



Prosecutorial Discretion at the International Criminal Court: A Comparative Study

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Abstract

In International Criminal Court (ICC), the prosecutorial discretion in nature is a hybrid of the common-law adversarial model and the inquisitorial approach of civil-law systems. This paper studies the ICC prosecutorial discretion from the perspectives of common law and civil law and draws the conclusion that the ICC needs some more time to carefully design the prosecutorial discretion to reach coherence.

Keywords: Prosecutorial discretion, The International Criminal Court, A comparative study

1. Introduction

The term “Prosecutorial discretion” refers to a prosecutor's power to choose from the options available in a criminal case, such as filing charges, prosecuting, not prosecuting, plea-bargaining, and recommending a sentence to the court. (Note 1) This paper will focus on prosecutorial discretion on whether to bring a charge and what charge to bring.

The prosecutorial discretion in common law system is different from that in civil law system. In common law system, the prosecutor's discretion is broad and prosecutor is free to choose whether to bring a charge and what charge to bring. However in civil law countries, prosecutorial discretion is comparatively limited and subjected to judicial review.

In International Criminal Court (ICC), the prosecutorial discretion in nature is a hybrid of the common-law adversarial model and the inquisitorial approach of civil-law systems. Following the common-law model, prosecutions at the ICC are directed by an independent prosecutor rather than by an investigating judge, as would be the practice under civil-law systems. However, the ICC prosecutor is subject to close judicial scrutiny by the Pre-Trial Chamber, something that would not generally be the case in a common-law system.

The purpose of this paper is to explore the issue of prosecutorial discretion at the ICC from the comparative point of view. First, this paper will discuss the different practice in the matter of prosecutorial discretion under common law and civil law system and the reasons behind the practice. Second, the ICC approach will be compared with the common law and civil Law practice and the reason of the mixed approach will be discussed. Third, the current practice of ICC will be examined. Finally, the conclusion will be given.

2. Comparative study of prosecutorial discretion in civil and common law system

2.1 *Prosecutorial discretion in civil law and common law system and the role of attorney in this matter*

2.1.1 Prosecutorial discretion in civil law system and the role of attorney in this matter

In civil law countries, the prosecutorial discretion is limited and subjected to judicial control. It is generally impossible not to prosecute felonies, but with regard to misdemeanors the prosecutor has certain powers to end proceedings.

France provides a good example of the prosecutorial role under civil legal tradition. In the prosecution process, there are three actors: the judicial police, the prosecutor, and the examining magistrate. Examining Magistrates function as an investigation director who assigns and supervises activities of the judicial police and the prosecutor, but he cannot open an investigation unless requested to do so by the prosecutor or the victim. The prosecutors determine appropriate charges against the accused, prosecute less serious felonies and most misdemeanors, and direct the work of the judicial police. For the serious offenses, the prosecutor must send them to the Examining Magistrate for a judicial investigation. At the completion of the magistrate's investigation, prosecutors must follow the magistrate's recommendation for disposition. (Note 2) In Germany, The prosecutor can only exercise discretion in the context of less serious offences (“*Vergehen*”) and where the law provides for. (Note 3) The prosecutor can end the case when the guilt of the perpetrator is considered minor and where there is no public interest in the prosecution. With the exception of the most unimportant cases, the prosecutor's decisions to discontinue proceedings are subject to supervision by a judge. In China, The criminal action can be initiated only by the prosecutor. For the minor crimes, the prosecutor can choose not to bring a case before a court. (Note 4) All the solutions of not sending before court pronounced by the prosecutor, as well as the measures taken

or the actions performed by him during the investigation, can be contested, the complaints being under the hierarchically superior prosecutor's competence. (Note 5)

In a civil law system, although the prosecutor is a party in the litigation, He functions as an administrator of Justice also. In this sense, the prosecutor carries the function of seeking truth, therefore, he should assess the evidence impartially to determine appropriate charges against the accused. In fact, the prosecutor in civil law is a government official, a separate professional group than lawyers. Moreover, since the prosecutor does not have discretion to drop a charge at his own will, the prosecutor should cooperate with court and police closely rather than reaching conclusion too fast and arbitrarily. In addition, the popularity of plea bargaining in civil law countries requires prosecutors to have the skill of negotiation also. (Note 6) However, due to the difference of the criminal law, the bargaining power of prosecutors from civil law countries is not as strong as the American prosecutor. For example, French prosecutors' inability to drop charges at post-filing makes it impossible for them to use overcharging as a means to coerce cooperation from the accused. Moreover, Prosecutors in Germany cannot expect that a threat to charge the accused with multiple crimes would create pressure on the accused because the German law does not permit the imposition of multiple consecutive sentences.

2.1.2 Prosecutorial discretion in common law system and the role of the attorney in this matter

In stark contrast, under common law system, the officer charged with public prosecutions has absolute discretion (Note 7) on whether a case will be carried forward, what the formal charges will be, and even if the charges should later be dropped.

In the U.S., the prosecutor decides whether to prosecute or not to prosecute, who to prosecute and with what offence. The typical examples of broad prosecutorial discretion are selective prosecution and plea bargaining. The prosecutor also has power to withdraw or discontinue any prosecution whether initiated by him or by a private prosecutor or authority. And in doing so he does not have to give any reasons, for to require him to do so would be to encroach on his discretion. The result is that the American prosecutor at least has broad discretionary power, and at the extreme is the most influential person in America in terms of the power he or she has over the lives of citizens. (Note 8) During the pre-trial investigation, the judge has traditionally hardly any role to play, apart from authorizing coercive measures. It is a judicial task (magistrate or a grand jury in the United States), however, to determine whether the evidence is sufficient to commit the accused for trial. However, neither the review by magistrate nor a grand jury has exercised much control over prosecutor's discretion. First, there is no control on the prosecutor's decision to discontinue a case because those two procedures are initiated after the prosecutor brings a charge. Secondly, it's easy to pass the review of grand jury and preliminary hearing conducted by a judge because the standard is really low. Therefore, such kind of judicial control over prosecutor is not comparable to judicial control in civil law system. In the English system the main responsibility for the continuation of the prosecution lies with the police. It is for them to decide whether to charge a suspect and refer the case to Crown Prosecution Service (CPS). (Note 9) If they transfer the case to the CPS it is then in its discretion to decide whether or not there is sufficient evidence and whether or not 'public interest' requires a prosecution. (Note 10) The CPS therefore has the power to discontinue proceedings. If the prosecutor want to discontinue a case and caution the suspect, they have to refer the case back to the police.

Since the prosecutor in common law countries has broader discretion than in civil law countries, he should have more responsibilities and skills. First, the prosecutor should assess the evidence more carefully to make decisions or charges because, unlike the civil law prosecutor, the common law prosecutor might only have the evidence not favorable for the accused. Second, the skill of negotiation is necessary for common law prosecutors in plea bargaining. The prosecutor should judge the bargaining power of the accused and make the bargaining strategy. In those cases which involve the important witness, the prosecutor should try hard to make a successful plea bargaining in exchange for the witness's cooperation in giving testimony. In those cases where the evidence is not sufficient, plea bargaining might be a better choice than going to trial. However, Prosecutors should handle the plea bargaining in a lawful way. Overcharging is a tactic often employed by prosecutors to augment leverage in bargaining. The strategy, though it is unlawful, can be a successful one. Because American law does not require prosecutors to open their entire file for inspection by the defense, the defense may well be kept in the dark as to the true strength of the prosecutor's case against the defendant. In the exercise of discretion in selective prosecution, the prosecutor should be objective in making a decision to charge the accused to avoid the law enforcement become personal. For example, the prosecutor should not pick people that he thinks he should get, rather than pick cases that need to be prosecuted. The greatest danger of abuse of prosecuting power lies here. Finally, in order to use the broad discretion properly, the prosecutor must have a sophisticated understanding of people and their motivations and of the needs of the public, as well as the wisdom to determine an appropriate course of action. Being a prosecutor draws upon legal skills as well as one's capacity for fairness, compassion, and empathy.

2.2 The reasons behind the different prosecutorial discretion in civil law and common law system

First, the different practice in prosecutorial discretion is closely linked to different legal traditions. A common law,

'adversarial' system, is a contest between two equal parties, seeking to resolve a dispute before a passive and impartial judge, with a jury pronouncing one version of events to be truth. Civil law, 'Inquisitorial' systems consist in the investigation by the state of an event, with a view to establish the truth – the state doubly present in the fact-collecting prosecutor on the one hand and, on the other, an impartial and independent judge actively involved in truth finding. (Note 11) Therefore, in the matter of prosecutorial discretion, the civil law approach likes to involve the judiciary to intervene to help to find the truth. On the same reasoning, the civil law countries do not accept the plea bargaining because it might disguise the truth. Comparatively, the adversarial principle is generally taken to mean that judges in American courts are not commissioned to investigate cases, determine the truth, and provide justice. The judges take a more passive role. Primary responsibility for defining the nature of the dispute, and presenting the relevant facts, lies with the parties and their lawyers. More specifically, criminal cases are seen as disputes between the government and individuals accused of crime. In a criminal case, the prosecutor, as representative of the government, can decide that the interests of his client are best served by not taking any legal action at all, or by settling for relief short of what could in theory be available if litigation were pursued to its final conclusion. This justifies the broad prosecutorial discretion of the prosecutors in common law countries.

Second, the different practice in prosecutorial discretion is due to the different legal principles in this matter that are adopted in common and civil law systems. In Civil law system, it is believed that the legislator is the proper person to prescribe rules and criminalize certain behavior. Therefore all arbitrary decisions, including Prosecutor's decision, must be controlled. (Note 12) The prosecutor could not drop a charge unless permitted by law to do so. In common law system, there are four policies that seem to govern the discretionary power of the prosecutors. (1) legal sufficiency, which means that there is in general an interest to prosecute offences which constitute a crime; (2) system efficiency, which contributes to the huge overload and backlog of prosecuting agencies (3) defendant rehabilitation, which aims at assessing what would be best in the interests of the defendant, opening up possibilities of pre-trial diversion programme or probation without verdict; (4) trial sufficiency, whereby the possible outcome of a trial is assessed and it is decided accordingly whether or not to continue prosecution. The system is governed by practicability and effectiveness. (Note 13) Under the above guided principle in common law system, the prosecutor has full discretion in making decisions on charging.

2.3 Recent transformations and assessment: are common law and civil law converging or permanently divergent?

Having looked at the common law and civil law systems we find that important variations exist regarding the prosecutorial discretion. These national systems, however, have undergone important transformations over the course of history. Civil law systems in the past thirty years have undergone significant changes. In the context of prosecutorial practice, nothing illustrates the extent of the changes better than the emergence of plea bargaining and the gradual expansion of prosecutors' autonomy. However, it remains true that prosecutors' discretion is subject to much stricter control than that enjoyed by their American counterparts.

From a comparative angle, the intriguing question arises whether the legal systems of civil and common law countries are gradually converging. Will the adoption of the other's characteristics make the differences no longer essential? Take plea bargaining in civil law system for example. Plea bargaining was introduced in the Italian code of criminal procedure recently. Unlike the U.S., the plea bargaining in Italy is used only in minor crimes. Additionally, in Italy, only the sentence of the accused could be bargained, which makes it different from the U.S. where both the charges and sentences of the accused can be bargained. Therefore, the judge still has to try the case to determine the proper charges. Why is the plea bargaining practice in Italy substantially different from that in U.S.? The reason is rooted in the fundamental differences between two different systems. In Italy, a civil law country, Prosecutorial discretion is subjected to judicial control, including plea bargaining because the judge serves the function of truth finding. On the contrary, in U.S., Prosecutor, as a party of a case, can make bargaining with the accused freely. The differences of the two systems are still essential although there are similar practices with regard to prosecutorial discretion.

3. Prosecutorial discretion at the ICC ---civil law, common law or mixed?

3.1 The Mixed approach and the role of the ICC prosecutor

At the ICC, the prosecutor's discretion in charging is shared with the Pre-Trial Chamber. (Note 14) On the one hand, the ICC Statute affirms the principle of prosecutorial independence in stating that 'the Office of the Prosecutor shall act independently as a separate organ of the Court'. (Note 15) On the other hand, the ICC Statute entitles the Pre-Trial Chamber to confirm the charges against the accused on which the Prosecutor intends to seek a trial: a hearing is held for the confirmation, the aim of which is to determine whether there is "sufficient evidence" to establish "substantial grounds" to believe that the person committed each of the crimes charged. (Note 16) Nevertheless, the Prosecutor has the right of an interlocutory appeal when he disagrees with the pretrial chamber when it actually takes over part of the responsibility of the Prosecutor. (Note 17)

The confirmation hearing has received general support from all sides and it can be accommodated within both the

common law and civil law model: one may consider it –as common lawyers usually do– as a kind of filter to ensure that only the really significant cases go to trial or –as civil lawyers do– as a rather lengthy pretrial in order to confirm or check the charges and to avoid time consuming disputes about disclosure of evidence in the trial stage.

Indeed, the ICC confirmation procedure is a compromise that combines several elements of different systems of pretrial procedures but does not imitate one of them completely. The prosecutorial discretion is not completely common law in nature because the Prosecutor normally acts under the supervision of the Pre-Trial Chamber. The confirmation procedure is not comparable to the review process by the magistrate or grand jury in common law system because the ICC Pre-Trial Chamber plays a more active role than the magistrate or grand jury. Unlike the Pre-Trial Chamber in the ICC, the Grand Jury has no power to require the prosecutor to amend the charges or reduce the charges. Additionally, Restrictions on the Prosecutor's discretionary powers are further manifested with respect to his decision not to prosecute. (Note 18) The Pre-Trial Chamber acting *proprio moto* on the application of either the State or the Security Council may review the decision of the prosecutor and “request” him to reconsider the decision. (Note 19) Notably, the confirmation hearing is not same as the practice in civil law system because this pre-Trial judge has only coordinating or controlling, not investigation functions.

Under this mixed approach, the ICC Prosecutor functions have characteristics of both systems: “The Prosecutor acts both as an ‘administrator of justice’, in that he acts in the interest of international justice pursuing the goal of identifying, investigating and prosecuting the most serious international crimes and, as in common law legal orders, as a party in an adversarial system.” (Note 20) To carry his function, the prosecutor should independently make the decision to guarantee the justice against the self-interested parties. Additionally, the Prosecutor should have the wisdom in using his discretion because the Prosecutor in the ICC needs cooperation and help of domestic countries in the exercise of his prosecutorial discretion. The ICC prosecutor must be both a diplomat and a judicial officer. Moreover, the prosecutor of the ICC should have good command of civil law and common law knowledge since he has to deal with judges, defense counsel, witnesses and victims from different systems. Finally, for the sake of judicial economy, the prosecutor should have the ability to filter the cases and select the proper individuals to charge without sacrifice of justice.

3.2 The reasons behind the mixed approach

The extent of prosecutorial discretion in national jurisdictions depends on a variety of legal, social, political and historical factors. In the international dimension, the exercise of prosecutorial discretion must be adapted to different features and needs. ICC is an international forum to accuse those most serious international crimes. The independence of the prosecutor constitutes the best guarantee of the independence of the whole international judicial institution towards self-interested states. Yet because of man's proneness to err there is need to put in place mechanisms and practices to minimize the prosecutor's errors, to monitor his exercise of his powers and to correct him when he appears to be going astray. The inclusion of the Pre-Trial Chamber avoids the concentration of too much authority in the hands of the Prosecutor and prevents the use of prosecutorial powers in other purposes divergent from the justice administration.

Additionally, looking back to the history of the Rome statute of ICC, We might find the controversial arguments of the representatives from civil law and common law system contributes to the mixed approach in prosecutorial discretion. (Note 21)

4. Evaluation of the ICC mixed approach on prosecutorial discretion

The existing rules on prosecutorial discretion are sufficient to bring manageable cases at the ICC. However, there are controversial arguments on the efficiency and coherence of those roles. It might be a time to consider whether there is a better way to solve the issue of prosecutorial discretion than the current practice.

4.1 Controversial arguments: different opinions result from different perspectives ---common law and civil law perspective

The mixed approach on prosecutorial discretion aroused many controversial arguments. Obviously, different opinions result from different perspectives of civil law and common law. The main issues are as following:

First, the triggering proceedings on the initiative of the prosecutor are unusually long. Indeed, they may require up to two sets of decisions by the Pre-Trial Chamber and eventually by the Appeal Chamber, on the admissibility of the situation referred to in the Prosecutor's activation request before the ICC's dormant jurisdiction can be definitively initiated. (Note 22) The common law colleagues do not like the delay of process caused by the confirmation process. On the contrary, civil law colleagues might think confirmation hearing will make the later trial more efficient by filtering the charges. It is a common practice in civil law countries.

Second, the restriction of the prosecutor's power is contrary to common law practice where the independence of prosecutors is emphasized. On the contrary, from the view of civil law, judicial control is a guarantee of a fair and efficient trial. Additionally, the civil law colleagues think that the confirmation process puts a minor restriction on Prosecutor's discretion.

Third, due to lack of clarity in the Rome statute, there are arguments regarding the Pre-Trial Chamber's discretion in the confirmation hearing which illustrates the internal tension between the Prosecutor and Pre-Trial Chamber. The key issue is whether the Pre-Trial Chamber has the power to amend charges. In *Prosecutor v. Lubanga*, the charge brought by the Prosecutor contains conscripting and enlisting child soldiers to fight in Ituri, Congo. The Prosecutor marked this armed conflict as being internal, the Pre-Trial Chamber changed the charge and found an international armed conflict. The prosecutor sought leave to appeal the decision because of his concern that at trial he would be unable to meet his burden of proof for establishing Lubanga's individual criminal responsibility—that is, to prove, the international nature of the conflict. Moreover, the prosecutor believed that the right of the Prosecution to bring charges before the Chamber is violated by allowing the Pre-Trial Chamber to amend the charges. Actually, the argument on this issue illustrates the different view on judicial control in this matter. Based on the theory of common law, the discretion of amending charges should belong to the prosecutor since in its tradition the Court is bound by the Prosecutor's legal classification of the charges. Comparatively, based on the theory of civil law, the Court can not only accept or dismiss but also – according to the principle *iura novit curia* – amend, in its own right, the charges. (Note 23) In fact, the lack of clarity of the ICC Statute in this matter is due to the lack of agreement of common and civil lawyers during the negotiations. (Note 24) The question was, as many, conspicuously left open.

4.2 Is there a better way than the mixed approach?

Given the controversial arguments regarding the mixed approach, it is time to consider whether there is a better way than the current practice. Some might argue the adoption of a common law or civil law approach rather than the mixed approach because each system represents a carefully structured balance between the rights of the parties to the trial. Although it is true that problems of coherence exist in the ICC, it is no solution to adopt either a common or civil law approach because successful national practice might not work well in the international world. Unlike domestic legislators, it is hard for international legislators (party members of the ICC) to reach an agreement on the Prosecutorial discretion. On the one hand, it is good for a prosecutor to work independently to achieve justice. On the other hand, the over-expansion of the prosecutor's rights might work against a party member's interest. The above special concerns in the ICC make the adoption of either civil law or common law approach not so effective. Therefore the current issue is whether these rules can be applied more systematically than they are. The aim is clear, ensuring that justice in complex and wide scale cases such as those of serious violations of international law can be at the same time fair and expeditious.

It must not be forgotten, however, that procedural rules only provide for a general framework, the smooth functioning of which depends, ultimately, on the procedural protagonists. A truly mixed procedure requires Prosecutors, defense Counsel and Judges who have knowledge of both common and civil law and are able to look beyond their own legal systems.

5. Conclusion

Adapting the notion of prosecutorial discretion from domestic jurisdictions, where it was born and well integrated within the intrinsic checks and balances, to the newly evolving field of international criminal law, where no such structures exist and where world politics play a major role, will not be done easily.

From the comparative study of national practice in civil law and common law system, one can see fundamental differences still exist although there is emergence of similar practice in both systems. The integration of elements of both systems in a new well-balanced system calls for a search for a new coherence, an intrinsic balance between all the elements of the system in its various procedural stages. It took most national systems, embedded in one of the major legal systems, many centuries to find such a coherence and intrinsic balance, without being perfect yet. The ICC needs some more time to carefully design the prosecutorial discretion to reach coherence.

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Notes

Note 1. Black's Law Dictionary (8th ed. 2004), discretion (4)

Note 2. Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find out, and Why Should We Care?* 78 Cal L. REV. (1990)

Note 3. Christoph J.M. Safferling, *Towards and international criminal procedure*, Oxford University Press, P173.

Note 4. Article 142 of criminal procedure law of China

Note 5. Article 145 of criminal procedure law of China

Note 6. Some civil law countries in some degree adopt plea bargaining, but plea bargaining is limited to minor crimes.

Note 7. In U.S., There are limits to a prosecutor's discretion, and the judiciary has a responsibility to protect individuals from prosecutorial conduct that violates constitutional rights. Such conduct usually involves either selective prosecution, which denies equal protection of the law, or vindictive prosecution, which violates due process. However, the prosecutor is rarely found liable for abuse of prosecutorial discretion because most courts apply a clearly erroneous standard of review. *U.S. v. Schoolcraft*, 879 F.2d 64, 67 (3d Cir. 1989); *U.S. v. Johnson*, 91 F.3d 695, 698 (Sth Cir. 1996) cert. denied, 117 S. Ct. 752 (1997); *U.S. v. Sammons*, 918 F.2d 592, 601 (6th Cir. 1990).

Note 8. Reichel L. Philip, *Comparative Criminals Justices Systems, A Topical Approach*, Sec.Ed.1999, p. 211.

Note 9. J. Fionda, *Public Prosecutors and Discretion* (Oxford, 1995), p. 39

Note 10. Id. p. 24

Note 11. Jörg, N; Field, S & Brants, C. 1995. Are Inquisitorial and Adversarial systems converging? In Fennell, P et al (eds) *Criminal Justice in Europe: A Comparative Study*. Oxford: Clarendon Press., p 41-42

Note 12. Christoph J.M. Safferling, *Towards an international criminal procedure*. Oxford university press, 2001, p.174

Note 13. Id.

Note 14. Article 61(7) Rome statute of the ICC

Note 15. Article 42(1) of the Rome Statute of the ICC

Note 16. Article 61(5) Rome statute of the ICC

Note 17. Article 56(3) (b) Rome statute of the ICC

Note 18. Article 53(2) of the Rome Statute of the ICC

Note 19. Article 53(3) of the Rome Statute of the ICC

Note 20. Antonio Casses Paola Gaeta John R.W. D. Jones, *The Rome statute of the international criminal court: A commentary Volume II*, Oxford University Press, P.163.

Note 21. As to the ICC, the beginning of the Preparatory Committee discussions in 1995 was common law dominated to such a degree that the French delegate Gilbert Bitti decided "to warn" his government "that a strong reaction was necessary in order to avoid a pure common law system". Bitti, *Two Bones of Contention between civil and common law: The Record of the Proceedings and the Treatment of Concursum Delictorum*, in: Fischer/Kreß/Lüder, *International and national prosecution of crimes under International Law*, 2001, p. 274.

Note 22. Article 15, Article 18 of Rome statute of the ICC

Note 23. The judge knows the law (technically, there is no need to "explain the law" or the legal system to a judge/justice in any given petition). see at [http://en.wikipedia.org/wiki/Brocard_\(legal_term\)](http://en.wikipedia.org/wiki/Brocard_(legal_term))

Note 24. Bitti, *Two Bones of Contention between civil and common law: The Record of the Proceedings and the Treatment of Concursum Delictorum*, in: Fischer/Kreß/Lüder, *International and national prosecution of crimes under International Law*, 2001, p. 273

Note 25. Article 61(7) of the Rome Statute does not explicitly authorize the pretrial chamber to substitute its own charges for those of the prosecutor. According to Art. 74 (2) cl. 2 of the Statute, the Court must base its judgment "on the facts and circumstances described in the charges and any amendments to the charges"; however, it is not clear whether these charges are still the original ones as drafted by the Prosecutor or whether the Pre-Trial Chamber has the right to amend them proprio motu in the confirmation hearing.