the jubilee of Professor Renata Szafarz), WSHiP, Warszawa: 2007, pp. 479-80.

[62] Coté, *supra* note 14, p. 353; M. Bergsmo, F. Harhoff, Article 42, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (2nd ed.), Hart Publishing and Verlag C.H. Beck, München/Oxford: 2008, p. 972; P. Milik, *Komplementarność jurysdykcji Międzynarodowego Trybunału Karnego i trybunałów hybrydowych* (Complementarity of the International Criminal Court and hybrid tribunals), Dom Wydawniczy Elipsa, Warszawa: 2012, p. 105.

[63] This decision is not subject to appeal: J. Izydorczyk, P. Wiliński, *Pozycja i zakres uprawnień Prokuratora Międzynarodowego Trybunału Karnego* (The position and the scope of powers of the Prosecutor of the International Criminal Court), 6 Prokuratura i Prawo 35 (2005), p. 38; Bergsmo, Harhoff, *supra* note 62, pp. 585, 590.

two situations described in Art. 53(3) of the ICC Statute. Depending on what subject initiates the control, the powers of the Pre-Trial Chamber may look differently. The first possibility to review the decision of the Prosecutor appears when the State making a referral or the Security Council makes such a request. In this situation the Pre-Trial Chamber may review a decision of the Prosecutor not to proceed and may request the Prosecutor to reconsider that decision. The second option of review triggers the Pre-Trial Chamber on its own initiative, which may review a decision of the Prosecutor not to proceed if it is based solely on the Prosecutor's assessment that a prosecution is not in the interests of justice. In such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber.

4.2. The decision to prosecute

The conditions on which the Prosecutor may initiate an investigation are set in Art. 53(1) of the Statute. It states that:

> The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:
> a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
> b) The case is or would be admissible under article 17; and
> c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his determination is based solely on subparagraph (c), he shall inform the Pre-Trial Chamber, which may then review a decision of the Prosecutor not to proceed and may request the Prosecutor to reconsider that decision.

At this point three problems are relevant. First, the decision to prosecute a case consists of these two decisions: first whether to investigate a situation and then, whether to prosecute a particular case. The differentiation between a situation and a case seems to resemble continental structure of an investigation which is divided into two phases: *in rem* and *in personam*. There is no doubt that the selection of a defendant separates two stages of investigation. After the stage of conducing the proceedings *in rem* (investigation into a case), the proceedings is transferred to the *in personam* (investigation against a certain person) stage. Whereas during the first stage the prosecutor (also the ICC Prosecutor) analyses the whole factual situation and allegation as to the crime, the second stage refers to a specific person and specific charges, which are presented in the charging document. While a "situation", which justifies the initiation of the proceedings before the Court, includes a whole range of behaviours restricted to time, venue and potential perpetrators, a "case" refers to the specific event constituting one of the crimes falling within the Court's jurisdiction. The notion of a "case" "is used herein to denote

one or more defendants and one or more charges stemming from one or more related incidents".[64] The Registrar even keeps a separate record for each "situation" and each "case". When a "case" is commenced, its record is completed with copies of the relevant documents from the "situation" record.[65] From the point of view of prosecutorial discretion, we can say that this discretion comes into play in two stages of initiating an investigation: the first stage being the selection of a situation for investigation; the second, selecting a case and a defendant for prosecution.

Second, in relation to the decision to prosecute the key question is when the specific defendant is selected – that is – when precisely a case is selected within a situation. There is no specific provision in the Statute that would suggest when cases are separated from a situation. It seems that the prosecution is directed against a certain person in the moment of issuance of the arrest warrant (or a summons to appear). It is the first moment in which the defendant is mentioned. Decision to prosecute is therefore taken in the moment of issuing an arrest warrant (or summoning the person to appear). This statement may – however – lead to another question: whether the decision to prosecute is taken when the ICC Prosecutor drafts such a warrant , when he applies to the Pre-Trial Chamber to issue it, or when the Pre-Trial Chamber, on the application of the Prosecutor, issues a warrant of arrest of a person according to Art. 58 of the Statute. It is also important to define the precise moment of directing the prosecution against a certain person as of this moment onward all the procedural guarantees apply to the suspect. Two reasons should speak for the second conception. First, we could not adopt the third solution, as we are looking for the precise moment when the Prosecutor takes the decision to prosecute; confirmation of this decision (which manifests itself in the issuance of the warrant) by the Pre-Trial Chamber cannot be equaled to the decision to prosecute, as it has no powers to take such a decision – only to confirm it. Moreover, it has been stated by the ICC that the "use of the word 'shall' indicates that the Pre-Trial Chamber is under an obligation to issue a warrant of arrest, provided that the prerequisites of article 58(1) of the Statute are met."[66] Second, we cannot acquiesce to the first solution, as up until this moment the draft warrant can be changed by the Prosecutor: it is only the lodging of this document to the Chamber that makes it final.

This approach finds confirmation in the first opinions expressed on the matter of the decision to prosecute. G. Turone stated that the application of the Prosecutor to issue the warrant of arrest

> is the very document through which the Prosecutor manifests his/her decision to prosecute, and since it shall contain the name of the person, a specific reference to the alleged crime committed, a concise statement of the facts and a summary of the evidence, it may be regarded as a document substantially equivalent to the indictment prepared by the

[64] deGuzman, Schabas, *supra* note 17, p. 132.

[65] *See* H. Olásolo, *Essays on International Criminal Justice*, Hart Publishing, Oxford/Portland: 2012, p. 26.

[66] *Situation in the Democratic Republic of the Congo*, ICC-01/04, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled "Decision in the Prosecutor's Application for Warrants of Arrest, Article 58", 13 July 2006, para. 44.

> Prosecutor of the ad hoc Tribunals (...). In other words, the application under Article 58(2) constitutes a sort of provisional indictment, and the issuance by the Chamber of the warrant or summons somehow constitutes the equivalent of provisional confirmation of an indictment.[67]

According to this view this provisional indictment becomes formal when the Prosecutor presents the charges to the Pre-Trial Chamber for the confirmation procedure. This indictment, in turn, becomes valid and complete when the Chamber confirms the charges. Similarly, also later, W. Schabas observed, that Art. 58 "is really about the 'indictment'. But this term, which was 'strange to many delegations' is replaced in the Rome Statute by 'arrest warrant' and 'summons to appear'. These terms describe the accusatory instruments by which an individual 'suspect' becomes jeopardized by formal prosecution proceedings."[68] Also, the history of drafting of this provision leads to the conclusion that Art. 58 constitutes the basis for selection of the defendant. According to the 1993 draft of the International Law Commission on the ICC, Art. 31 treated upon the commencement of prosecution. It stated that "Upon a determination that there is a sufficient basis to proceed, the Prosecutor shall prepare an indictment containing a statement giving particulars of the facts and indicating the crime or crimes with which the accused is charged under the Statute." Then, even prior to a formal indictment by the Court, a person may be arrested or detained if the Court determines that such arrest or detention is necessary because there is "sufficient ground to believe that such person might have committed a crime within the jurisdiction of the Court; and, unless so arrested the person's presence at trial cannot be assured."[69] On the other hand, it cannot be forgotten that this provision may be applied not only to the "pre-indictment" arrests, but also to "post-indictment" arrests.[70]

In the Polish criminal procedure, the moment of pointing to the selected defendant who will be held responsible for the examined criminal behavior takes place when the charging document is presented to the suspected person (or such a document is made public in case when the suspected person cannot be found). In the German criminal trial, however, there is no need to present such a document and a defendant is selected only when the investigating authorities manifest their suspicion against a certain person by taking up a certain activity against such a person (being the consequence of such

[67] G. Turone, *Powers and Duties of the Prosecutor*, [in:] A. Cassese, P. Gaeta, W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Oxford University Press, Oxford: 2002, p. 1178.

[68] Schabas, *supra* note 60, p. 704 citing F. Guariglia, *Investigation and Prosecution*, [in:] R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute*, Kluwer Law International, The Hague/Boston: 1999, p. 235.

[69] *Report of the Commission to the General Assembly on the work of its forty-fifth session, Annex: Report of the Working Group on a Draft Statute for an International Criminal Court*, Yearbook of the International Law Commission 1993, Volume II, Part Two, p. 114.

[70] Which was noticed by: C. K. Hall, *Article 58*, [in:] O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 2nd ed., Hart Publishing and Verlag C.H. Beck, München/Oxford: 2008, p. 1137.

a suspicion), e.g., issuing an arrest warrant. Such an activity decides about treating such a person from this moment onward as a factual suspect – if it constitutes an externalization of this suspicion. This method gives rise to the theory of the substantially (not formally) suspected person or – in other words – to a substantive (material) definition of a suspect.[71] It means that there is no need for a formal decision to consider a person to become a suspect: it is enough to direct against this person factual actions. We can see that this concept, after necessary adjustments, was adopted by the ICC. It can be claimed that this solution is more favorable to the suspect as it does not leave any space for the investigative authorities to start activities directed against a certain person "informally" – even before treating this person as a formal suspect enjoying certain rights (and among them the right to information about the charges) during an investigation.

The second important question regarding the moment of selecting a defendant is whether the parameters from Art. 53(1) of the Statute should be applied at this stage of proceedings. Art. 58 of the Statute states that the Prosecutor applies for an issuance of the warrant of arrest only if he is satisfied (*per analogiam* to the threshold that needs to be established by the Pre-Trial Chamber in order to issue the warrant) that "there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court" (what in the continental doctrine is known as the "general parameter") and "The arrest of the person appears necessary: (i) To ensure the person's appearance at trial; (ii) To ensure that the person does not obstruct or endanger the investigation or the court proceedings; or (iii) Where applicable, to prevent the person from continuing with the commission of that crime or a related crime which is within the jurisdiction of the Court and which arises out of the same circumstances" (the "specific parameter"). The first solution would be to consider that these parameters that should be fulfilled are of an evidentiary nature and that this is an evidentiary threshold as the "reasonable grounds" parameter has already been checked by the Prosecutor while initiating an investigation. However, it seems more appropriate to consider that the Prosecutor should for the second time demonstrate that there are "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court." This conviction results from the word "reasonable grounds to believe", that should be comparable to the threshold from Art. 53(1) of the Statute. There is, however, one important difference – this test should be fulfilled towards the certain defendant. We cannot also forget that – as applied at a different stage of the proceedings – this notion should be differentiated from the standard from Art. 53(1)

[71] This theory presented by: S. Steinborn, *Status osoby podejrzanej w procesie karnym z perspektywy Konstytucji RP (uwagi de lege lata i de lege ferenda)* (The status of the suspected person in criminal trial from the perspective of the Constitution of the Republic of Poland), [in:] P. Kardas, T. Sroka, W. Wróbel (eds.), *Państwo prawa i prawo karne. Księga jubileuszowa Profesora Andrzeja Zolla* (The book for the jubilee of Professor Andrzej Zoll), vol. 2, Warszawa: 2012, pp. 1781-1801, *see also* A. Murzynowski, *Faktycznie podejrzany w postępowaniu przygotowawczym* (The factual suspect in an investigation), 10 Palestra 36 (1971), pp. 37-39.

of the Statute. The interpretation of each of them "depends on the different stages of the proceedings."[72] This concept is supported by the analysis of the Pre-Trial Chamber jurisprudence regarding the admissibility of issuance of a warrant of arrest. In each case it analyses whether all the conditions from Arts. 17 (especially the parameter of "gravity of the case") and 53(1) are fulfilled – in case of the certain person selected by the Prosecutor. In consequence, the decision of the Pre-Trial Chamber whether to issue the warrant of arrest (or a summons to appear) is the moment when the admissibility of the case against a certain person is decided.[73]

Third, legal criteria for the selection process are provided in Art. 53(1) should be differentiated from factual parameters from (2). The criteria from Art. 53(1) should be applied in the process of selection of a situation. A positive decision of the Prosecutor that these criteria are fulfilled allow the Prosecutor to follow from the pre-investigation stage to the stage of investigation. Criteria constituted in Art. 53(2) are applied at the later stage, when the Prosecutor decides whether there is a sufficient basis for a lodging an indictment (here known as charges). This parameter is assessed by the Prosecutor upon completion of the investigation. According to Art. 53(2) of the Statute,

> 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 interests 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 – he should inform the Pre-Trial Chamber and the State making a referral or the Security Council, of his or her conclusion and the reasons for the conclusion.

This paragraph is known as the "factual parameter" as it applies to the evaluation of the evidence gathered during the investigation. On the basis of such evidence, the Prosecutor examines whether he is going to be able to prove that the accused has committed the alleged crime and that all criteria of the crime have been met and that the accused assumed a particular role. The Prosecutor refuses to proceed with a case if he decides that there is no sufficient basis for prosecution due to the lack of sufficient – legal or factual – basis for formulating charges. Using this provision as a basis, the Prosecutor

[72] *The Prosecutor v. Bemba*, ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, 15 June 2009, para. 27.

[73] As can be concluded from the wording of Situation in the Democratic Republic of the Congo, ICC-01/04, Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled "Decision in the Prosecutor's Application for Warrants of Arrest, Article 58", 13 July 2006, para. 4. Of course, such a person may challenge the admissibility of the case at any stage of the subsequent proceedings.

may, therefore, refuse to proceed in the event of lack of evidence.[74] This can happen before or after selecting a defendant – both in a situation where the Prosecutor has failed to find the perpetrators of crimes or proof of the perpetrator's guilt.

4.2. Discretion to initiate an investigation and the principle of opportunism

Based on the same wording of the provisions of Arts. 15 and 53(1) of the Statute, both arguments supporting the principle of opportunism and the principle of legalism have been presented. It is interesting to observe that in most cases the attitude towards this issue depends on the model of accusation functioning in the country the author belongs to: these coming from the Anglo-Saxon tradition have tendency to search for the elements of the principle of opportunism; those from civil law states assume that the model of accusation operates according to the principle of legalism.

According to some authors, the elements mentioned in Art. 53(1) are of an opportunist nature. The term "interests of justice" is generally used to "acknowledge the need for discretion and the inability of legal texts to codify answers for difficult issues."[75] According to this theory, "the structure of prosecutorial authority set forth in the Rome Statute closely resembles that typical of traditional common law systems, in which prosecutors, subject to varying degrees of judicial supervision, enjoy the primary authority to select and pursue criminal cases."[76] Therefore, the Prosecutor is at liberty to evaluate both "reasonable basis to proceed", "gravity of the crime" and the lack of "interests of justice" parameters.[77] The evaluation of these three parameters belongs solely to the Prosecutor. He enjoys the full independence to select both situations and cases (that is defendants) which to investigate on the basis of these conditions. He independently assesses whether the conditions justifying initiation of an investigations have been fulfilled. This power is related to as "prosecutorial discretion" or even "absolute discretion".[78] With this notion all the decisions during investigation are described: both decision to initiate an investigation, decision whom to prosecute and decision for what crimes.

However, even if we accept application of the principle of opportunism, it should be remembered that the discretion of the Prosecutor is limited by the control powers of Pre-Trial Chamber. The Chamber enjoys two powers: to authorize the initiation of an investigation (Art. 15) and to confirm charges before trial (Art. 61). Therefore sometimes a notion of a "controlled opportunism" is being used.[79] The discretion of the

[74] *See* Schabas, *supra* note 60, p. 666; M. Bergsmo, P. Kruger, *Article 54*, [in:] Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd ed.), Hart Publishing and Verlag C.H. Beck, München/Oxford: 2008, p. 1073.

[75] Schabas, *supra* note 60, p. 663. *Similarly*, Płachta, *supra* note 61, p. 492.

[76] Greenawalt, *supra* note 37, p. 599.

[77] P. Vasiliev, *Trial*, [in:] L. Reydams, J. Wouters, C. Ryngaert (eds.), *International Prosecutors*, Oxford University Press, Oxford: 2012, p. 702; Ohlin, *supra* note 14, p. 187; H. Olásolo, *The Triggering Procedure of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden/Boston: 2003, p. 136.

[78] *See* Vasiliev, *supra* note 77, p. 702; Ohlin, *supra* note 14, p. 187; Greenawalt, *supra* note 37, p. 583. *See also*, Kuczyńska, *supra* note 6, p. 69.

[79] Płachta, *supra* note 61, p. 494.

Prosecutor may therefore be understood only as a power to investigate a case and not as a power to formally start an investigation (only to "initiate" it).

4.3. Obligation to act and the principle of legalism

According to the theory supporting the principle of legalism it is clear that the Prosecutor shall, having evaluated the information made available to him, initiate an investigation unless he determines that there is no reasonable basis to proceed. The representatives of this theory claim that "one cannot help an impression that it is drafted in mandatory terms",[80] as the notion "shall initiate" in connection with the exception of "the interests of justice" is typically used when it induces the operation of the principle of legalism. Therefore, on the first view it does not leave any space for prosecutorial discretion. According to this theory, Art. 53(1) suggests that when the conditions set out in this provision are met, the Prosecutor is obliged to initiate proceedings. If he disposes of evidentiary material in support of the fact of committing one of the crimes under the Court's jurisdiction, he should initiate an investigation if the case is admissible and it is not against the interests of justice.[81] A duty to investigate occurs only when the three criteria introduced by Art. 53(1) of the Statute occur: there is sufficient evidence that a grave crime within the jurisdiction of the Court occurred, the case would be admissible and when it is not against the interest of justice.

This conclusion is supported by the language used in the Preamble which "[a]ffirm[s] that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, [and d]etermine[s] to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes." From the language of the Preamble the supporters of this theory conclude that there is no possibility not to investigate when such crimes take place.[82] Therefore, the second argument – as in the case of the ICTY – is connected to the seriousness of crimes the ICC deals with. The Preamble seems to assume that the investigation of all the crimes it mentions is obligatory. The principle of legalism would be in compliance with the obligation to treat all the crimes in the same way and therefore with the principle of equality. Moreover, it would send a clear signal to all the states that all the situations and cases in jurisdiction of the ICC will be treated in the same way – independently of the personal opinions of the present Prosecutor of the ICC.[83]

Even if we assume the application of the principle of legalism, it should be evaluated in the light of the complementarity principle.[84] As the ICC does not possess factual

[80] I. Stegmiller, *The Pre-Investigation Stage of the ICC: Criteria for Situation Selection*, Duncker & Humblot, Berlin: 2011, p. 251.

[81] *See* Bergsmo, Pejić, *supra* note 60, p. 589; I. Stegmiller, *The Pre-Investigation Stage of the ICTY and ICC Compared*, [in:] T. Kruessmann (ed.), *ICTY: Towards a Fair Trial?*, Wien: 2008, p. 330.

[82] Stegmiller, *supra* note 80, p. 251; Bergsmo, Pejić, *supra* note 60, p. 586.

[83] *See also* Kuczyńska, *supra* note 6, p. 70.

[84] D. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale Law Journal 2537 (1991), p. 2598; *see also* Turone, *supra* note 67, p. 1154.

means to ensure the legal standards consistent with the principle of legalism, this principle has to undergo a certain adaptation to the task of the ICC. It will only find application in cases when the jurisdiction of the ICC would come into force in cases of the unwillingness of a state or inability to investigate the crimes in jurisdiction of the Court. This attitude highlights the primary responsibility of the states to punish the perpetrators of crimes of international law.

4.4. "Concurrent validity" of both principles and mixed solutions

Moreover, a number of mixed theories have been presented. Their representatives usually agree that "it cannot be argued that that a strict principle of legalism was adopted given the selective prosecution strategy of the ICTY and ICTR and, moreover, the ICC's statutory implementation of discretion through the 'interests of justice' clause in article 53(1)(c) and 53(2)(c)." On the basis of this conclusion, they assume that the solution adopted in Art. 53(1) of the Rome Statute "appears to be a compromise between the choice of strict legalism and prosecutorial discretion", in consequence it expresses "a sort of hybridization between various national traditions."[85]

It is said that the most useful application of the models is to operate elements from both principles into one system.[86] Systems based purely on the principle of legalism are expensive, and cause long delays in the court system, which in the end may lead to jeopardizing the overall aim of protection of rights and interests of the accused. On the other hand, application of the principle of opportunism in the pure form is often criticized. Systems based on the principle of opportunism offer to a prosecutor too much freedom to choose cases to prosecute, which is not subordinated to any kind of judicial control. Whereas, a mixed form is a result of the search for the right balance between the necessity to prevent impunity and effectiveness of criminal reaction, as well as providing the right guarantees of the accused's and victims' rights. As a matter of fact – most systems are mixed nowadays, with the characteristic combinations of various elements of these two principles being determined by practical necessity, constitutional rules, historical and sociological background or political demands.[87]

The most frequently supported attitude divides conditions from Art. 53(1) to non-discretionary parameters and discretionary parameters. G. Turone states that the decision based on the first parameter – reasonable basis – is non-discretionary "since such decision is anyway supposed to depend upon a rational and objective assessment of the *notitia criminis*, i.e. of the original information provided, plus the additional information collected through preliminary examination."[88] Also, the scope of jurisdiction cannot be freely assessed. However, the conditions from Art. 53(1)(c) can be discretionally evaluated by the Prosecutor. Both the "gravity" of the crime and "lack of interests of

[85] *See* M. Delmas-Marty, *Criminal Law in the Preliminary Phase of Trial at the ICC*, 4(2) Journal of International Criminal Justice 2 (2006), p. 9.

[86] *Similarly*, Fionda, *supra* note 3, p. 10.

[87] Cited after *ibidem*, p. 9.

[88] *E.g.* Turone, *supra* note 67, p. 1152.

justice" do not undergo easy limitations. The first of the discretionary parameters means that crimes of a "non-sufficient gravity" should be dealt with by national jurisdictions. As to the second discretionary parameter – it must be remembered that the evaluation of this condition is controlled by the Pre-Trial Chamber. Therefore it should be not viewed as to "open the door" for the Prosecutor to escape investigation by invoking arbitrary grounds under this provision – at least in theory. The same attitude is presented by M. Bergsmo, who states that the Prosecutor "is not at liberty to exercise discretion in applying to the Chamber to proceed when he or she considers that there is a sufficient basis. Art. 53, on the other hand, provides a further opening for prosecutorial discretion in this regard, by incorporating a consideration of interests of justice in the Prosecutor's final determination of whether to actually proceed with an investigation following authorization by the Pre-Trial Chamber."[89]

I. Stegmiller describes this system as "based on the legality maxim, tempered by substantial opportunity elements."[90] According to him, after introducing a general obligation to initiate an investigation by the use of the "shall" expression the provision introduces an exemption thereto "unless there is no reasonable basis". These "opportunity elements" are supposed to be the three criteria standing at the base of discretionary powers of the Prosecutor: reasonable basis to proceed, interests of justice and gravity of crimes. On the basis of this interpretation, I. Stegmiller concludes that "a general duty to start formal investigations is imposed upon the Prosecutor, but with the adjunct that a differentiated procedural system derogates this general obligation."[91] Furthermore he states that "the Prosecutor shall not proceed if he sees no reasonable basis in favor of investigations, and in order to reach a determination on the reasonable basis he 'shall consider' the criteria of article 53(1)(a) to (c)."[92] He calls it "the backdoor" and states that thanks to its use the principle of legalism is softened. As it can be seen from the other side – he is under an obligation to initiate an investigation if there is a reasonable basis to proceed.

It seems that the main difference between opportunism and legalism depends on a decision whether the assessment of the parameter "reasonable basis to proceed" and its elements – existence of interests of justice and gravity of the crime – lead to a mandatory reaction or whether the reaction is of a discretionary character. It seems that, notwithstanding the meaning of these notions, the main difference between opportunism and legalism lies in the assessment whether existence of a reasonable basis to proceed (or lack thereof) should be assessed subjectively (by the Prosecutor) or according to an objective test. While the first interpretation is characteristic for the common law tradition, the second is used by continental states. The latter interpretation assumes that in starting an investigation the prosecutor must take into consideration an objective evaluation of a situation, and act according to this idealistic assessment, rejecting at the same time the possibility to apply his personal judgment. This complicated method is

[89] Bergsmo, Pejić, *supra* note 60, pp. 589 and 1068.
[90] Stegmiller, *supra* note 80, p. 262.
[91] *Ibidem*, p. 250.
[92] *Ibidem*.

referred to as the "relative obligation" (as nonsensical as it may seem). It means that the initiation of an investigation is mandatory if the prosecutor comes to a conclusion that, objectively, there is a reasonable basis to proceed. At the same time, the common law tradition leaves the evaluation of existence of a reasonable basis to the discretion of the prosecutor, not subjecting him (as a rule) to an objective assessment of the tests provided for by the legal act. Based on this view we can observe that the same wording of a legal provision leads to completely different interpretations in two legal traditions. The whole cultural and legal heritage of a given state seems to weight upon this interpretation and the meaning given to a certain phrase.

5. THE SELECTION OF DEFENDANTS IN PRACTICE OF THE ICC

5.1. Selective prosecution

Taking into consideration two conditions influencing actions of the ICC Prosecutor – the almost unlimited scope of jurisdiction and limited (both personally and financially) means to execute it – it seems obvious that it is not possible to prosecute all the perpetrators of the crimes under the ICC's jurisdiction, even in a situation when the Prosecutor could consider the initiation of an investigation to be reasonable.[93] The scope of jurisdiction itself constitutes a strong argument for opportunism: it is too wide to assume that it is possible to apply the principle of legalism. The number of communications coming to the OTP causes that the Prosecutor is not practically capable of bringing to justice every person suspected of having committed a crime within the jurisdiction of the ICC. The scale of the problem is best shown by the numbers: between 1 November 2013 and 31 October 2014, the Office received 579 communications relating to Art. 15 of the Rome Statute (of which 462 were manifestly outside the Court's jurisdiction; 44 warranted further analysis; 49 were linked to a situation already under analysis; and 24 were linked to an investigation or prosecution). The Office has received a total of 10,797 communications since July 2002.[94] Crimes investigated by the Prosecutor of the ICC entail large numbers of perpetrators, sometimes even thousands of them, and it is virtually impossible to bring them all to face the ICC. The workload would lead to a total paralysis of the Court. Even in a situation when the Prosecutor acquires evidence in support of the information about committing a crime within the ICC's jurisdiction, he will always face the necessity to select the alleged perpetrators he indicts – on the basis of the criteria named in Art. 53(1): gravity of crimes, interests of justice, and reasonableness of initiating an investigation. In consequence, the general relations of crimes investigated (9 situations under investigation – Democratic Republic of the Congo, Uganda, Central African Republic, Darfur, Sudan, Kenya, Libya, Cote d'Ivoire, Mali, Central African

[93] *See also* Kuczyńska, *supra* note 6, pp. 72-73.

[94] *Report on Preliminary Examination Activities 2014*, paras. 17-18, available at: http://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf (accessed 30 March 2015).

Republic II – which include 21 cases, and 8 preliminary examinations) to crimes communicated must diverge to the detriment in comparison to state systems.

But most importantly, the limited resources provided by the Assembly of State Parties practically narrow down the number of simultaneous investigations.[95] So practically, these are the State Parties that define the number of cases and perpetrators that can be brought before the ICC. It is therefore often bitterly observed that "States created the ICC to adjudicate 'the most serious crimes of concern to the international community as a whole', but they gave it a budget that enables only a handful of prosecutions per year."[96] Such is the impact of financial possibilities of the Office that quite commonly we can encounter opinions indicating that the Prosecutor should have regard to available financial resources and treat this factor as one of the conditions evaluated in the process of the selection of cases.[97] As the Prosecutor is solely responsible for deciding how many cases will be brought before the ICC, in order to make this decision he has to compare the available finances with cost of a single case (and the number of potential defendants) and come up with a result being the number of cases that can be dealt with simultaneously (at the present moment that being 21 investigated cases, in the scope of 9 situations under investigation).

The prosecutorial discretion cannot be analysed in separation from the objectives and the reality of the international criminal tribunal, which are in their substance different from those of the state systems and do not allow easy comparisons. On what principle should the prosecution be based in such a reality then? Legalism rejects discretionary selection of defendants, as all perpetrators should be treated alike. This assumption clearly contradicts the reality of every international criminal tribunal. It seems that tempered legalism also does not allow for introducing any new criteria for selecting defendants, accepting that the parameters from Art. 53(1) should be applied equally in every case, based on an objective test. So, even legalism adapted by the use of complementarity principle does not solve the problem of multiplicity of perpetrators. In the reality of the ICC, the Prosecutor must set priorities. He "needs to balance interests and to prioritize the overall limited resources of time and personnel."[98] It is necessary to limit the number of persons accused by the Prosecutor – and as a result those judged by the Court – to an absolute minimum.[99] It cannot be done without

[95] W. W. White-Burke, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 Harvard International Law Journal 53 (2008), pp. 53-54.

[96] deGuzman, *supra* note 49, p. 267.

[97] Ntanda Nsereko, *supra* note 42, p. 125, A. M. Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 American Journal of International Law 510 (2003), p. 545.

[98] V. Röben, *The Procedure of the ICC: Status and Function of the Prosecutor*, 7 Max Planck Yearbook of United Nations Law 520 (2003), p. 524.

[99] Greenawalt, *supra* note 37, p. 620; Ambos, Bock, *supra* note 14, p. 541; Wu Wei, *Die Rolle des Anklägers eines internationalen Strafgerichtshofs*, Frankfurt am Main: 2007, p. 174. The so-called "screening and gatekeeping competence" as [in:] P. Bibas, W. W. Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 Duke Law Journal 637 (2009-10), p. 681.

the selection of defendants. As A. Cassese puts it "even from a merely theoretical point of view it would be absurd to assume that every single international crime and every single offender could be investigated and prosecuted by an international court."[100] Only within the principle of opportunism is it possible to accept that the Prosecutor may select defendants among the large number of alleged perpetrators. Only the principle of opportunism allows the Prosecutor to investigate only the most serious cases in which circumstances suggest – such as a high position in the hierarchy of the alleged perpetrator or the significance of the legal issues – that an international judicial organ should deal with them.

5.2. Basis for application of selective prosecution

It was during the first investigations that it turned out that the framework as set in the Rome Statute was not a sufficient basis for the selection of cases. As we have seen, a copious amount of literature was published on the topic of prosecutorial discretion of the ICC Prosecutor. Among various concepts as to the legal nature and sources of this discretion there were three aspects that all the publications had in common: firstly, they concluded that the present legal basis for the selection of cases is insufficient and secondly, they criticized the present politics of the Prosecutor, admitting that the choice of cases is directed by unclear goals and criteria. The third element that was in common was the conclusion that there is a need to introduce clear and coherent rules on which discretion in choosing defendants is based.

In the present moment, the selection of cases and defendants done by the Prosecutor is modeled by three sources The Statute itself provides the list of factors in Art. 53(1). This Article provides that in order to determine whether there is a reasonable basis to proceed with an investigation into the situation, the Prosecutor shall consider: jurisdiction (temporal, either territorial or personal, and material); admissibility (complementarity and gravity); and the interests of justice.

Second, the OTP have used several methods in order to render the process of selection of situations and cases more transparent. It develops a more precise prosecutorial strategy in its policy papers.[101] In its 2003 Policy Paper, the Office admits that the selection of cases and defendants is indispensable. However, as it is highlighted by the Office, the selection of cases does not lead to selective responsibility. According to the Office, this "impunity gap" should be "patched" if national authorities co-operate with the Court to ensure that all appropriate means for bringing other perpetrators to justice are used. In the Office's opinion, other offenders, who will not be prosecuted by the OTP, can wait for the strengthening or rebuilding of national justice systems, whereas the most guilty ones should not wait.[102] The Policy Paper explains that prosecuting the most responsible

[100] Cassese, *supra* note 4, p. 472.

[101] The policy of the OTP derives from OTP Regulation 14(2), ICC-BD/05-01-09, 23 April 2009.

[102] *Paper on some policy issues before the Office of the Prosecutor*, September 2003, available at: http://www.icc-cpi.int/NO./rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf (accessed 30 March 2015), pp. 6–7.

perpetrators might encourage national authorities to deal with other cases. Also in its 2007 Policy Paper on the Interests of Justice, the OTP concluded that the Prosecutor's actions inevitably lead to the occurrence of the "impunity gap".[103] Again in this Paper, it was stressed that such a gap may be eliminated by designing comprehensive strategies to combat impunity, fully endorsing the complementary role that can be played by domestic prosecutions, truth seeking, reparations programs, institutional reform and traditional justice mechanisms in the pursuit of a broader justice.

It appears that this Paper creates an impression that the Prosecutor does not "select" situations, but rather is obliged to prosecute all situations that meet the criteria for jurisdiction and admissibility before the Court.[104] It seems that, in the two above mentioned papers, the OTP makes a promise that in the end all the perpetrators of the crimes in the jurisdiction of the ICC will be brought to justice – in national courts. However, it appears to be a promise made on behalf of the national authorities, over which the ICC has no power.

It is only in the 2009-12 Prosecutorial strategy that we can find a straight-forward statement that the OTP prosecutes in a selective way. Namely, it adopted "a policy of focused investigations and prosecutions". According to the OTP, "a policy of focused investigations" means that "cases inside a situation are selected according to gravity, taking into account factors such as the scale, nature, manner of commission, and impact of the alleged crimes." A limited number of incidents are selected. This allows the Office to "carry out short investigations; to limit the number of persons put at risk by reason of their interaction with the Office; and to propose expeditious trials while aiming to represent the entire range of victimization." While the Office's mandate does not include production of comprehensive historical records for a given conflict, incidents are selected to provide a sample that is reflective of the gravest incidents and the main types of victimization.[105] Moreover, against those chosen on this basis, the Office brings only representative charges. Which person and what charges the Prosecutor will choose to make an example of remains to his own personal discretion.

The Office has also used the Code of Conduct for the Office of the Prosecutor as the source explaining the criteria behind the selection of situations and cases. However, these criteria are still rather vague: Rule 51(a) and (c) dictates only that the Prosecutor should make impartial judgments based on the evidence and consider foremost the interests of justice in determining whether or not to proceed and to refrain from prosecuting any person whom they believe to be innocent of the charges.

Finally, every year it publishes Reports on Preliminary Examination activities; the first one was issued on 13 December 2011. In every one of these reports, the Office of the Prosecutor not only describes and presents the actual state of preliminary analysis

[103] *Policy Paper on the Interest of Justice*, September 2007, available at: http://icc-cpi.int/NO./rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf, p. 7 (accessed 30 March 2015).

[104] Similar observations made by deGuzman, *supra* note 49, p. 287.

[105] Prosecutorial strategy 2009-12, para. 20.

or investigation and conclusions about this state, but also establishes the criteria which it will follow to decide whether or not to initiate an investigation.

Publication of these guidelines provides information about factors that are taken into consideration by the Prosecutor.[106] This method aims at ensuring transparency of decisions – so much expected from the OTP – and helps to demonstrate that the Prosecutor's choice to prosecute (or not) has been made on the basis of legal, not political, criteria. Possibly, they could help to accept the choices made by the Prosecutor.[107] However, considering the legal validity of these documents we cannot forget they are documents reflecting internal policy of the OTP. In the OTP Policy Paper on Preliminary Examinations November 2013, even the Office itself admits that "[a]s such, [the paper] does not give rise to legal rights, and is subject to revision based on experience and in light of legal determinations by the Chambers of the Court. The Office has made this policy paper public in the interest of promoting clarity and predictability regarding the manner in which it applies the legal criteria set out in the Statute".

The third source of information about the basis for selection can be found in the practice of the OTP. Both the decisions of the OTP in specific cases and the applicable jurisprudence of the ICC Chambers will be described later.

Even with the list of factors standing at the base of the discretionary powers of the Prosecutor, still very often we can encounter the conclusion that the normative framework for the selection process is insufficient.[108] It leaves open the risk of arbitrariness and leads to the question whether the Prosecutor's policymaking functions bear sufficient legal accountability.[109] As a matter of fact, the ICC Prosecutor is often criticized for applying a non-coherent policy of prosecuting, which depends on the specific state where he intervenes and the position of the suspect.[110] Selectivity of the Prosecutor's actions is even presented as "a threat to the ICC's legitimacy."[111] It has to be admitted that this selectivity has so far led to instituting prosecutions mainly against citizens of states that are weak actors in the international arena or that fail to enjoy the support of powerful nations.[112] In the doctrine, it is widely agreed that there is a need to intro-

[106] Danner, *supra* note 97, p. 511.

[107] J. Stigen, *The Relationship between the International Criminal Court and National Jurisdictions*, Martinus Nijhoff Publishers, Leiden-Boston: 2008, p. 413.

[108] Stegmiller, *supra* note 80, p. 240.

[109] Greenawalt, *supra* note 37, p. 651, *but cf.* Brubacher, *supra* note 14, p. 72.

[110] Brubacher, *supra* note 14, p. 76; E. Muller-Rappard, *International Cooperation in Prosecution and Punishment*, [in:] M. C. Bassiouni (ed.), *Post-Conflict Justice*, Transnational Publishers, New York: 2002, p. 918; J. Locke, *Indictments*, [in:] L. Reydams, J. Wouters, C. Ryngaert (eds.), *International Prosecutors*, Oxford University Press, Oxford: 2012, pp. 610-12.

[111] deGuzman, *supra* note 49, p. 271.

[112] M. Damaška, *What is the Point of International Criminal Justice?* 83 Chicago-Kent Law Review 329 (2008), p. 361. This attitude leads to a "growing perception" that "Africans have become the sacrificial lambs in the ICC's struggle for global legitimation", cited after C. Jalloh, *Regionalizing International Criminal Law?,* 9 International Criminal Law Review 445 (2009), pp. 462-65.

duce more precise guidelines for prosecution which would provide a framework within which decision-making takes place.[113]

For a long time in the legal doctrine, it has been proposed that certain fundamental principles should govern the selection process: independence, impartiality, and non-discrimination[114] or independence, impartiality, objectivity and transparency.[115] Many authors, among others W. Schabas, have proposed that when selecting perpetrators, the Prosecutor should bear in mind such criteria as the "social alarm" criterion, meaning the concerns that such conduct may have caused in the international community and 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. It means that he should weigh the risk that an investigation or prosecution may have on a political situation against the other interests that are likely to favour a prosecution, the broader impact of crimes on the community and on regional peace and security, including longer-term social, economic and environmental damage.[116]

There are also a number of other proposals. Some suggest introducing a special review procedure for the accused to allow him to challenge the decision of the Prosecutor on the grounds of allegation that political, and not legal considerations motivated this decision.[117] However, this solution simply shifts the decision-making from the Prosecutor to the judges.[118] We can also meet proposals to create a certain type of investigative chamber – e.g. equip the Pre-Trial Chamber with investigative powers.[119] It would not lead to creating a new organ, but should enable the existing organ to exercise control over pre-investigations. Another solution would be "outsourcing" the decision-making to an external actor. A. Greenawalt proposes that it could be the Security Council. Thus the political questions could remain with the political organs – "where they belong."[120] However, even he agrees that this solution should be rejected as it threatens the sole idea that stood behind the creation of an international criminal court; it threatens the independence not only of the Prosecutor but of the whole ICC.

There are also several supporters of a notion to introduce new legislation, which would provide the precise criteria for the selection of cases. A new Rule 104bis of the

[113] J. E. Hall Williams, *Introduction*, [in:] J. E. Hall Williams (ed.), *The Role of the Prosecutor: Report of the International Criminal Justice Seminar held at the London School of Economic and Political Science in January 1987*, Gower Publ., Avebury: 1988, p. 3.

[114] *See* F. Guariglia, *The selection of cases by the Office of the Prosecutor of the International Criminal Court*, [in:] C. Stahn, G. Sluiter (eds.), *The Emerging Practice of the International Criminal Court*, Martinus Nijhoff Publishers, Leiden/Boston: 2009, pp. 212–13.

[115] deGuzman, *supra* note 49, pp. 291 ff.

[116] *See* Brubacher, *supra* note 14, pp. 81-82; Schabas, *supra* note 14, p. 742.

[117] Knoops, *supra* note 56, p. 384.

[118] Greenawalt, *supra* note 37, p. 660.

[119] J. De Hemptinne, *The Creation of Investigating Chamber at the ICC: An option worth pursuing*?, 5 Journal of International Criminal Justice 402 (2007), p. 416; Stegmiller, *supra* note 80, p. 265.

[120] Greenawalt, *supra* note 37, p. 672.

RPE could mention a "short but exhaustive list of precise and binding criteria on gravity and interests of justice."[121] As the changes in the Rules are up to the State Parties, they should "act as legislators" and limit the scope of personal discretion of the Prosecutor, binding him with an obligation to prosecute, e.g., the military or political leaders and the highest state officials. However, this idea was rejected during negotiations on the Rome Statute. In the doctrine, it has been assumed then that the lack of any mention as to whether the Prosecutor should focus on a particular group of people (the most responsible; the highest state officials; most senior leaders) was purposeful.[122] The Prosecutor was not meant to concentrate only on a certain group of people, and was supposed to make his own choices. As a matter of fact, any efforts to concretize the notions of "interests of justice" and "gravity" would lead to limiting the scope of prosecutorial discretion. Moreover, in each case, each criterion – as much as these provided in Art. 53 – depends on the personal evaluation and subjective decision-making of the Prosecutor (and his Office). Even with guidelines written down and introduced, the criteria undergo a process of subjective evaluation by the Prosecutor. None of the rules limits the powers of the Prosecutor to evaluate the basis to initiate an investigation subjectively. There is a general consensus that they constitute "guidance" rather than a binding order.[123]

So far, the Prosecutor makes his own decision in every situation he decides to investigate. These decisions are awaited with impatience by the international community: "since the ICC is limited to prosecuting a handful of cases out of thousands of potential cases, each selection attracts substantial attention. Each decision expresses a statement about how the Court views its role in the world, with which relevant audiences may agree or disagree."[124] The reasons behind his choice are usually presented in the application for a warrant of arrest. These reasons, however, relate to the fact, that a particular defendant can be held responsible for the crimes under the ICC's jurisdiction. They do not present a clear opinion on the fact why this person, and not the other potential perpetrators, was chosen to be prosecuted.

5.3. The practice of the OTP: "the senior leaders" v. "the most responsible"

So far, the ICC Prosecutor has concentrated his actions on the most responsible perpetrators – as it was suggested from the beginning of the operation of the ICC, in the strategy presented by the OTP.[125] Both Art. 1 of the Rome Statute and the OTP papers refer to prosecuting "persons for the most serious crimes of international concern" and do not allow restricting prosecution only to the senior leaders. Therefore, pursuant to the 2003 Policy Paper, the concept of prosecuting "those who bear the greatest responsibility" was adopted as a basic rule: "the Office of the Prosecutor should focus

[121] Olásolo, *supra* note 77, p. 190, Stegmiller, *supra* note 84, p. 263.
[122] Stegmiller, *supra* note 80, p. 442.
[123] *See generally* Greenawalt, *supra* note 37, p. 630; Locke, *supra* note 110, p. 612.
[124] deGuzman, *supra* note 49, p. 269.
[125] *See* Greenawalt, *supra* note 37, p. 627; Schabas, *supra* note 14, pp. 745-46; Płachta, *supra* note 61, p. 487.

its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes." In some cases, the focus of an investigation by the Office of the Prosecutor may go beyond high-ranking officers.

We can see that there is no equation between the concept of "senior leaders" and "those most responsible".[126] Prosecuting senior leaders means prosecuting only the senior state officials, whereas prosecuting the most responsible leads to a conclusion that also mid-level perpetrators can be held responsible if an investigation of a certain type of crimes or those officers lower down the chain of command is necessary for the whole case. In this policy paper the OTP observed that there is a distinction between these two groups as the group of "those who bear the greatest responsibility" may include "the leaders of the State or organisation allegedly responsible for those crimes" but also other perpetrators.

However, this distinction not always seemed to be clear. In the beginning of its operation, the Pre-Trial Chamber's policy inclined towards prosecuting the most senior leaders. In the Situation in the Democratic Republic of the Congo, this Chamber recommended concentrating on "the highest ranking perpetrators" – as "only by concentrating on this type of individual can the deterrent effects of the Court be maximized."[127] In consequence, it refused to issue a warrant of arrest against Bosco Ntaganda, who was alleged to be the Deputy Chief of the Staff of operation of the FPLC in Congo, as requested by the Prosecutor.

However, the Appeals Chamber in the judgment on the Prosecutor's Appeal against the Decision of the Pre-Trial Chamber expressed a different view: that it is difficult to understand that the deterrent effect is higher if all other categories of perpetrators cannot be brought before the Court:

> It seems more logical to assume that the deterrent effect of the Court is highest if no category of perpetrators is per se excluded from potentially being brought before the Court. (…) The imposition of rigid standards primarily based on top seniority may result in neither retribution nor prevention being achieved. (…) The predictable exclusion of many perpetrators on the grounds proposed by the Pre-Trial Chamber could severely hamper the preventive, or deterrent, role of the Court which is a cornerstone of the creation of the International Criminal Court, by announcing that any perpetrators other than those at the very top are automatically excluded from the exercise of the jurisdiction of the Court.[128]

The Appeals Chamber considered the attitude expressed by the Pre-Trial Chamber to be not only detrimental to the operation of the Court, but also to conflict with the "contextual interpretation of the Statute". It observed that this interpretation does not allow for any limitation of perpetrators of the most serious crimes of international

[126] Stegmiller, *supra* note 80, p. 444.

[127] *Situation in the Democratic Republic of the Congo*, ICC-01/04, Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, 10 February 2006, paras. 54-55.

[128] *Situation in the Democratic Republic of the Congo*, ICC-01/04, Judgment on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I Entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58', 13 July 2006, paras. 73-78.

concern. The interpretation of the Statute may lead to only one conclusion: that its drafters did not intend it to apply only to the most senior leaders or top officials. First of all, the Preamble of the Statute mentions "most serious crimes" but not "most serious perpetrators". Second, attention should paid to Art. 27(1) which states that the Statute "shall apply equally to all persons without any distinction based on official capacity". Third, also in the light of specific provisions concerning the issues of responsibility there can be only one conclusion that all ranks of and perpetrators could be held responsible before the Court. Based on the example of the rules of responsibility of inferior soldiers established in Art. 33, which constitutes the principle of irrelevance of superior orders, we can conclude that "[r]ules regarding the irrelevance of superior orders for those who received such orders would be superfluous if only perpetrators who were in senior positions – and would thus be more likely to be giving than acting pursuant to those orders – could be brought before the International Criminal Court".

According to the Appeals Chamber, excluding a perpetrator from bearing criminal responsibility before the Court merely because his responsibility has been excluded based on the adopted policy of prosecuting only "the highest ranking perpetrators" would constitute refusal to prosecute on formalistic grounds. The Appeals Chamber compared adopting of formal criteria excluding certain groups from responsibility before the Court to "automatic" exclusion of responsibility. "Predetermination of inadmissibility on the above grounds could easily lead to the automatic exclusion of perpetrators of most serious crimes in the future."[129] Any formal obstacles in the form of assesing the responsibility on the basis of formal position in hierarchy could lead potential suspects to ensuring that they were not "a visible part of the high-level decision-making process." Meanwhile, the factual activities and possibilities of the perptrator should be assessed when taking a decision on prosecution as individuals who are not at the very top of an organization may still carry considerable influence and committ, or generate, the widespread commission of very serious crimes. The Chamber pointed to many various criteria that should be considered in the process of evaluating the factual position of a defendant:[130] "national or regional scope of activities of a group or organization, the exclusively military character of a group, the capacity to negitiate agreements, the absence of an official position, the capacity to change or prevent a policy." Only thanks to taking into consideration the above mentioned factors the Court will have the real picture of the person's responsibility.

The actual policy which takes into consideration the jurisprudence of the Appeals Chamber is expressed in the Prosecutorial Policy of 2009-12. The OTP adopted the policy of "focused investigations and prosecutions", meaning that "it will investigate

[129] The OTP applied for the warrant of arrest in the case of *The Prosecutor v. Bosco Ntaganda* again and this time the warrant was issued on 12 of July 2012 (ICC-01/04-02/06, Decision on the Prosecutor's Application under Article 58).

[130] *Situation in the Democratic Republic of the Congo*, ICC-01/04, Judgment on the Prosecutor's Appeal against the Decision of Pre-Trial Chamber I Entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58", 13 July 2006, para. 77.

and prosecute those who bear the greatest responsibility for the most serious crimes, based on the evidence that emerges in the course of an investigation. Thus, the Office will select for prosecution those situated at the highest echelons of responsibility, including those who ordered, financed, or otherwise organized the alleged crimes." [131] We can see that there is no equation between "the highest echelons of responsibility" and "the highest echelons of hierarchy". We can also notice that there is no better way to express the guidelines for selection of defendants. From their nature, guidelines must be generalized.

This Policy Paper still does not explain on what basis the Prosecutor should select lower-ranking officials. We can see in the actions of the Prosecutor a tendency which can be named as "exemplary prosecution". It means targeting some preselected individuals from a large number of possible suspects who all were involved in the case selected by the Prosecutor to investigate.[132] According to this concept, the Prosecutor should prosecute defendants according to the following key: they should be persons, whose prosecution would lead to indicating to the guilty ones and demonstrating the condemnation for given acts on behalf of the international community and satisfy the sense of justice for the victims. This method was also proposed as one of the guidelines for the selection of defendants: "As a matter of policy, international prosecutions should be limited to leaders, policy-makers and senior executors. This policy, however, does not and should not preclude prosecutions of other persons at the national level which can be necessary to achieve particular goals."[133]

This attitude gives to the Prosecutor the possibility to use a flexible approach. A strict inadmissibility of cases concerning lower level perpetrators would lead to an even greater impunity gap.[134] States could make an assumption that all low-level perpetrators are beyond the reach of the ICC jurisdiction and benefit from impunity.[135] It is worth to make a note, citing the words of I. Stegmiller,[136] that if the "ICTY and ICTR had not adopted a 'pyramidal strategy', they would not have been able to gain any convictions for gender crimes – such as the now-infamous names of 'nobodies' (Akayesu, Furundzija, Kunarac, Kovac and Vuković)." The ICC must safeguard its flexibility in order to secure the possibility to prosecute lower-level perpetrator and minor charges, which are also in the jurisdiction of the ICC.

Additionally, besides presenting the adopted strategy of prosecuting only the most responsible, on the basis of all the above mentioned jurisprudence and documents, we

[131] Prosecutorial strategy 2009-2012, 1 February 2010, The Hague, available at: http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf (accessed 30 March 2015), paras. 19-20.

[132] *See* Greenawalt, *supra* note 37, p. 621.

[133] *See* M. C. Bassiouni, *Proposed Guiding Principles for Combating Impunity for International Crimes*, [in:] M. C. Bassiouni (ed.), *Post-Conflict Justice*, Transnational Publishers, New York: 2002, p. 27.

[134] Stegmiller, *supra* note 80, p. 443; Smith, *supra* note 47, p. 334.

[135] Stegmiller, *supra* note 80, p. 443.

[136] Smith, *supra* note 47, p. 343.

can assume that the policy of the ICC inclines towards the principle of opportunism. It is the policy to choose only a few cases from each situation. The Prosecutor must focus investigations and prosecutions on those who bear the greatest responsibility for the most serious crimes, and who are chosen on a discretionary basis, according to the above mentioned rules. From the existing legal framework, it results that not only the Prosecutor can do it, but that is what he is doing: prosecuting the most responsible, choosing them on an exemplary level.

As a matter of fact the OTP in the first cases heard before the ICC adopted a policy of prosecuting the highest ranking officials. The warrant of arrest against Germain Katanga was issued on the grounds that there were "reasonable grounds to believe that, as the highest ranking FRPI (the Union des patriotes Congolais) commander, and by designing the common plan and ordering his subordinates to execute it, Germain Katanga's contribution was essential to its implementation."[137] Thomas Lubanga Dyilo founded the FRPI as the military wing of the UPC and immediately became its Commander-in-Chief and remained in this position until the end 2003 at least.[138] Callixte Mbarushimana has been (only) the Executive Secretary of the FDLR since July 2007 but later, after the arrest of the FDLR's President in November 2009, he inherited part of the latter's powers.[139]

However, this attitude varied in the next cases. Although it can mainly be said that the highest ranking perpetrators were prosecuted there have been several exceptions to this rule. As a matter of fact the policy adopted by the Prosecutor is not coherent. Certainly, it can be said that the most responsible are being prosecuted. However, the Prosecutor chooses the defendants quite randomly – perhaps basing on the evidentiary material that is at his disposal as gathered during the preliminary examination or perhaps basing on the principle of exemplary prosecution.

In the situation in Sudan, when the Prosecutor applied in 2009 for the warrant of arrest for Omar Al Bashir we can say that the policy of prosecuting the most senior leaders was obviously applied. The Pre-Trial Chamber agreed with the choice of the Prosecutor, concluding that there were reasonable grounds to believe that Omar Al Bashir has been the de jure and de facto President of the State of Sudan and Commander-in-Chief of the Sudanese Armed Forces from March 2003 to 14 July 2008, and that, in that position, he played an essential role in coordinating, with other high-ranking Sudanese political and military leaders, the design and implementation of counter-insurgency campaign led by the Government of Sudan.[140] Ahmad Harun, chosen to be prosecuted in the frames of the same situation, served as Minister of State for the Interior of the Government of Sudan and coordinated different bodies responsible for counter-insurgence actions.[141] Also in the situation in Côte d'Ivoire there can be no doubt that the Prosecutor selected

[137] Warrant of Arrest for Germain Katanga, ICC-01/04-01/07, 2 July 2007.
[138] Warrant of Arrest for Thomas Lubanga Dyilo, ICC-01/04-01/06, 10 February 2006.
[139] Warrant of Arrest for Callixte Mbarushimana, ICC-01/04-01/10, 28 September 2010.
[140] Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, 4 March 2009.
[141] Warrant of Arrest for Ahmad Harun, ICC-02/05-01/07, 27 April 2007.

Laurent Koudou Gbagbo on the basis of the fact that he was the main leader and top official standing behind the violence in the aftermath of the presidential elections. He was considered to be an indirect perpetrator standing at the head of a joint criminal enterprise responsible for actions conducted in Côte d'Ivoire by pro-Gbagbo forces who attacked the civilian population in Abidjan and targeted civilians who they believed were supporters of the other presidential candidate Mr Ouattara. However, the cases of Simone Gdagbo and Charles Blé Goudé were chosen on a totally different basis – they both belonged to the inner circle of Mr Gbagbo and "met frequently to discuss the implementation and coordination" of the common plan.[142]

In the situation in Kenya, however, the warrant of arrest concerned two levels of hierarchy: not only the top leaders were chosen to be prosecuted but also the local leaders. Among the top leaders members of governments were summoned: Muthaura (Head of Civil Servant), Kenyatta (later the President) and Ali (Police Commissioner) were suspected to be criminally responsible for the crimes against humanity alleged either as indirect co-perpetrators pursuant to Art. 25(3)(a) of the Statute or, in the alternative, as having contributed to a crime committed by a group of persons under Art. 25(3)(d) of the Statute (joint commission).[143] On the other hand, three commanders were selected – Ruto, Kosgey and Sang – who established a network of perpetrators on the local level, responsible for the attack against the civilian population that was committed pursuant to an organizational policy. The network was under responsible command and had an established hierarchy, with Ruto as leader, Kosgey as deputy leader and treasurer and Sang as responsible for communicative purposes.[144]

Also in the situation in Libya, the political leaders and the leaders of various levels of military forces were selected – every one of the three defendants seems to be chosen according to a different principle. Muammar Gaddafi was the Commander of the Armed Forces of Libya and held the title of Leader of the Revolution, and as such, acted as the Libyan Head of State. The Pre-Trial Chamber established that as the recognized and undisputed leader of Libya he had absolute, ultimate and unquestioned control over the Libyan State apparatus of power, including the Security Forces. Saif Al-Islam Gaddafi acted as the Libyan de facto Prime Minister. Although he did not have an official position, he was the unspoken successor and the most influential person and exercised control over crucial parts of the State apparatus, including finances and logistics.[145] On the other hand, Abdullah Al-Senussi, was a colonel in the Libyan Armed Forces – being at the same time the current head of the Military Intelligence.[146] The Prosecutor pre-

[142] Warrant of Arrest for Laurent Koudou Gbagbo, ICC-02/11, 23 November 2011.

[143] Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, ICC-01/09-02/11, 8 March 2011.

[144] Decision on the Prosecutor's Application for Summons to Appear for William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, ICC-01/09-01/11, 8 March 2011.

[145] Public Court Records – Pre-Trial Chamber I, 27 June 2011, pp. 7-8.

[146] Warrants of arrest for Muammar Mohammed Abu Minyar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi, ICC-01/11-01/11, 27 June 2011.

sented evidence in support of his application for a warrant of arrest from which results that inhuman acts that severely deprived the civilian population of its fundamental rights were inflicted on it by the Security Forces under the command of Al-Senussi. He also exercised his role as the national head of the Military Intelligence, one of the most powerful and efficient organs of repression of Gaddafi's regime and the state security organ in charge of monitoring the military camps and members of the Libyan Armed Forces. However, proceedings against Al-Senussi before the ICC came to an end on 24 July 2014 when the Appeals Chamber confirmed Pre-Trial Chamber I's decision declaring the case inadmissible before the ICC – on the grounds of complementarity not because of the lower rank of the suspect.[147] The defendant at that time was subject to both a military and civilian investigation due to his extradition to Libya.

CONCLUSIONS

In the case of international criminal tribunals, we can observe a functional need to be selective. No legal system is currently capable of prosecuting all cases of criminal law infringement. In national systems, selectivity is introduced either through provisions of the substantive law (using the criteria of a socially dangerous act) or by implementation of the prosecutorial principle of opportunism.[148] In the case of the ICC, substantive law does not solve the problem, as it leaves us with an indefinite number of possible perpetrators – and only one court. There is still the principle of complementarity, in accordance to which it is mainly the state's responsibility to prosecute perpetrators of international law crimes. However, it seems that national jurisdictions are not able, prepared or willing to fill the "impunity gap". We have seen that the selection of defendants is indispensable. We have also experienced what importance for the practical operations of the Court – its credibility and efficiency – has the coherent and clear method of selection of defendants.

In the Nuremberg and Tokyo Tribunals, prosecutorial discretion was subordinated to governments of the victorious states that had already decided who would be tried. The jurisdiction of the ad hoc tribunals for Rwanda and the former Yugoslavia was limited from the beginning by the resolution of the Security Council, which determined their temporal and geographical frames. The prosecutors of these tribunals could select situations and cases only within this framework. Their discretion was therefore, by definition, limited. Nevertheless, it was at these tribunals that the foundations of the meaning and significance of prosecutorial discretion in international criminal procedure

[147] Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi", ICC-OI/II-OI/IIOA6, 24 July 2014.

[148] This tendency highlighted by R. Cryer, *supra* note 26, p. 192. *See also* K. Ambos, *Comparative Summary of the National Reports*, [in:] L. Arbour, A. Eser, K. Ambos, A. Sanders (eds.), *The Prosecutor of a Permanent International Criminal Court*, Iuscrim, Freiburg: 2000, pp. 495 and 505-509.

were set. In the process before the ad hoc tribunals, questions of the limits of prosecutorial discretion were asked for the first time and fundamental comparisons between this system and national systems were drawn.

It is only at the ICC that we observe the importance of this problem of setting the correct extent of prosecutorial discretion, resulting from the universal scope of the ICC jurisdiction. Because of this scope, the selection of defendants stands at the basis of its effective and correct functioning. Although some observers argue that the Rome Statute obliges the Prosecutor to act according to the principle of legalism – adapted to the role of the ICC by the way of complementarity of jurisdiction – the OTP assumed that the "impunity gap" is an indispensable – and therefore necessary – element of the selection strategy. This assumption serves as the foundation of the principle of opportunism. Even if we assumed that the ICC Statute operates on the basis of the principle of legalism, we could come to a conclusion that this principle remains solely an assumption made in the written law of the Rome Statue – it was never the aim of the ICC Prosecutor to follow this maxim. In this situation, we can conclude that the obligation to act, which is mentioned in Art. 53(1) of the ICC Statute by the use of words "shall act", was supposed to relate only to a situation when the Prosecutor (subjectively) considers that the conditions from this Article have been fulfilled. The Prosecutor concentrates not on the "shall" notion, but rather on the discretionary possibilities that are given by the criteria coming afterwards.

We cannot forget that there are also other different factors that may limit prosecutorial discretion. We can name among them factors such as judicial control of the Pre-Trial Chamber, hierarchical dependence and political considerations, and financial abilities of the OTP resulting from the budget. A discussion of the selection of defendants involves a number of issues related to political motivations lying behind the process and reasons for choosing the specific defendant. The Prosecutor has to take decisions taking into consideration various issues: bringing back peace, expectations of international society, and expectations of the victims. We cannot ignore a danger that a conflict may arise between political and legal interests. The Prosecutor's role is to meander between these interests and the interests of justice. This complex interrelationship between legal and political motivations requires the Prosecutor to make decisions that are both compliant with objective legal criteria but also taken with a due consideration to the political and social context and executed in a manner that fosters the support of states.[149]

[149] Brubacher, *supra* note 14, p. 74.