# PUBLIC

# ANNEX B

# International Criminal Justice at the Yugoslav Tribunal

*A Judge's Recollection*

MOHAMED SHAHABUDDEEN

OXFORD
UNIVERSITY PRESS

### 2.3.2 The Prosecutor

In many ways, as observed earlier, the Prosecutor of the ICTY is the engine of the Tribunal.[57] In the words of the Committee of Ministers of the Council of Europe, 'it is public prosecutors, not judges, who are primarily responsible for the overall effectiveness of the criminal justice system'.[58] Moreover, it is right to remember, as Prosecutor Richard Goldstone recalls, that prosecutions under the Statute are 'the most important criminal investigations ever conducted in History'.[59] It should be remembered that the Prosecutor's jurisdiction includes investigation: in Kosovo alone, and speaking of the period ending in 2008, 2,000 bodies were exhumed by teams working for the Office of the Prosecutor (OTP);[60] between 1994 and 2008, 10,000 witnesses were interviewed by the OTP.[61]

The Prosecutor's independence is well established, both in practice and in the Statute, Article 16(2) of which expressly requires that the 'Prosecutor shall act independently'. It is not thought that any insuperable question of reconciling the independence of the Prosecutor with that of the Chambers can ever arise: where there is a conflict, the independence of the Chambers will prevail. In an order by the President made in *Meakić and Sirikica* it was, for example, simply stated that the Prosecutor had no role in the assignment of a case to a Chamber or a Judge.[62]

The Prosecutor has wide authority. It is said that this is wider than the discretion which a national prosecutor has. If so, this is not due to any fundamental juridical difference. It is due to the fact that an international prosecutor's resources tend to be insufficient to enable him to reach all. But, however wide the international prosecutor's discretion, it is not absolute: it is subject to judicial review. This was recognized in *Celebići*[63] and *Akayesu.*[64] But certain questions have arisen.

First, there is a question whether the independence of the ICTY Prosecutor is compromised where the Appeals Chamber remits a case with directions to continue the hearing. It may be said that this requires the Prosecutor to continue the proceedings even if he would have wished to discontinue them. An answer is that nothing in the direction of the Appeals Chamber wrests the prosecution function from the Prosecutor: he is not deprived of the competence to offer no evidence and thereby bring the proceedings to an end. Whether that is an entirely satisfactory

[57] That has been sufficiently shown by the experience of the ICC.

[58] See A M Donner, 'Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court', 97 *AJIL* (2003) 510, at 512.

[59] L Coté, 'Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law', 3 *JICJ* (2005) 176.

[60] UNICRI (ed), *ICTY Manual on Developed Practices* (Turin, 2009).

[61] *ICTY Manual on Developed Practices*, at 12 and 17, para 26.

[62] *Meakić* et al, IT-95-4-I and *Sikirica* et al, IT-95-8-I, Order on the Prosecutor's Requests for the Assignment of a Confirming Judge, 27 August 1998.

[63] *Celebići*, IT-96-21-A, Judgment, 20 February 2001.

[64] *Akayesu*, ICTR-96-4-A, Judgment, 1 June 2001. In the 2012 Guyana case of Henry Green, reported in the local press, Chang CJ, without the usual preliminary inquiry, dismissed a prosecution for being based on irrational evidence; the opposing argument was that he should have left it to the jury.

Those remarks demand respect both as regards the general question of the extent to which a court should permit itself to disagree with the judgment of a prosecutor as to when he should move, and as regards the particular question of the right of a prosecutor, who has a sufficiency of evidence on which to lay charges, to defer laying them until better or alternative forms of proof are made available to him through further investigations. Accordingly, if there is no question of the prosecution gaining a tactical advantage, what remains is a principle which recognizes that the prosecution has a right not to institute charges as soon as it has enough material to do so; it may competently defer doing so until it has inquired into the possibility of obtaining better or alternative forms of evidence. If there was any view that the availability of evidence meant that there should be an indictment forthwith, that view has not prospered.[74]

Fifth, it has to be considered that the grounds of judicial intervention have to be carefully chosen. 'Impermissible discrimination' would appear to be a ground of judicial intervention, but it is not shown by mere proof that members of one group were prosecuted while members of another group, being in the same situation, were not. Something more is needed. In *Ndindiliyimana*,[75] the defence sought to supply it by asserting a political motive. This is capable of being regarded as a vitiating consideration. But a high burden is required to establish it. The burden was not met in that case. It has to be shown that the difference in treatment has nothing to do with the criminal conduct of the accused—that the prosecution is objectionably selective,[76] that it is oppressive or vexatious. The ICTR Prosecutor, to his credit, accepts that the Tribunals have inherent power to stop a prosecution because it is oppressive or vexatious.[77]

Sixth, it is sometimes suggested that it is fair to prosecute where the sole reason for prosecuting is to make it appear that both sides are being prosecuted. There is sympathy for the opposite view.[78] A life sentence prisoner will not regard it as fair if he had been selected for prosecution merely to show 'balance'. He would probably say that that was an 'oppressive' use of prosecutorial discretion; and the public would agree. There is a difference between determining that there is an indictable case against a man and selecting him for indictment. If the only reason for selecting him for indictment is to show 'balance', there is no confidence that the selection can be defended.

Seventh, a question is how far the Prosecutor may go in declaring his belief in the guilt of the accused, as compared with statements by him as to his readiness to prove guilt. The Prosecutor is not required to be neutral in a case; in one

[74] See M Schrag, 'Lessons Learned From ICTY Experience', 2 *JICJ* (2004) 427, at 430.

[75] *Ndindiliyimana*, ICTR-2000-56-I, Decision on Urgent Oral Motion for a Stay of the Indictment, or in the Alternative a Reference to the Security Council, 26 March 2004, at para 26.

[76] *Ndindiliyimana*, at para 2; L. Coté, 'Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law', 3 *JICJ* (2005) 176.

[77] H B Jallow, 'Prosecutorial Discretion and International Criminal Justice', 3 *JICJ* (2005) 144, at 156.

[78] See L Coté, 'Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law', 3 *JICJ* (2005) 176.

construction of the Statute, he is a party.[79] But he is not of course a partisan. The same thought was expressed in *Kupreškić* when an ICTY Trial Chamber remarked that:

> the Prosecutor of the Tribunal is not, or not only, a Party to adversarial proceedings but is an organ of the Tribunal and an organ of international criminal justice whose object is not simply to secure a conviction but to present the case for the Prosecution, which includes not only inculpatory, but also exculpatory evidence, in order to assist the Chamber to discover the truth in a judicial setting.[80]

It is right that the prosecution should not prosecute without itself believing in guilt; but an announcement of the prosecution's belief in guilt is to be avoided. Judicial traditions vary and the Tribunal must seek to benefit from all of them. One may consider that the system of the Statute under which the Tribunal is functioning will support a distinction between a public affirmation of belief in guilt and a public affirmation of preparedness to prove guilt. The latter is relevant; the former is not. The same thinking seems to animate the discussion of a related matter in the ICC.[81] The point is that an assertion of guilt by a public authority can prejudice the presumption of innocence and thus do harm to the fair trial to which the accused is entitled. The ECtHR has held that the duty to respect presumption of innocence applies to public authorities, apart from the courts.[82]

In its written arguments on appeal in *Kanyabashi*,[83] the prosecution said:

> It is the Prosecutor's bounden duty to assist the Appeals Chamber in matters of law, procedure and fact. This duty involves bringing to the attention and notice of the Appeals Chamber the exact position of the law, procedure and evidence even in circumstances where the point of law, procedure and evidence appears adverse to the Prosecutor's contention.[84]

That is correct. A prosecution must be conducted vigorously, and that is the case at the Tribunals. Members of the prosecution team honour the injunction that they 'ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice'.[85]

[79] See *Delalić* et al, IT-96-21-T, Judgment, 16 November 1998, at para 228, stating that 'the Prosecution is clearly always a party' to cases before the International Tribunal. It is submitted that the view that, though a party, he or she is not a partisan, is implicit in Prosecutor's Regulation 2 (1999) of 4 September 1999 entitled 'Standards of Professional Conduct for Prosecuting Counsel'.

[80] *Kuprěskić* et al, IT-95-16-T, Decision on Communications between the Parties and their Witnesses, 21 September 1998, at 3, subpara (ii).

[81] ICC Pre-Trial Chamber I, *Muthaura* et al, ICC-01/09-02/11, Application for Order to the Prosecutor regarding Extrajudicial Comments to the Press, 30 March 2011.

[82] *Allenet de Ribemont v France*, ECtHR, Application No. 15175/89, Judgment, 10 February 1995.

[83] *Kanyabashi*, ICTR-96-15-A, Judgment, 3 June 1999.

[84] *Kanyabashi*, ICTR-96-15-A, Prosecutor's Brief Pursuant to the Scheduling Order of the Appeals Chamber, 30 December 1998, at section 2A.

[85] *R v Banks* [1916] 2 KB 621, at 623, *per* Avory J. In keeping with that view, it is indeed said that the prosecuting counsel 'should not regard himself as appearing for a party'. See Code of Conduct of the Bar of England and Wales, at para 11(1). See also the Trial Chamber's remarks in *Kuprěskić* et al, IT-95-16-T, Decision on Communications between the Parties and their Witnesses, 21 September 1998, cited in J Jones and S Powles, *International Criminal Practice* (Oxford, 2003), at para 2.5.28.