Chapter 5

Position of the Prosecutor before the International Criminal Court: Challenges and De Lege Ferenda Postulates

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Abstract

This study analyses the position of the International Criminal Court (ICC) prosecutor, using two theses as the prism of the study. According to the first thesis, the position of this figure is closely linked to the structural "fluctuability" of proceedings based on the Rome Statute. The second thesis argues that the ICC prosecutor has a dualistic role, being both an officer of justice and a party to the jurisdictional proceedings. Within this role, the principle of opportunism plays a pivotal role. Simultaneously, that the gradual opportunism formula has been adopted is recognised. Thus, the examination of the advisability of prosecution becomes less critical as the proceedings progress. In this context, the prosecutor's position is outlined against the background of the effectiveness of procedural functions. This paper consists of five parts: introduction, description of the model and the main research theses, compact overview of the essential formulas of the prosecutor's activities, critical examination of selected prosecutorial actions, and final remarks. Among other things, the last propositions include a recommendation to reconsider modifying the accusatory principle by increasing prosecutorial discretion. This overview ignores the interaction between ICC bodies and the UN Security Council, as the mechanisms provided for in the Rome Statute

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to block prosecution by the Security Council's decision is considered to have political rather than legal connotations.

Keywords: ICC prosecutor, opportunism, directionality of prosecutor, accusatorial principle, statute, prosecutorial activities, structural fluctuability

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1. Introduction

Two central and fundamental questions are addressed in this study: What role does the International Criminal Court (ICC) prosecutor play in the model of proceedings before the ICC, and does the adopted formula enhance the effectiveness of this procedure? Additionally, in this study, effectiveness is perceived as a comprehensive construct that encompasses the economic, temporal, and axiological dimensions. In this sense, effectiveness also refers to values that correspond, on the one hand, to the principle of objectivity and material truth and, on the other hand, to the right to defence principle.

To answer these questions, a few assumptions must be made. First, this study adopts the dynamic perspective; thus, the prosecutor's role is observed based on subsequent phases of the proceedings. We specifically focus on the investigation and accusation models. Nevertheless, the study adopts an idealistic and provocative approach, namely, the controversial issue of achieving international consensus regarding the reshaping of the procedure is reconsidered (although it seems almost impossible, as it implies the amendment of the Rome Statute and achieving consensus of State parties to this treaty). Consequently, a few proposals *de lege ferenda* are presented.

The following hypotheses are adopted to address the main issue. The prosecutor of the ICC plays a double role in the type of procedure at hand (being simultaneously the investigative authority and subsequently a party to the trial). Based on the provisions of the Rome Statute (hereinafter, RS or Statute), the ICC prosecutor is an organ of the ICC and the justice officer of justice acting under the supervision of the Pre-Trial Chamber (PTC) during the preparatory stage (predominantly regarding the subject matter of the case).[1] Consequently, the role of the justice officer influences the ICC prosecutor's position as a party before the Trial Chamber (TC).

This study shows that the more the procedure advances, the less discretion remains in the prosecutor's hands.[2] This refers to the five subsequent phases of the proceedings: preliminary examination of a situation; commencement of investigation

1 Ambos, 2000, pp. 98–101.

2 See: Schabas, 2008; Brubacher, 2004; Ambos, and Bock, 2012; Greenawalt, 2007; Coté, 2005; Jallow, 2005.

(including proceedings *proprio motu*); commencement of prosecution (requesting the arrest warrant or summons to appear); confirmation of charges; and commencement of trial before the TC. In this study, due to the need to select issues, we concentrate on pre-trial proceedings only within the context of the accusatory principle. Some remarks will be made regarding the position of the prosecutor in judicial proceedings.

2. Position of the ICC Prosecutor Based on the Adopted Model of Procedure: Structural Fluctuability and Gradual Opportunism

In discussing the issue of effectiveness, the realisation of the prosecutorial function must be juxtaposed with the challenges that refer to the model of the given procedure, so-called structural challenges.[3] These challenges can be summarised as structural fluctuability and gradual opportunism.

To understand these two phenomena, one should note that the procedure before the ICC is a unique hybrid of common law and civil law constructs and, consequently, is "less framed" than the typical common law or civil law repressive model of investigation or prosecution.[4] What does it mean to be "less framed"? The transition from one phase to another subsequent phase of the proceedings before the ICC is more flexible than that based on typical continental law or common law criminal procedures.[5] Following the latter examples, it is evident when the pre-trial and judicial stages begin (continental law proceedings) or when the trial before the court commences and pre-trial activities terminate (common law systems).

An additional typical feature of the analysed model (but somehow linked with structural fluctuability) concerns the protective approach that refers to the position of the prosecutor as a *dominus litis* in the pre-trial stage balanced by the activity of the PTC. This balance is coherent with the claim of protecting "the future defendant" – the claim not to stigmatise the latter until the judicial stage starts. This refers to the selective nature of criminal responsibility before the ICC, under which offenders in leadership positions, and thus with specific political influence or having social position and support (even if lost at the time of the proceedings), are prosecuted. Therefore, the very fact of bringing them to justice might be controversial for specific sectors of society.[6] These are people who, metaphorically speaking, "have blood on their hands", but most often, they are not the direct perpetrators of atrocity crimes. Therefore, charging them occurs in a somewhat specific series of steps.

3 Cf. Janusz-Pohl, 2022.
4 Cf. Kress, 2003.
5 Eser, 2008; Damaska, 1973; Langer, 2004; Luna Erik, 1999.; Packer, 1964.
6 See: Kuczyńska, 2014.

Unlike in continental pre-trial proceedings, where pressing charges formalises a suspect's status, in pre-trial proceedings conducted by the ICC prosecutor, the actions of criminal prosecution are directed towards a specific person starting at the time of the issuance of an arrest warrant or summons to appear by the PTC. The charges are approved by the PTC through a particular confirmation procedure as part of the final phase of the pre-trial proceedings, which, when referring to continental systems, corresponds to the phase of building an indictment.

Eventually, the procedure's structural fluctuability might provoke doubts regarding external transparency (external in terms of the international community and private participants in global justice from various legal systems). Given the international community, particularly non-professional actors, it may not be apparent when a pursued person acquires the status of a suspect in this type of proceeding. Moreover, a dualism of pre-trial organs, that is, the ICC prosecutor on the one hand and the PTC on the other, requires clarification as to who is a tutor of "substantive truth". In this study, a hypothesis on "gradual opportunism" in the negative formula is adopted. It asserts that opportunism is greatest at the beginning of the procedure, mainly within the choice of the situation to be examined and investigated, and then against whom the arrest warrant or summons to appear is to be issued.[7] Opportunism diminishes as the proceedings progress, in the sense that once the charges are confirmed (final stage of pre-trial), the imperative (obligation) to hold the real perpetrators of atrocity crimes criminally accountable based on the principle of substantive truth is affirmed.

To clarify the identified theses regarding structural fluctuability and gradual opportunism, we must briefly refer to the model of proceedings adopted under the Rome Statute. After all, these theses stem directly from the assumed model of proceedings, which is widely considered a hybrid combination of features referring to continental and common law procedures.[8]

Let us start the inquiry by formulating a few general remarks on the elements of the model of proceedings at hand. For the scope of this analysis, four elements that determine the model are pivotal: composition of the proceedings (stages-oriented approach), position and interferences of participants (personal composition of trial approach), set of guarantees for participants (guarantees-oriented approach), and finally, principles of this type of procedure (values-oriented approach).[9]

For the scope of this analysis, the following principles must be considered: a) the principle of opportunism v. legalism; b) the principle of complementarity; c) the principle of material truth; d) the accusatorial principle; e) the balance of inquisitorial and adversarial principles; f) the principle of objectivity; g) *onus probandi*; h) the principle of collective action v. the principle of individual actions. A detailed

7 Kuczyńska, 2014, p. 187.
8 Kress, 2003.
9 Janusz-Pohl, 2022.

discussion of these principles is beyond the scope of this study. Therefore, we highlight a few observations that will serve as the basis for further research.

The first group of principles includes a) opportunism v. legalism, b) complementarity, and c) the principle of material truth, which interfere with each other. However, they remain closely connected to the hypotheses proposed in this study regarding gradual opportunism.

Admittedly, the initiation of proceedings is based entirely on the principle of opportunism, as the ICC's jurisdiction is complementary to national jurisdictions.[10] Moreover, the adopted criminal liability formula is selective, not universal; however, all authorities' decisions must be based on factual findings consistent with objective reality (context of truth principle). As the proceedings progress (after the case and defendants have been selected, and especially after the charges have been approved and proceedings have been initiated), the imperative to establish the truth about the selected perpetrators strengthens. This tendency is also reflected in the so-called evidentiary thresholds. According to this approach, a warrant of arrest shall be issued under 'reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court'; the confirmation of the charges shall be approved when there is 'sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged' (Article 61(7) of the Statute).[11]

Regarding the second group of principles, the issue of the accusatory principle and the inquisitorial and adversarial principles remains closely connected to the hypothesis of the structural fluctuability of procedure. As indicated earlier, the specific combination of the features of inquisitorial and adversarial processes, and therefore the specific design of the accusatory principle, determines the lack of formalised and precise transitions between the stages of these proceedings. The balance between inquisitorial and adversarial bias is apparent in several elements (examined in the following sections). However, it is most clearly manifested within the relationship between the ICC prosecutor and the PTC, and the cumulation of this unique interaction concerns the institution of confirmation of charges.

Hence, in the third group of relevant principles, one shall include the principle of *onus probandi,* the principle of objectivity with regard to the rule *in favour defensionis*, and the principle of collective actions v. individual actions. Thus, this group concerns

10 This study overlooks the context of the UN Security Council's powers obstructing prosecution before the ICC, that is, the issues regulated by Article 16 RS, according to which 'no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions'. It was considered that the indicated mechanism has political rather than legal connotations; hence, in this context, this institution has a status external to the model of proceedings at hand.

11 For the description of probability threshold, see: Prosecutor v.Lubanga, ICC A. Ch. I, 13 June 2007, para. 14; Prosecutor v. L. Gbagbo, ICC PT. Ch. I, 3 June 2013, para. 17; Prosecutor v. L. Gbagbo, ICC PT. Ch. I, 12 July 2013, para. 35.

the specific activities of the ICC prosecutor examined in this study. Therefore, we refer to them in the discussion to the extent necessary.

However, since the central thesis of this study refers to gradual opportunism, let us focus here on a few initial remarks concerning the angles of opportunism. We note that opportunism presupposes an examination of the purposiveness of the actions taken by a given body (predominantly actions related to the initiation of the penal response). Meanwhile, legalism, particularly in the so-called "substantive legalism" version, assumes the automaticity of action in response to the infringement of the criminal law norm.[12] Given this general perspective and considering the principle of complementarity of the ICC's jurisdiction concerning national criminal courts, the initiation of proceedings is undoubtedly based on the principle of opportunism. Thus, the prosecutor has full discretion regarding whether to prosecute a given situation and, subsequently, a case. As the literature emphasises, prosecutorial discretion can be defined as the power of a prosecutor to make autonomous (independent or impartial) choices as to when to start a preliminary investigation and whom to incriminate, on which charges, based on what evidence, and at what moment in time, within a given legal framework.[13]

Thus, to summarise, in the context of proceedings before the ICC, two aspects of opportunism can be distinguished: 1) the substantive dimension of opportunism, which refers directly to the situation to be researched, and 2) the subjective dimension of opportunism relating to the case to be investigated and prosecuted. Additionally, dynamic and static perspectives should be considered. The dynamic perspective refers to interactions between the ICC prosecutor and the PTC in terms of the subsequent phases of preparatory proceedings and the prosecutor's position as a party to the trial. The structure of the proceedings based on stages influences the prosecutorial position and the scope of competencies. The latter static perspective focuses on the Office of the Prosecutor, which is headed by the prosecutor and is viewed as a body of the ICC.

From a static perspective, the office of the ICC prosecutor can be described as a separate organ of the court, playing the role of the institutionalised party before the TC. As Article 42(1) RS states,

> *The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, examining them and conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.*[14]

12 Janusz-Pohl, 2023.
13 Schabas, 2008; Brubacher, 2004; Ambos, and Bock 2012; Greenawalt, 2005; Jallow, 2005.
14 Turone, 2002.

3. Prosecutorial Activities – Keynotes

To elaborate the ICC prosecutor's activity formula, some general remarks on the typology of procedural activities at his disposal must be made. Thus, we may distinguish, according to the criterion of legal force, between prosecutorial autonomous actions and actions that shall be authorised by the PTC. In addition, due to the criterion of the mode of initiation, action upon request and action *ex officio* should be considered.[15] Another important typology separates actions based on obligation that is denominated by the expression "shall" (i.e. when the prosecutor is obligated to act) and actions that remain within the scope of prosecutorial power. However, their performances remain optional (discretional). The latter is expressed in the text of the Statute and other relevant legal content by the expression "may".

In the framework of the discussion in this study, an essential example of the prosecutor's mandatory activity is related to the principle of material truth and objectivity. Subsequently, under Article 54(1)(a) RS,

> *The Prosecutor shall, to establish the truth, extend the investigation to cover all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally*

(objectivity; all investigative activities should be directed towards the identification of evidence that can eventually be presented in open court).[16]

As a side note, it should be added that the principle of objectivity may not always be easy to reconcile with the more adversarial than inquisitorial nature of the proceedings at hand. As mentioned at the outset, a certain tension exists between the prosecutor's role as a party and as a justice officer. An example of this tension is in the case of Mbarushimana, when the prosecution was reprimanded by PTC II, which found the confrontational questioning methods used by some investigators to be inappropriate given their duty of objectivity and held that such techniques might significantly weaken the probative value of evidence so obtained.[17] Additionally, in the Lubanga case, the Appeals Chamber clarified that the obligation 'to establish the truth' is not limited to the period prior to the confirmation of charges, and the prosecutor as a party before the ICC during the trial stage is also covered by this obligation.[18] The jurisprudence of the ICC is not consistent in this respect, as a different stance was adopted in Kenyatta, Trial Chamber V, which interpreted the prosecutorial duties to 'establish the truth' and to 'extend the investigation to cover all

15 See: Janusz-Pohl, 2017.

16 Prosecutor v. Lubanga Dyilo, ICC A. Ch., ICC-01/04-01/06-1486 (OA 13), 21 October 2008, para. 41.

17 Prosecutor v. Mbarushimana, ICC PT. Ch. II, Decision on the Confirmation of Charges, ICC-01/04-01/10-465-Red, 16 December 2011, para. 51.

18 Prosecutor v. Lubanga, ICC A. Ch., ICC-01/04-01/06-568 (OA 3), 13 October 2006, para. 52.

facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally' under Article 54(1)(a) as imposing an obligation to properly investigate the case against the accused prior to the confirmation of charges.

Regarding the scope of prosecutorial obligation, Article 54(1)(b) RS, states,

> *The ICC prosecutor is obliged to take appropriate measures to ensure the effective investigation and prosecution of crimes within the jurisdiction of the Court, and in doing so, respect the interests and personal circumstances of victims and witnesses, including age, gender as defined in Article 7, paragraph 3, and health, and take into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children.*

Article 54(1)(c) states, 'Fully respect the rights of persons arising under this Statute'.[19]

In contrast, regarding prosecutorial activities of a facultative nature, namely addressing the scope of prosecutorial competencies, we must refer to Article 54(3) RS, based on this provision:

> *The Prosecutor may (a) Collect and examine evidence; (b) Request the presence of and question persons being investigated, victims and witnesses; (c) Seek the cooperation of any State or intergovernmental organisation or arrangement in accordance with its respective competence and/or mandate; (d) Enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organisation or person; (e) Agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely to generate new evidence, unless the provider of the information consents; and (f) Take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence.*

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4. Analysis of Selected Activities of the ICC Prosecutor from the Dynamic Perspective

Nonetheless, according to the theses adopted in this study, the challenges to the effectiveness of the ICC prosecutor's activities are in the proceedings' structural

19 Cf. Prosecutor v. Lubanga, ICC A. Ch., ICC-01/04-01/06-1486 (OA 13), 21 October 2008, paras. 42-43.

features, namely fluctuability and gradual opportunism. Selected spheres of activity of the ICC prosecutor exemplify both these phenomena. Consequently, we trace the activities relating to the initiation of the proceedings, namely preliminary examination, the proper pre-trial proceedings, and the activity relating to the interim proceedings and, more narrowly, associated with the performance of the accusation function before the TC.

As stated, prosecutorial activities at the pre-trial stage remain in constant balance with the activities of the PTC. The examples of interactions between the prosecutor and the PTC refer predominantly to a) authorisation of the PTC for the commencement of investigation *proprio motu*; b) the Court's control over the discontinuation of investigation; c) evidentiary actions of non-repeatable (of unique opportunity) character or in favour of the defendant;[20] d) decision on the admissibility of investigation; e) decision on an arrest warrant or summons to appear.

4.1. Preliminary examination

According to the gradual opportunism thesis, the prosecutor's discretion is the most significant within the framework of a preliminary examination. Meanwhile, let us recall that the initiation of proceedings shall occur under three triggering mechanisms based on Articles 13, 14, and 15 of the RS. One must distinguish between initiation upon request (as a result of referrals of situations to be investigated either by the States or the UN Security Council) and *proprio motu* initiation (by virtue of a decision made by the ICC prosecutor).[21] Nevertheless, this seemingly broad discretion is tempered by the fact that investigations *proprio motu* can only be opened with a previous PTC authorisation (Article 15). In this respect, according

20 Referring just to one example based on Article 56(1)(a) RS,

> *Where the Prosecutor considers an investigation to present a unique opportunity to take testimony or a statement from a witness or to examine, collect or test evidence, which may not be available subsequently for the purposes of a trial, the Prosecutor shall so inform the PTC. (3)(a) Where the Prosecutor has not sought measures pursuant to this Article but the PTC considers that such measures are required to preserve evidence that it deems would be essential for the defence at trial, it shall consult with the Prosecutor as to whether there is good reason for the Prosecutor's failure to request the measures. If, upon consultation, the Pre-Trial Chamber concludes that the Prosecutor's failure to request such measures is unjustified, the PTC may take such measures on its own initiative.*

It must be mentioned that the PTC may even preserve evidence in favour of the defence (see: Kony et al., Decision on Prosecutor's Applications for Leave to Appeal Dated 15th Day of March 2006 and to Suspend or Stay Consideration of Leave to Appeal Dated the 11th Day of May 2006, ICC-02/04-01/05-90, 10 July 2006, para. 35. Moreover, this is a measure that goes beyond "[taking] measures to preserve evidence").

21 In this study, the procedure *proprio motu* is not discussed in depth, as it has raised controversy since the draft project of the RS was presented. However, having in mind that the prosecution of atrocity crimes takes place in a global landscape, understandably, the drafters sought to weaken the position of the prosecutor of the ICC to strengthen the presumption of objectivity of the criminal prosecution.

to the Kenya authorisation decision, it appears that the prosecutor may only seek authorisation to investigate crimes that have already been committed or are ongoing at the time of the request.[22] Such a stance seems to be premised on PTC II's fear of losing its supervisory power if open-ended investigations are authorised, and it has spurred criticism because it artificially decreases the prosecutor's ability to investigate complex and evolving crisis situations. However, when authorising investigations in Côte d'Ivoire, a different PTC has adopted the opposite stance by affirming that investigations of any crime subsequent to the prosecutor's request would still be covered by the authorisation as long as it is part of the same ongoing situation.[23]

In the case of referrals, it must be emphasised that the ICC prosecutor has discretional power to determine the territory where the preliminary examination will be conducted. PTC I clarifies that "situations" are

> *generally defined in terms of temporal, territorial and in some cases personal parameters and refer basically to the set of circumstances subject to investigation and prosecution. Most situations have so far been delimited with reference to a particular region or country".*[24]

It must be emphasised, though, that PTC I explained that an examination could be initiated as long as it remains within the boundaries of the situation being the object of the referral. This means that the prosecutor can investigate not only crimes that have already been committed or are ongoing at the time of the referral but also subsequent crimes 'in so far as they are sufficiently linked to the situation of crisis

22 Cf. Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC PT. Ch. II, ICC-01/09-19-Corr, 31 March 2010, para. 206.

23 Cf. Situation in the Republic of Côte d'Ivoire, Corrigendum to 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire', ICC PT. Ch. III, ICC-02/11-14-Corr, 15 November 2011, paras. 178-179.

24 See: Northern Uganda or the Central African Republic – Situation in the Democratic Republic of the Congo, Decision on the Applications for participation in the proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC PT. Ch. I, ICC-01/04-101-tEN-Corr, 17 January 2006, para. 65. See also Prosecutor v. Thomas Lubanga Dyilo, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, ICC PT. Ch. I, ICC-01/04-01/06-8-Corr, 24 February 2006, para. 21; Prosecutor v. Germain Katanga, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Germain Katanga, ICC PT. Ch. I, ICC-01/04-01/07-4, 5 November 2007, para. 9; Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the Prosecutor's Application for a Warrant of Arrest against Jean-Pierre Bemba Gombo, ICC PT. Ch. III, ICC-01/05-01/08-14-tENG, 10 June 2008, para. 16. Additionally, it should be noted that the Comoros referral is the first not to define the situation geographically, but 'with respect to the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza strip', and the first one to invoke a vessel's flag as a precondition for the exercise of jurisdiction [Referral under Articles 14 and 12(2)(a) of the Rome Statute arising from the 31 May 2010 Gaza Freedom Flotilla situation, 14 May 2013. Available at https://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf].

referred to the Court'.[25] At the same time, at the preliminary examination, the prosecutor 'cannot deploy all these investigative powers'[26] and must rely on voluntary cooperation and gather information through open sources to the extent available. Thus, the efficiency of information gathering is directly proportional to the efficiency of prosecution, namely related to the issuing decision to either initiate or refuse an investigation. As a truism, it can be said that the ICC struggles with the shortage of manpower. Additionally, distance hinders investigators from collecting relevant information; therefore, any solution that has the potential to increase efficiency in this activity is to be welcomed. A new approach that can potentially increase the speed and reduce the cost of information gathering as part of this preliminary phase is the OTPLink digital platform,[27] which allows the online submission of evidence. Victims, witnesses, and other actors involved can submit evidence such as videos, written statements, and documents. It should be mentioned, though, that this platform is regarded as a tool for reporting under Article 15 of the ICC Statute. OTPLink is an integral part of the preliminary examination procedure, in which the prosecutor collects information, public reports, statements, and testimonies of victims and witnesses.

The prosecutor's discretion to initiate pre-trial proceedings also relates to the temporal aspect of conducting a preliminary examination. It must be stressed that the ICC Statute does not specify a timeframe for preliminary examinations, nor does it provide any real mechanism forcing the prosecutor to submit a request to open an investigation. Hence, Article 19(4) of OTP Regulations[28] states that the evaluation shall continue for as long as the situation is investigated. Undoubtedly, the decision of whether a "reasonable basis" is reached marks the line between preliminary examination and proper investigation. However, the question remains, 'What happens if the prosecutor does not officially announce such a decision?' and whether the PTC controls the prosecutor's decision to initiate an investigation.

This matter has led to a controversy in the Central African Republic when the prosecutor provided no information on the situation under scrutiny for over two

25 See: Prosecutor v. Callixte Mbarushimana, Decision on the Prosecutor's Application for a Warrant of Arrest against Callixte Mbarushimana, ICC PT. Ch. I, ICC-01/04-01/10-1, 11 October 2010, para. 6; Prosecutor v. Callixte Mbarushimana, Decision on the Defence Challenge to the Jurisdiction of the Court, ICC PT. Ch. I, ICC-01/04-01/10-451, 26 October 2011, paras. 26-27.

26 See: Situation in the Republic of Côte d'Ivoire, ICC PT. Ch. III, Judge Fernàndez de Gurmendi's Separate and Partially Dissenting Opinion to the Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, ICC-02/11-15, 3 October 2011, para. 29.

27 OTPLink (icc-cpi.int). At this website, one can read that under the RS, the ICC, the Office of the Prosecutor (OTP) may analyse information on alleged crimes within the jurisdiction of the ICC submitted to it from any source. This can occur during preliminary examination as well as in the context of situations under investigation. The form on OPTLink allows for the transfer of communications to OTP either anonymously or named.

28 OTP Regulations, Regulations of the Office of the Prosecutor ICC-BD/05-01-09, RegulationsOTPEng.pdf (icc-cpi.int)

years. In this regard, the PTC emphasised that a preliminary examination must be completed within a "reasonable time", regardless of its complexity.[29] In the given case, the prosecutor provided information on the status of the preliminary examination to the PTC but pointed out that this information was delivered voluntarily, as the PTC has no supervisory function at this early stage, and that the decision to seek the opening of investigations lies within the discretion of the prosecution alone.[30] As observed, this disagreement was neither explicitly settled by jurisprudence nor by an amendment to the Rules of Procedure and Evidence. As many authors claim, the status and length of preliminary examinations could be (partly) resolved by a new rule regulating the timeframe of preliminary examination.[31] This *de lege ferenda* postulate seems rational. The issue of the length of preliminary examination has been discussed for a long time in the literature.[32] Official data show that in 2002–2014- more than 10.000 and 2014–2022- almost 11,000 communications on situations, respectively, were submitted, and only a dozen cases were opened.[33] Undoubtedly, it should 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 do not enjoy the support of powerful nations.

4.2. Investigation in rem and ad personam

Although a prosecutorial decision on the commencement of investigation is discretional,[34] it shall be based on three thresholds: a) the jurisdictional threshold combined with the probability threshold; b) the admissibility and complementarity threshold; and c) the gravity threshold. Consequently, when deciding whether to initiate an investigation, the prosecutor shall consider whether: a) the gathered information 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 the complementarity criteria to determine whether the case at hand has been or is being genuinely investigated or prosecuted by a State's national

29 Situation in the Central African Republic, ICC PT. Ch. III, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, ICC-01/05-6, 30 November 2006, p. 4.

30 Situation in the Central African Republic, ICC PT. Ch. III, Decision Requesting Information on the Status of the Preliminary Examination of the Situation in the Central African Republic, ICC-01/05-6, 30 November 2006.

31 Stegmiller, 2011.

32 Ibidem.

33 Available at https://www.icc-cpi.int/

34 The prosecutor's discretion on the commencement of the investigation is being questioned in the Comoros case, which is also an issue regarding the competence of the prosecutor and the PTC. After the prosecutor decided not to proceed with an investigation, the PTC I "requested" the prosecutor to reconsider her decision and "shall do so as soon as possible". See: Decision on the Request of the Union of the Comoros to Review the Prosecutor's Decision Not to Initiate an Investigation, ICC-01/13-34 16-07-2015 and the Partly Dissenting Opinion of Judge Péter Kovács.

judicial system;[35] 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. To determine whether a case is sufficiently grave to warrant the Court's intervention, two features must be considered: first, 'the conduct which is the subject of a case must be either systematic (pattern of incidents) or large-scale'. This permits the exclusion of isolated instances of criminal activity. Second, the assessment of gravity must give due consideration 'to the social alarm such conduct may have caused in the international community'.[36]

Referring to the thesis on structural fluctuability, an investigation is divided into two phases: *in rem* (investigation into a situation) and *in personam* (investigation against a certain person); however, the moment of transition from *in rem* to *in personam* proceedings is unclear. Consequently, during the first phase, the prosecutor analyses the entire factual situation and allegation regarding the prohibited act, and during the second phase, refers to a specific person and specific charges, which are presented in the charging document. In addition, whereas a "situation", which justifies the initiation of the proceedings, includes a 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.[37] The notion of a "case" is used predominantly to denote one or more defendants and one or more charges stemming from one or more related incidents. The key question to be addressed is when the specific defendant is selected; precisely, when a case is selected within a situation.[38] Undoubtedly, no specific provision in the Statute would suggest when cases are separated from a situation.

While it is convincing that the moment of transit from the *in rem* to the *in personam* phase relates to the issuance by the PTC of an arrest warrant or summons to appear (Article 58 RS), it is not clear when the case is separated from the situation under investigation. Regarding the first issue, Article 58(1) RS states,

> *At any time after the initiation of an investigation, the Pre-Trial Chamber shall, on the application of the Prosecutor, issue a warrant of arrest of a person if, having examined the application and the evidence or other information submitted by the Prosecutor, it is satisfied that: (a) There are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the*

35 The Appeals Chamber has defined this situation, where a State having jurisdiction is not investigating or prosecuting or has not done so, as a case of "inaction". See: Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, (Case No. ICC-01/04-01/07-1497 OA 8), ICC Appeals Chamber, Judgment on the Appeal of Mr. Germain Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case, 25 September 2009, para. 2.

36 Cf. Prosecutor v. Thomas Lubanga, (Case No. ICC-01/04-01/06), ICC Pre-Trial Chamber I, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, 24 February 2006, Annex 1, para. 46.

37 Stegmiller, 2011.

38 Kuczyńska, 2014.

Court, and (b) 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.[39]

However, according to Article 58(3) RS,

The warrant of arrest shall contain (a) The name of the person and any other relevant identifying information; (b) A specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought; and (c) A concise statement of the facts which are alleged to constitute those crimes.

Regarding the second issue, and strictly when the separation of the case from the situation occurs, the interpretation of Article 58(2) RS regarding the content of the prosecutor's application for issuing an arrest warrant is crucial. According to this provision:

The application of the Prosecutor shall contain (a) The name of the person and any other relevant identifying information; (b) A specific reference to the crimes within the jurisdiction of the Court which the person is alleged to have committed; (c) A concise statement of the facts which are alleged to constitute those crimes; (d) A summary of the evidence and any other information which establish reasonable grounds to believe that the person committed those crimes; and (e) The reason why the Prosecutor believes that the arrest of the person is necessary.

From the quoted content, it can be concluded that the prosecutor's request, in accordance with his discretionary power, indicates specific reference to the crimes within the jurisdiction of the ICC that the specific person is alleged to have committed. This means that the demarcation of the subject boundaries of the case, although not yet confirmed by the PTC, occurs at the time of the prosecutor's application. This interpretation is supported by the wording of Article 58(6) RS:

The Prosecutor may request the Pre-Trial Chamber to amend the warrant of arrest by modifying or adding to the crimes specified therein. The Pre-Trial

39 For example, in the situation in Uganda, the PTC stated 'that attacks by the LRA are still occurring and that there is therefore a likelihood that failure to arrest [...] will result in the continuation of crimes of the kind described in the Prosecutor's application'. Prosecutor v. Kony, Warrant of Arrest for Joseph Kony issued on 8 July 2005 as amended on 27 September 2005, para. 45; Prosecutor v. Otti, Warrant of Arrest for Vincent Otti, 8 July 2005, para. 45; Prosecutor v. Lukwiya, Warrant of Arrest for Raska Lukwiya, 8 July 2005, para. 33. Warrant of Arrest for Okot Odhiambo, 8 July 2005; Prosecutor v. Ongwen, Warrant of Arrest for Dominic Ongwen, 8 July 2005, para. 33.

Chamber shall so amend the warrant if it is satisfied that there are reasonable grounds to believe that the person committed the modified or additional crimes.

Indeed, this provision expressly indicates that the subject matter boundaries of the case may be amended as appropriate.

4.3. Confirmation of the charges before trial

Holding a confirmation hearing before the trial's opening is a unique feature of this type of procedure and, at the same time, a core moment of the interaction between the prosecutor and the PTC. No other international criminal tribunal contemplates this proceeding. The trial eventually follows the confirmed indictment after the remaining pre-trial proceedings have been completed. During this phase, as is well known, the right to defence is preserved as the person concerned may challenge the charges during the confirmation hearing and, if successful, prevent the opening of a trial against him or her. One could say that Article 61 RS marks the boundaries between the pre-trial and trial stages before the Court.

Based on case law, we must add that the confirmation hearing is not a "trial before the trial" or a "mini-trial" but a procedure designed to protect the suspect against unfounded accusations and to ensure judicial economy.[40] The balance of prosecutorial discretion and controlling power of the PTC is ruled by Article 61(4) RS:

Before the hearing, the Prosecutor may continue the investigation and amend or withdraw any charges. The person shall be given reasonable notice before hearing any amendment to or withdrawal of charges. In case of a withdrawal of charges, the Prosecutor shall notify the PTC of the reasons for the withdrawal.

However, Article 61(4) RS clarifies that the provision of the document containing the charges alone does not limit the prosecutor's flexibility concerning the charges brought. Before the confirmation hearing, the prosecutor may continue the investigation and amend or withdraw charges without the permission of the PTC.[41] Meanwhile, Article 61(7) states, 'The PTC shall, based on the hearing, determine whether

40 Prosecutor v. Lubanga, ICC PT. Ch. I, 29 January 2007, para. 37; Prosecutor v. Katanga and Ngudjolo, ICC PT. Ch. I, 21 April 2008, paras. 5-6; Prosecutor v. Katanga and Ngudjolo, ICC PT. Ch. I, 30 September 2008, paras. 63-64; Prosecutor v. Bemba, ICC PT. Ch. II, 15 June 2009, para. 28; Prosecutor v. Abu Garda, ICC PT. Ch. I, 8 February 2010, para. 39; Prosecutor v. Banda and Jerbo, ICC PT. Ch. I, 8 March 2011, para. 31; Prosecutor v. Muthaura et al., Decision on the Schedule for the Confirmation of Charges Hearing, 13 September 2011, para. 8; Prosecutor v. Mbarushimana, ICC PT. Ch. I, 16 December 2011, para. 41; Prosecutor v. Ruto et al., ICC PT. Ch. II, 23 January 2012, para. 40; Prosecutor v. Kenyatta et al., ICC PT. Ch. II, 23 January 2012, para. 52.

41 Prosecutor v. Lubanga, ICC A. Ch., 13 October 2006, para. 53; Prosecutor v. Mbarushimana, ICC PT. Ch. I, 16 December 2011, para. 88.

there is sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged'. *Mutatis mutandi*, the PTC is not a finder of truth in relation to the guilt or innocence of the person against whom a warrant of arrest or a summons to appear has been issued.[42] However, the PTC is required to evaluate the evidence to determine the sufficiency of the evidence in order to meet this evidentiary threshold that refers to 'substantial grounds to believe (…)'. The prosecution must offer 'concrete and tangible proof demonstrating a clear line of reasoning underpinning its specific allegations'.[43] Unless a party provides information that can reasonably cast doubt on the authenticity of items presented by the opposing party, such items must be considered authentic in the context of the confirmation hearing (presumption of authenticity).[44]

At the outset, we emphasised that the crucial area of criticism in terms of the prosecution model before the ICC lies within the scope of the accusatorial principle. Based on Article 61(9) RS, which refers to the amendment of the charges after confirmation, states:

> *After the charges are confirmed and before the trial has begun, the Prosecutor may, with the permission of the PTC and after notice to the accused, amend the charges. If the Prosecutor seeks to add additional charges or to substitute more serious charges, a hearing under this Article to confirm those charges must be held.*

Consequently, the binding character of charges for the TC has two implications. First, the TC has no authority to ignore, strike down, or declare null and void the charges as confirmed by the PTC. Second, although the confirmation of charges could be seen as a moment of validation of indictment and, simultaneously, the moment of pendency, the latter remains conditional as the confirmation procedure shall be repeated in case of amendments to the charges by the prosecutor under the conditions stated in Article 69(9) RS.

42 Prosecutor v. Lubanga, ICC PT. Ch. I, 15 May 2006, Annex I, para. 55.

43 Prosecutor v. Lubanga, ICC PT. Ch. I, Decision on the Confirmation of Charges, 29 January 2007, para. 39; Prosecutor v. Katanga and Ngudjolo, ICC PT. Ch. I, Decision on the Confirmation of Charges, 30 September 2008, para. 65; Prosecutor v. Bemba, ICC PT. Ch. II, 15 June 2009, para. 29; Prosecutor v. Abu Garda, ICC PT. Ch. I, 8 February 2010, para. 37; Prosecutor v. Mbarushimana, ICC PT. Ch. I, 16 December 2011, para. 40; Prosecutor v. Ruto et al., ICC PT. Ch. II, 23 January 2012, para. 40; Prosecutor v. Kenyatta et al., ICC PT. Ch. II, 23 January 2012, para. 52; Prosecutor v. L. Gbagbo, ICC PT. Ch. I, 3 June 2013, para. 17; Prosecutor v. Ntaganda, ICC PT. Ch. II, 9 June 2014, para. 9; Prosecutor v. L. Gbagbo, ICC PT. Ch. I, 12 June 2014, para. 19; Prosecutor v. Bemba et al., ICC PT. Ch. II, 11 November 2014, para. 25; Prosecutor v. Blé Goudé, ICC T. Ch. I, 11 December 2014, para. 12.

44 Prosecutor v. Lubanga, Decision on the Confirmation of Charges, ICC PT. Ch. I, 29 January 2007, para. 97; Prosecutor v. Mbarushimana, ICC PT. Ch. I, 16 December 2011, para. 59; Prosecutor v. Bemba et al., ICC PT. Ch. II, 11 November 2014, para. 14.

It should be emphasised that the essence of the accusatory principle relates to the fact that, without the consent of the authorised prosecutor, the adjudicating body in the case may not initiate proceedings (initiating function). At the same time, the complaint that initiates proceedings before the court of first instance absolutely determines the programme of these proceedings (programmatic function). This means that the court procedures may concern only the defendants and the prohibited acts specified in the indictment. The judicial authority may not expand the indictment's substantive and subjective limits, but may and even must update the legal qualification. It also has a duty to recognise a complaint brought successfully (function of procedural duty). Based on the content of the complaint, the complaint is also considered to have a balancing function (in comparison with the pre-trial proceedings) and an informational function (complementary and subsidiary to the programmatic function). Simultaneously, controversy may arise regarding the regulation of the withdrawal of the complaint. Article 61(9) RS states that withdrawal of the charges after confirmation is possible even after the commencement of the trial; the 'Prosecutor may withdraw the charges with the permission of the TC'. After the opening of the trial, the withdrawal of the complaint by the prosecutor, but with the consent of the TC, is an inquisitorial feature of the analysed model of proceedings. Thus, even though the prosecutor is a party and is obliged to have the dispute handled before the TC, his power to dispose of the complaint is not granted. This means that in a situation of conflict referring to the prosecutor's decision to withdraw the charges, on the one hand, and the lack of consent of the TC for the withdrawal, on the other hand, the power of the TC prevails, and consequently, hypothetically, the prosecutor shall be forced to maintain charges.

Another problematic aspect of the accusatory principle relates to its temporal scope, as no definition is provided in the Statute or the Rules of Procedure and Evidence regarding when the trial is considered to have begun. As stated at the outset, this shall be regarded as an example of the fluctuability (referring to flexible frames of procedure) of the model of the proceedings at hand. As scholars rightly observe, the drafters of the Statute borrow from different legal cultures and systems and intend the "commencement of the trial" to mean both the start of the proceedings before the TC ("trial proceedings") and the commencement of hearings on the merits ("trial" or "hearing").[45] Therefore, between the confirmation of charges phase and the commencement of trial, there is a unique transitional phase in which, in principle, the case becomes pending before the court. However, there is still room for some significant modifications regarding the charge lodged, including its withdrawal by the prosecutor. Inferring *a contrario*, withdrawal before the beginning of the trial does not require TC approval.

45 Prosecutor v. Katanga and Ngudjolo, ICC T. Ch. II, 16 June 2009, para. 41.

4.4. Scope of prosecutorial activities in the trial

Within the framework of the assumptions of this study, the dualistic position of the ICC prosecutor, being an organ of pre-trial proceedings and an officer of justice on the one hand, and a procedural opponent of the accused in the judicial process on the other, is highlighted. In addition, we have indicated that the prosecutor's discretion decreases with the advancement of the proceedings and, similarly, the opportunism of the proceedings decreases. This finding corresponds with the formula of the accusatorial principle described above, particularly the mechanism of withdrawal of charges.

Thus, focusing on the most critical elements of the prosecutor's position in judicial proceedings features that are considered challenges based on the analysed model, one should refer to the issue of the distribution of the burden of proof, prosecutorial discretion regarding the subject matter of the case and additional prosecutorial actions at the request of the TC. As Article 66(2) RS states, the onus is on the prosecutor to prove the guilt of the accused; moreover, the evidentiary threshold for conviction is settled by the expression that the guilt of the accused must be proved beyond a reasonable doubt. Therefore, the prosecutor bears the burden of proving the veracity of the accusation's allegations. He must carry out the evidentiary initiative. Moreover, the realisation of the onus probandi is being subordinated to the principle of the defence. Article 67(2) states,

> *In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in the Prosecutor's possession or control which they believe shows or tends to show the innocence of the accused or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.*

It follows from the above that, regardless of the performance of the accusatory function, the prosecutor of the ICC is obliged by the principle of objectivity and, therefore, acts more even in court proceedings as an officer of justice than as a party.

Moreover, although the prosecutor acts as a party to the jurisdictional proceedings and is not under the court's control, he may carry out the court's instructions in exceptional circumstances. Indeed, let us recall that at the judicial stage, the TC, not the prosecutor, is the principal guardian of the principle of material truth. For example, Article 65(4) RS states,

> *Where the Trial Chamber is of the opinion that a complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims, the Trial Chamber may: (a) Request the Prosecutor to present additional evidence, including the testimony of witnesses […].*

With the background of the analysed model, which, as has been highlighted many times, is a certain compilation of the features of the prosecution model in the continental proceedings and also in the common law regimes, we have already emphasised that once the pendency of the case before the court arises and the trial begins, the prosecutor relinquishes the right to dispose of the case. A manifestation of this rule is also the formation of procedural consensualism and, more specifically, procedural bargains. Consequently, Article 65(5) RS states, 'Any discussions between the Prosecutor and the defence regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be binding on the Court'. Once the pendency of the case before the court is created, the subject matter of the lawsuit remains entirely at the court's disposal.

5. Final Remarks

Based on the assumption that the two elements, namely structural fluctuability and gradual opportunism, constitute challenges relevant to the effectiveness of the performance of prosecutorial functions. It should be mentioned that it was also assumed that effectiveness is not only a praxeological category but also an axiological one.

Thus, in the context of the realisation of prosecutorial functions, it also includes the values derived from the principle of an appropriate criminal response, according to which only the true perpetrator of a crime is allowed to be held criminally responsible. This requires taking into account, on the one hand, the guarantees arising from the right to defence, and, on the other hand, the demands of material truth. Within the framework of the issues analysed, reference was made to the role of the ICC prosecutor in dynamic terms. Nevertheless, one should advocate for the proposal of those scholars who postulate that the preliminary examination should be covered by a temporal rule, albeit with optional restrictions. In the context of the prosecutor's powers during investigations. Although prosecutorial discretion is strongly limited by the PTC, it still includes competence to isolate "the case" from "the situation under investigation". It should also be noted that the very moment of the transformation of proceedings *in rem* to the *ad personam* phase could be nontransparent from the point of view of representatives of the international community (particularly non-professionals), as the RS does not employ the notion of "a suspect" but only operates based on notions such as "a person against whom the arrest warrant has been issued" or "a person against whom the prosecutor requests the confirmation of charges". Thus, it can be said that (based on the RS) the so-called "material option" of the defendant in pre-trial proceedings is assumed. It would seem reasonable to reconsider introducing a formal definition of "the suspect", although, undoubtedly, such a demand was initially rejected by the drafters of the Statute. The sequential analysis was critical for

shaping the accusatory principle, particularly within the context of the institutions of confirmation of charges or the withdrawal of charges (which currently depends on the decision of the TC). The general postulate in this regard is to strengthen the accusatory principle and thus claim greater prosecutorial discretion. Naturally, the author is aware that the outlined reflections have little chance of turning into actual *de lege ferenda* postulates. However, the 25th anniversary of the ICC seems to be a suitable moment to put forward a tentative postulate to start a discussion on the optimisation of the adopted model.

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