Résumé

Cet article examine de manière critique l’important rôle que joue le procureur devant les juridictions pénales internationales telles que le Tribunal pénal international pour l’ancienne Yougoslavie et celui pour le Rwanda. Il examine les fonctions du procureur ainsi que son indépendance, sa redevabilité et son professionnalisme. Il démontre enfin l’abus de pouvoirs du procureur dans deux importantes affaires jugées par le Tribunal pénal international pour le Rwanda, en l’occurrence les affaires André Ntagerura et Gratien Kabiligi.

Keywords : Abuse of power ; independence; professionalism; International Criminal Tribunal for Rwanda; prosecutor
Introduction

In most, if not all of domestic jurisdictions ‘the prosecutor plays a special and unique role in the criminal justice process’ (Layton 2002:449; Bubany & Skillern1976; Paten 2010; Gourie 1983:31) though the role varies considerably among legal systems (Dandurand 2005:3). A prosecutor is an ‘essential agent of the administration of justice (Havana Guidelines on the role of the prosecutor 1990).’

The prosecutor serves to uphold the rule of law and the respect of human rights more generally. In domestic systems, the lack of these two attributes may bring the criminal justice system and governing institutions into disrepute and losing all credibility and moral authority (Dandurand 2005: 2) over the public. This is derived from the fact that the prosecutor notional client is a public that seeks the attainment of justice as opposed to victory in court (Layton 2002: 449).

Terzano underscores the role of the prosecutor as “not just one of an advocate, but rather an ‘administrator of justice’ whose ultimate goal is to protect the innocent, convict the guilty, and guard the rights of the accused. Prosecutors—unlike defence attorneys—do not advocate for a single individual; they advocate for a just outcome (Terzano et al 2009: 2).

To discharge the function of seeking justice, the prosecutor should not act as a time-keeper or bloodhound to avoid being seen as conviction-minded, hypocrite and an instrument of injustice (Gourlie 1982-83: 41).

The American Bar Association’ Standards for Criminal Justice (ABA Standards) indicate that ‘the duty of the prosecutor is to seek justice, not merely to convict (ABA Standards for Criminal Justice 1993).’ These standards reflect the prosecutor’s role at common law (Caves 2008: 3).

Groome, both a former Manhattan District Prosecutor and ICTY Lead Prosecutor in the Milosevic case highlights that the prosecutor is not a partisan adversary but a judicial officer charged foremost with determining the truth (Groome 2006:797). Gershman argues that ‘whether rural or urban, local or federal, elected or appointed, this official is glamorized by the media and diabolized by his foes. […] he has the power to make decisions that control and even destroy people’s careers, reputations and lives (Gershman 1997: vii).

Gifford adds that ‘being charged with a crime jeopardizes employment, reputation, and social standing (Gifford 1980- 1981: 669; Caves 2008: 11)’. It is the decision to charge that ultimately shapes and impacts on the criminal justice system at large in terms of efficiency, character, and quality(Caves 2008:12).These two roles of a domestic public prosecutor and the negative impacts it has on the accused apply mutatis mutandis to the international prosecutor as well.

This article studies the prosecutor’s role at the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Section one analyses the prosecutor’s functions while section two looks into the prosecutor’s attributes of independence, accountability and professionalism. Section three casts a critical view on the international prosecutor imbalance approach
to his role. Section four illustrates how, for instance, the prosecution abused its powers in the cases of Andre Ntagerura and Gratien Kabiligi, heard at the ICTR. The last section concludes the article.

The prosecutor’s role

The role of the prosecutor is to fight the crime by prosecuting those guilty of it. This role serves to redress the wrong done by an offender. This duty has a purpose and is not done in the sole interest of the individual who acts as a prosecutor.

According to Sornarajah (1996:47), ‘a crime is not only directed at the victim [alone] but at society at large and it [is] therefore not possible for the victim alone to forgive the offender either through mercy or because of financial rewards provided for such forgiveness. Therefore, the prosecutor does not act for his own benefit or interest. He acts in the interest of the society. He must therefore meet the expectation of the society’. Recalling the Michigan Court opinion in 1872, Green (1999:613) summarises the role of the prosecutor one of representing

the public interest, which can never be promoted by the conviction of the innocent. His object like that of the court should be simply justice; and he has no right to sacrifice this to any pride of professional success. And however strong may be his belief of the prisoner’s guilt, he must remember that, though unfair means may happen to result in doing justice to the prisoner in the particular case, yet, justice so attained, is unjust and dangerous to the whole community.

The prosecutor must be a zealous advocate who seeks to win a case and an officer of the court seeking justice. The corollary of this twin obligation is also about balancing between a career and the obligation to serve justice as a moral imperative. A good and professional prosecutor will therefore be one who arrives at satisfying these equally demanding duties. In Fisher’s (1988:198) view, however, observers have complained about a tendency on the part of prosecutors to prefer the former of these ‘schizophrenic’ obligations to the later. This is commonly described as a tendency to behave overzealously or according to a ‘conviction psychology.’

Fisher’s arguments describe better the international criminal tribunals’ prosecutors. They prefer overzealousness over anything else. Overzealousness can and has led to wrong convictions (Terzano et al 2009:7; Norman1975:3). They further argue that

Psychological biases can lead prosecutors to favour evidence which confirms their theory, while ignoring or discrediting contradictory information. This phenomenon often leads to a ‘tunnel vision’ mentality, where prosecutors and law enforcement focus all of their attention and efforts on building a case against a single suspect, often overlooking weaknesses in their case or leads pointing to other suspects. Tunnel vision is particularly dangerous when the prosecution’s theory is wrong, and the defendant is in fact innocent (Terzano et al 2009: 14).

Carter (1977-1978:51) reminds prosecutors to play the game by its stated rules, namely “convicting the guilty only within the boundaries of law – because regardless of how undeserving any given defendant may be of how he or she reacts to the disposition of the case, we feel the good society does not wield unlimited power over
Most often, international prosecutors act as if they have personal accounts to settle against the accused. Others seem to force a way for better positions in the future. In domestic jurisdictions to a large extent, as has been seen above, prosecutors exhibit a one-sided vision of their role. Yet in national systems prosecutors may be wary of the public outcry about their behaviour. On the international level, it looks like this concern has not, as yet, alarmed anyone while prosecutors perform the same role as in domestic jurisdictions. The international prosecutors are by far out of reach of any form of oversight and control. They are accountable to no one. It will then be very naïve to believe that the way prosecutors behave in domestic jurisdictions suddenly change by the magic move at the international level. The role and functions prosecutors perform at home are the same they are entrusted with in the international arena so are the attributes expected of them.

**Prosecutor’s attributes**

The prosecutor should be independent, accountable and professional. McKechnie (1996: 273) finds a strong relationship between independence and accountability: the former can only be assured if there is appropriate accountability of the latter in a professional manner. This principle applies whether at domestic or international level of prosecution. This is valid whether in domestic or international prosecutions. What these three pillars encompass then?

**Independence**

It is not an easy task to frame the independence of the international prosecutor beyond the theoretical understanding of what the term ‘independence’ means more generally.

Tak observes that ‘the topic of dependence or independence of the prosecution service can be dealt with from various angles since the level of (in-) dependence is the result of the interaction of various elements’ (Tak 2004: 3). Tak identifies and distinguishes between the external and internal (in-) dependence and the institutional and functional aspects of the (in-) dependence. He argues that external (in-) dependence deals with the question to what state power the prosecution service is subordinated or related while internal dependence refers to the internal structure of the prosecution service – a centralized or decentralized structure – and its hierarchical links (Tak 2004:3). The external (in-) dependence is institutional. It relates to the relationship between the prosecution service and the three traditional powers within a functioning democratic government, namely the legislative, the executive and the judiciary. The second leg of (in-) dependence, concerns more the internal organisation of the office of the prosecutor.

The crucial question is therefore to understand the scope of the institutional independence and how it transpires in practice. According to Brubacher (2004:84), this independence refers to ‘the institutional division of power, including the independence of the prosecutor from other bodies within the tribunal and
independence from the executive, which, in the international system, is considered to be the function of states and some international organisations such as the Security Council.

The International Commission of Jurists (2004:70) remarks, however, that ‘unlike with judges and lawyers, international law does not contain a provision that guarantees the institutional independence of prosecutors.’ Nevertheless, one thing that needs to be born in mind is that independence without accountability poses an obvious danger to the public interest which requires the fair and just administration of the criminal justice system (Flatman 1996: 4). Independence without accountability has an inherent danger for being abused in arrest, charging and capricious prosecution. Accountability at all level of criminal proceedings remains key in the exercise of prosecutorial discretion (Bellemare 2004).

Greenawalt (2006-2007: 591) remarks that the question of prosecutorial authority proved a major point of dispute throughout the negotiation of the Rome treaty. The matter was so important that ‘no aspect of the Court’s institutional architecture has provoked more controversy – or proven more central to the United States’ opposition – than has the provision for a standing independent prosecutor authorized to initiate investigations and indictments subject primarily to judicial, rather than political, constraints’ (Greenawalt: 2006: 585). It is therefore quite surprising that no one has as yet questioned the independence and accountability of the international prosecutor as a matter of principle.

The principles of the prosecution’s independence are similar to those that apply to the judges. Those principles are, in Shetreet’s (2009-2010: 277) view ‘essential for ensuring the rule of law, protecting human rights, and securing the continued preservation and development of democratic societies’. This comprises the personal and institutional independence. Personal independence, according to Rugege (2006:413) ‘refers to the impartiality of a judge; that is, the judge’s ability to make a decision without fear, favour, or prejudice with regard to the parties irrespective of their position in society – it means the absence of bias’. It is the judge’s ability to resist intimidation or influence, and any kind of pressure whether it stems from governmental power, politics, religion, money, friendship, prejudice or other inducements (Rugege 2006: 413). The judge must only be guided by the fact and the law. Such independence should not be an end in itself but merely a means to the end of a proper exercise of judicial power (Jipping 2001-2002: 143). This independence protects the judges in whatsoever he does in the exercise of judicial functions. It serves important social needs: it is not, properly speaking, an end in itself or a way to secure the professional position of judges for their own benefit, but rather a means to achieve the goals of a just and prosperous society. For this reason, independence needs to be complemented with means to ensure that judges and the judiciary as a whole comport with society’s democratic principles and legitimate interests: even as they are independent, in other words, judges need to be accountable (Hammergren 2004:9).

The judge or prosecutor’s independence is not designed to promote the personal uplift of the individual who enjoys it. It is a tool that the community of rulers and
ruled recognise in the person of the judge or the prosecutor to properly exercise the function entrusted to them. Judges and prosecutors have an obligation to set aside any political, personal or private considerations when discharging their duties. They should not bow down because of pressure from whatsoever sources. Rarely do prosecutors acknowledge that they have acted under pressure. They never reveal that they have favoured anyone. Yet the facts and the way prosecutor behave constitute better indication that they are not independent. The barometer to measure the prosecution’s independence is not easily available. Is it through accountability eventually?

**Accountability**

It would be illogical for one to enjoy full independence without being accountable. Holding a prosecutor accountable of the way he discharges his duties is not much demanding given his special duties and the broader power he exercises in the criminal justice system. It is critical that a prosecutor discharges his duties responsibly and ethically (The Justice Project 2010).

A point of distinction needs to be made between the common law system and the civil law or prosecutorial system. In the latter system, the Prosecutor General is normally accountable to the Minister of justice, who in turn, accounts to Parliament.

This kind of accountability is of a disciplinary nature and does not concern prosecutorial decisions (Ambos 2000:102-103). Professional bodies play little role in holding prosecutors accountable. Common to civil law or prosecutorial system is a hierarchic oversight.

The common law system whose application prevails in international prosecution needs more details. The prosecutor may be accountable or otherwise subjected to control in many ways: there are the ‘normal mechanisms of the court system’ and through ‘internal review mechanism’. (Ambos 2000: 101-102) However, Bibas (2008:5) dismisses the courts control over the actions of prosecutors because ‘trial judges are limited by the confines of particular cases and controversies and are not well-suited to take the synoptic, bird’s-eye view needed to police systemic concerns about equality, arbitrariness, leniency, and overcharging. They lack statistical training and expertise, as well as detailed information from prosecutors’ files.’ It is even true that there is a little judicial oversight of prosecution’s power and it occurs in very limited and circumscribed cases. In the words of Gifford (1980-1981: 669) such few existing ‘procedural protections deal exclusively with questions of guilt or innocence; they do not address whether a prosecutor’s decision to charge was made in a fair and impartial way.’ In respect of the supervisory power of the courts, Saylor and Wilson (1992: 479) recall the United State Supreme Court position.

In *United States v. Hastings*, the Supreme Court pointed to only three legitimate bases for the exercise of supervisory power. It occurs ‘to implement
a remedy for the violation of a recognized statutory or constitutional right; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury; and to deter future illegal conduct.’ These criteria set a threshold rigidly difficult to meet and convince the court. Bronitt and McSherry (2001:102) are also of the view that the judges’ duty is not to ensure fairness in the whole criminal process, but rather to prevent the accused brought before them being subjected to an unfair trial and the risk of wrongful conviction. They do not have the responsibility for ensuing fairness during investigation; meaning that they care less on what happens before a trial, including all the investigative process. This inability of the court to control all the actions of the prosecutor stressed by Lord Scarman when he held in *R v Sang* that: ‘The judge’s control of the criminal process begins and ends with the trial, though his influence may extend beyond its beginning and conclusion’ (Bronitt & McSherry 2001: 102).

In Canada, for instance, judges have steadfastly refused to review [the] discretionary decisions [of the prosecutor], even in the face of apparent quasi-constitutional and constitutional limitations laid down in the Bill of Rights and the Charter of Rights respectively’ (Morgan 1986-1987: 24). The courts only intervene when there is an overtly abuse of process in case ‘where the court feels that the exercise of a prosecutorial power has resulted in an unacceptable degree of unfairness to an accused’. (Morgan 1986: 35) Worth to note is that the acceptance of the doctrine of ‘abuse of process has been slow and uneven’ (Morgan 1986: 36). The prosecutor may also account to his hierarchy like in Britain where parliament exercises that control (Ambos 2000: 102).

The prosecutor’s power may also be regulated by the Constitution and other laws. But prosecutor’s accountability is not easily achieved. The reason for this is that ‘legislatures have strong incentives to give prosecutors freedom and tools to maximize convictions and minimize costs’. (Bibas 2008: 15) Constitutions and laws are therefore not enough tools to hold prosecutors accountable as a matter of broader policy of combating crimes at lower costs. It is also worth to note that this kind of accountability varies from State to State.

The last way of controlling prosecutor’s action is to rely on professional ethics. Gershman (1992:293; Cassidy 2006: 635 - 636) realizes however, that ‘prosecutors are increasingly immune to ethical restraints.’ This observation is quite true because ‘prosecution is a low-visibility process about which the public has poor information and little right to participate’ (Bibas 2008:5). Bibas argues furthermore that ‘prosecutors have great leeway to abuse their powers and indulge their self-interests, biases, or arbitrariness’ (Bibas 2008: 5-6). He suggests moreover that prosecutors ‘are tempted to try a few strong or high-profile cases to gain marketable experience, while striking hurried plea bargains in most other cases’ (Bibas 2008: 6). These observations from knowledgeable scholars and practitioners counter the
sustained belief that in most instances, prosecutors exercise their discretion in good faith. They support instead the idea that discretion is unchecked, unstructured, and largely hidden from the public’s view (Gifford 1980-1981: 667) and scrutiny. Gifford goes even further suggesting that “to argue that all prosecutorial discretion is exercised in good faith and that controls are therefore unnecessary is to deny reality” (Gifford 1980-1981: 667).

Bibas enumerates a list of non-exhaustive misconducts and misbehaviours that prosecutor commit which go unpunished and undisciplined. They may include:

prosecutors who committed crimes, such as bribery, extortion, embezzlement, and conversion. Many others involved presenting false evidence, withholding exculpatory evidence, or lying to or deceiving the court. The only other significant categories of cases involved criticizing judges, neglecting duty, fixing traffic tickets, contacting represented defendants ex parte, and having conflicts of interest as a part time prosecutor (Bibas 2008: 44).

This may be due to practical and institutional reasons that shape the position of a prosecutor. Bibas finally considers what he calls creating a ‘prosecutorial office culture’ (Bibas 2008: 94) which must start in law schools and continues at work where head prosecutors would ‘formulate clear policies, follow them consistently, ferret out and penalize violations, and reward compliance’ (Bibas 2008: 119). There is however strong doubt that this can work within an office of an international prosecutor where the work is done on ad hoc basis.

The question is therefore whether this must go unchallenged, especially when one is dealing with international prosecutors. There are no international disciplinary organizations to look into prosecutor’s accountability and discipline. How to design mechanism and institutions to regulate and control the international prosecutor in the exercise of his discretion in the event of abuse is the crucial question.

The statutes establishing ad hoc tribunals and the Rome Statute of the ICC set up prosecution powers but do not provide for the regulation and control of their exercise. Trials and Appeals Chamber are also not very clear in holding prosecutors accountable. In extreme cases can professional bodies to which prosecutors belong intervene? Internal regulations within the OTP are likewise designed to facilitate the work of the international prosecutor rather than regulate its conduct.

Maybe a combination of the domestic mechanisms can help to regulate the international prosecutor’s exercise of power. Additionally, an external oversight body completely detached from the ad hoc tribunals to oversee the misuse and abuse of the prosecution powers can be imagined. The UN Department of Legal Affairs can establish such a body on a non-permanent basis. It may be modelled to what Terzano and others call ‘separate prosecutorial review boards responsible for investigating allegations of misconduct and sanctioning prosecutors when necessary’ (Terzano et al 2009: 4). They also suggest that such a ‘review board should be comprised of individuals within the criminal justice system who present a broad range of interests and an understanding of the unique responsibilities of prosecutors, including judges, prosecutors, and criminal defence attorneys’ (Terzano et al 2009:15).
Terzano et al finally recommend that the review board

should be unlike bar disciplinary boards in that it would conduct periodic, random, and unannounced reviews of closed cases. Its audits would help deter misconduct as well as gauge its prevalence and suggest how it might best be addressed. Additionally, the review board should serve as an information-providing entity by making its operations transparent, and its findings publicly available (Terzano et al 2009: 15).

How this body can perform its function without interfering with the work of the prosecutor more specifically and the work of the tribunal more generally remains to be tested. Yet it is a feasible idea especially to make international tribunals more effective; and improve prosecutor’s professionalism.

**Professionalism**

Professionalism in legal practices is better understood when one talks of defence lawyers more generally (Webb 2005; Brown 1992; Rodes 1992; Vischer 2005; Freedman 1992).

The literature on professionalism overuses the semi-phrase ‘service to client’ (Rodes 1992), ‘paying client and keeping cost down for clients who pay more’ (Baldwin 1992), or even ‘income of lawyers’ (Penegar 1992), and so on and so forth. Professionalism may therefore be perceived as a private defence lawyers’ empire that excludes lawyers acting as prosecutors. This understanding is too narrow and not justified. According to Terrell (1992, 1994, 1995, 1997, 2009) who wrote extensively on the topic, ‘being a lawyer, particularly one engaged in private practice seems suddenly an embarrassment rather than a source of pride’. (Terrell & Wildman 1992) This statement suggests that professionalism goes beyond the private legal practice and encompasses the work of prosecutors as well.

Prosecutors are lawyers first and foremost. Other practices have a professional tradition likewise. Professionalism is therefore a behavioural attribute of the conduct of people who work in a definite area of life. Nothing prevents a prosecutor from shifting from his position as a prosecutor to one of a private lawyer or a judge. Professionalism applies equally to all lawyers, including prosecutors.

Terrell argues that:

*everyone agrees that professionalism consists of something more than the ordinary rules of legal ethics that simply prohibit the worst sorts of behaviour by lawyers. Professionalism is loftier – an attitude, manifest in actions, demonstrating that the lawyer holds to fundamental principles that transcend any immediate project. Professionalism makes one’s vocation an aspiration. While ordinary lawyering can bring success, professionalism evokes praise (Terrell 1997: 1006).*

Professionalism has become ‘the accepted allusion to the Bar’s ambitious struggle to reverse a troubling decline in the esteem in which lawyer’s are held – not only by the public but also, ironically by lawyers themselves’ (Terrell & Wildman 1992: 403). Terrell defines professionalism in simple words stating that ‘if a thing is worth doing, it is worth doing right’ (Terrell 1994:16). Once again this argument clearly
shows that prosecutors are not taken out of ‘professionalism’. They are therefore expected to act as professionals. Professional lawyering must reflect

at the very least, the basic qualities of competence, diligence, informational responsibilities, confidentiality, loyalty, honesty, and independence of professional judgment that any code of professional duty would demand. All lawyers should manifest those characteristics when they engage in their profession. The question here is more ambitious: What qualities beyond these expected minima define the best lawyering that one encounters? What are the qualities of the lawyers we respect most – the ones typically held up as “role models” for the rest of us, the ones whose life story ennoble the profession and thereby inspire us? (Terrell 2009: 479).

According to Lex Mundi, an international body of independent law firms, the concept of professionalism must be distinguished “from the more familiar topic of legal ‘ethics (Lex Mundi 2010:1).’ While ethics remains the minimum standards that all members of a profession maintain to keep their license to practice, professionalism is aspirational in character. It is about the best rather than the acceptable least (Lex Mundi 2010: 1). Professionalism goes beyond the rules of legal ethics.

Terrell synthesizes those qualities in a diagram that combines the ethic of excellence, the respect of the legal system, the commitment to accountability, the ethics of integrity, the responsibility for adequate distribution of legal services and the respect for other lawyers (Terrell 2009: 482).

It has now been established how the term “professionalism” applies to the work and person of a prosecutor. What needs to follow is therefore to explore how general professional attributes merge in shaping up an international professional prosecutor.

The ICTY Statutes (2003) envisages a prosecutor of high moral character, who ‘possesses the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases’. The Standards of Professional Conduct of prosecution counsels appearing before the ICTY and ICTR underscore the crucial role of the prosecutor in the administration of justice (Arbour 1999). The prosecution counsels are furthermore required to ‘adopt the highest standards of professional conduct’, particularly in assisting ‘the tribunal to arrive at the truth and to do justice for the international community, victims and the accused (Arbour 1999).

Arbour (1999) pioneered the prosecutors’ regulations in specifically emphasizing that ‘the duties and responsibilities of the Prosecutor differ from, and are broader than, those of defence counsel’. According to Côté (2006:135) prosecutors are ‘the public face of this new international criminal justice system’. The question is whether the international prosecutor always plays the game by the rules.

**The international prosecutor’s imbalance approach to his role**

At domestic and international level, the prosecutor’s tendency to focus on conviction rather than doing justice has been highlighted. According to Davis (2007: 8) ‘if prosecutors always made decisions that were legal, fair, and equitable, their
power and discretion would be less problematic’. However, Gershman (1992: 407) realises that their discretion has become lawless, tyrannical and most dangerous. In addition to this, some prosecutors do not always even follow the rules (Davis 2007: 13). In most instances the function turns and focuses entirely and exclusively in convicting a target that comes in the prosecutor’s projector. The prosecutor manufactures all means to justify one move or the other depending on what he is pursuing.

Chuter (2003:227) expresses this tendency more tellingly in arguing that prosecutors often choose to present only that set of facts that will lead to a conviction. The full story of what happened may never be known, because it does not form part of the prosecution case, and it is not examined in court. The international prosecutor is less interested in discovering the truth, but rather in securing conviction, in fact victory in every single case. This tendency leads directly disappointing outcome of international prosecutions. Their contribution to the establishment of the truth about

large and complex episodes of violence is likely to be limited and patchy, because trials are actually intended for other purposes than the writing of history. But there are also important limits to what trials can discover, even about the incidents they address, because of how they are conducted. [...] By definition, what is proved cannot be more than what is alleged, and what is alleged will often be what prosecutors think can be proved (Chuter 2003: 227).

It is a quite puzzling situation because the prosecutor through his team of investigators is first to be on the crime scene. In situations where the prosecutor cooperates with other law enforcement agencies he may direct the kind of evidence he needs to be collected. He may even dismiss some evidence because it does not advance the case or simply because the prosecutor dislikes such evidence.

This practice disfavours the suspect or accused and their lawyers. Looking at the way evidence is manipulated, investigation and prosecution may cause insecurity and stress to the perpetrators (Askin 2002:903) or becomes a tool of intimidation and harassment (Nemeth 2008:13). International prosecutors have (had) acts (acted) without restraint, investigating whom they wished to, charging targets as abundantly as they deem fit without any kind of accountability, oversight or judicial review.

In some domestic systems, checks on the office of the prosecutor are either inexistent or very limited. It is troubling that on the international level the prosecutor is unaccountable to nobody, and no institution oversees the prosecutor’s work. There is nothing to check or regulate how the prosecutor does his job. This lack of oversight and accountability contrasts with the expectation and organisational chart of an office of the prosecutor (OTP). The chief prosecutor at the ad hoc tribunals (ICTR and ICTY) occupies a high rank in the United Nations system. The terms and conditions of service of the prosecutor are those of an Under-Secretary-General of the United Nations (Art. 16(4) ICTY & Art.15 (4) ICTR).

The prosecutor has at his disposal an office composed of qualified lawyers. With the kind of hierarchy in the OTP one would legitimately expect a harmonized system where information flows and is shared and delivered accurately, consistently from the top to the lower level in the office. Yet some prosecutors come with a story
that they do not have the information required to proceed with a case. Others argue ignorance of a situation. Judges do not attempt to challenge such an attitude. The following example illustrates this assertion.

Prosecutor’s abuse of power in the André Ntagerura and Gratien Kabiligi cases

The facts: an alleged meeting and delivery of weapons at the Bugarama football pitch on 28 January 1994

André Ntagerura served as Minister in Rwanda for almost 14 years, until 1994. His last appointment was that of Minister of Transport and Communications in the interim government (The Prosecutor v Ntagerura et al 2004: par.5). He was arrested in Cameroon on 27 March 1996. On 17 May 1996, the ICTR issued an order for provisional detention and Transfer to the Tribunal detention facilities in Arusha, Tanzania. He was indicted on 9 August 1996 (The Prosecutor v Ntagerura et al 2004: par.8). His indictment was subsequently amended on 28 November 1998. Together with Bagambiki, former Prefect of Cyangugu prefecture; lieutenant Imanishimwe, former interim commander of Karambo military camp, underwent a length trial from 18 September 2000. On 24 February 2004, the Trial Chamber unanimously acquitted Ntagerura on all charges. The Appeals Chamber confirmed his acquittal on 7 July 2006 (The Prosecutor v Ntagerura 2006).

After a successful senior officers’ training in Rwanda and abroad, Brigadier General Gratien Kabiligi served as the Director of Studies at the ESM (Ecole Supérieure Militaire, Military academy) in Kigali from 1988 until 1991. He subsequently commended a battalion on the frontline in Mutara sector. He was later appointed as a commander of the Byumba military operations sector from 1992 until 1993. Afterwards, he was appointed as the Head of training and operations at the Army Headquarters in Kigali (G3); where he remained until July 1994 when the Rwandan Army was defeated. He subsequently went into exile, and was arrested in Nairobi on 18 July 1997 and transferred the same day to the United Nations Detention Facilities in Tanzania. Like his co-accused, General Gratien Kabiligi was charged ‘with conspiracy to commit genocide, genocide, crimes against humanity (murder, extermination, rape, persecution and other inhumane acts) and serious violations of Article 3 common to the Geneva Conventions and Additional Protocol II (violence to life and outrages upon personal dignity) (The Prosecutor v Kabiligi 2008: par.2)’. On 18 December 2008, the Trial Chamber acquitted him on all charges, while sentencing his co-accused to life imprisonment.

What is particularly important to this article is the prosecutor’s allegation that on 28 January 1994, Kabiligi participated in a meeting in Cyangugu prefecture involving the distribution of weapons (The Prosecutor v Kabiligi 2008: par. 32) along with Ntagerura and others. Andre Ntagerura was charged
with genocide (The Prosecutor v Ntagerura et al 2004 or 2006?: par.665), extermination as a crime against humanity (The Prosecutor v Ntagerura et al 2004 or 2006?: par.696 et ss.) and serious violations of Article 3 Common to the Geneva Conventions and Additional Protocol II (The Prosecutor v Ntagerura et al 2004 or 2006?: par.764 et ss.). It is interesting to read from the Trial Chamber judgment that the prosecutor offered to ‘plead all material facts underpinning the charges against an accused in the indictment with sufficient details (The Prosecutor v Ntagerura et al 2004: par. 30)’. The prosecutor also acknowledges that “the mode and extent of an accused’s participation in alleged crime are always material facts that must be clearly set forth in the indictment (The Prosecutor v Ntagerura et al 2004: par.31).

All allegations against Ntagerura were dismissed either because they were not charged in the indictment or that they could not constitute the material elements of the crimes charged. Others were not proven beyond reasonable doubt, no evidence was lead or that they were impermissibly vague and could not plead a criminal conduct of Ntagerura.

**Aspects of Prosecutor’s abuse of power in these cases**

The crucial question is not whether the allegations in the indictment were impermissibly vague, that the evidence did not attain the acceptable threshold of proof beyond reasonable doubt or that the prosecution conceded it did not lead enough evidence to sustain a conviction. The problem lies in the prosecution’s attempt to mislead the Trial Chamber on facts it tendered.

In the Ntagerura case, evidence was actually lead but the prosecution knew that some of that evidence was false or otherwise fabricated or that witnesses were manipulated to tell lies to the court. The prosecution also hid evidence favourable to Mr. Ntagerura and Kabiligi. Though the Trial Chamber knew or could reasonably have known of the existence of that evidence it did not allude to these forms of prosecutorial misconduct. By not doing so, it is suggested; the Chambers, in the instant case, and Trial Chambers in general, deliberately encourage this culture.

In Ntagerura, the prosecution knowingly lead evidence through witness LAI that ‘on 5 January 1994, at around 5:00 PM, he was present when Bagambiki and Commander Bavugamenshi met at Munyakazi’s home [in Bugarama, South Western Rwanda], where they discussed an upcoming visit by Ntagerura planned for Democracy Day on 28 January 1994 (The Prosecutor v Ntagerura et al 2004: par.119)’. LAI testified that ‘on the morning of 28 January 1994, Ntagerura, Bagambiki, Kabiligi and another soldier arrived at the Bugarama football field in a helicopter to deliver weapons to Munyakazi (Ntagerura et al 2004 : par.120)’. The witness went as far as alleging that he offloaded the weapons.

To corroborate this incident, the prosecution also led witness LAJ who alleged that he was present on the site on 28 January 1994 (Ntagerura et al 2004: par. 122- 123) and heard Ntagerura delivering a speech that ‘the situation has become increasingly serious and that they had to be extremely vigilant at all times because,
the enemy, the Tutsis who were killing Hutus, could attack at any time’ (Ntagerura et al 2004: par. 122).

The prosecutor also led witness LAP who alleged that he was in Bigogwe camp in Northern West Rwanda where he saw Ntagerura, Kabiligi and the helicopter from which he personally offloaded firearms, grenades and ammunitions for Bigogwe on the same day at around 09:30 a.m. He alleged that ‘he heard both Ntagerura and Kabiligi say that they were heading to Cyangugu’ (Ntagerura et al 2004: par. 124).

Ntagerura denied that he went to Bugarama as alleged. General Kabiligi testified that he did not visit the Bigogwe camp or Bugarama in a helicopter with Ntagerura to supply arms to Interahamwe. Between 27 January and 8 February 1994 Kabiligi was in Cairo, Egypt, on a government mission concerning officers’ training which was approved by an order signed by the President on 19 January 1994 (Ntagerura et al 2004: par.126). Upon examination of the testimonies of prosecution witnesses LAI, LAJ and LAP, the Trial Chamber concluded that there was an inconsistency which ‘draws the credibility and reliability of their evidence into question (Ntagerura et al.: par. 129)’. The prosecution has also failed to prove the allegation beyond reasonable doubt. The prosecution appealed against the Trial Chamber factual finding.

The Trial Chamber however failed to indicate that this was a prosecutor’s misconduct, and not simply an inconsistence between prosecution witnesses’ account. One may even say that it was a pure fabrication of a seemingly corroborative evidence of an event which did not take place or ever happened.

The reason is that as earlier as 22 September 1997, namely one month and 4 days after Kabiligi’s arrest, the prosecutor knew that Kabiligi did not deliver weapons at the Bugarama football pitch. In Kabiligi’s own trial, the prosecutor himself, as part of the OTP, tendered into evidence a letter dated 17 January 1994, in which the Rwandan Ambassador to Egypt informed the Egyptian Defence Ministry of the arrival of Kabiligi (then a colonel) with another Rwandan officer:

the delegation will be composed of two people, namely colonel Gratien Kabiligi, head of the delegation and officer in charge of operations of the Rwandan Army General Staff, and Lt-Colonel Cyprien Kayumba, Director of Finances at the Ministry of Defence of the Republic of Rwanda.[...].

On 22 September 1997, the then Deputy Prosecutor of the ICTR, Mr. Bernard Muna also received a letter from the Egyptian Ambassador in Kigali which referred to a previous one eventually from the OTP dated 18 September 1997 in which ‘you [the prosecutor] seek assistance and cooperation for the investigation concerning colonel Kabiligi’. The Egyptian Ambassador wrote:

Upon receipt of your note, I contacted the concerned authorities in Egypt who informed me of the following:

1. Colonel Kabiligi arrived in Cairo on 28/03/94

1 Letter produced as evidence in Military One Case as P 233A (French version) & B (English version) on 7 June 2004. The French version of the letter is quoted K0098108 – K0098109 which is the prosecution numbering system of its documents. The English version is quoted K0247059.
2. He joined the seminar organized by the Nasser High Military Academy on 29/03/94

3. On 07/04/94 the Academy received a note from the Embassy of Rwanda in Cairo asking to cancel colonel Kabiligi’s participation in the seminar due to the development taking place in his country and that he will be leaving Cairo the same day 07/04/94.2

Probably due to mismanagement or disorganization within the OTP, another letter was addressed to the Egyptian Embassy in Kigali by Laurent Walpen, Chief of Investigations and Deputy Prosecutor on 12 March 2002. It was a request for information concerning travels of Colonel Gratien Kabiligi to Egypt during the months of January to April 1994. In his letter, Walpen stated the following:

the Office of the Prosecutor has in its possession information to the effect that colonel Gratien Kabiligi visited Egypt from January to February 1994 and March to April 1994 for official business with the Egyptian Ministry of Defence and a Seminar at the Nasser High Military Academy respectively. We are trying to establish the exact dates on which colonel Gratien Kabiligi entered and left Egypt on those occasions (Walpen 2003).

On 28 May 2002, the Embassador answered once again that it was closely following up on the subject with the Egyptian authorities (Shaheen 2002). On 20 June 2002, the Ambassador wrote:

I have the pleasure to inform you that the competent Egyptian authorities have focused aggressively on that matter giving it the attention it deserves and that the registers thoroughly consulted show the following information:

1. Arrival of the suspect to Cairo from Ethiopia on January 27th, 1994
2. Departure to Rwanda on February 8th, 1994
3. Arrival from Kenya on March 28th, 1994

This letter was produced in Military One Case on 7 June 2004

It is clear here that the prosecutor deliberately hid exculpatory and used false or misleading evidence. The prosecutor did not disclose evidence that Kabiligi and Ntagerura were not in Bugarama on 28 January 1994; neither did he abstain from leading evidence to that fact. Kabiligi could not be in Bugarama or anywhere else in Rwanda with Ntagerura as he was in Egypy on 28 January 1994. The prosecutor knew all of that. This is the first misconduct. The second misconduct is that the prosecutor deliberately and knowingly led evidence particularly through its witnesses LAI, LAJ and LAP tending to prove that Kabiligi was in Bugarama on that date. Witness LAI testified in Ntagerura case from 17 September 2001. LAJ testified in the same case from 23 October 2001 as did witness LAP (Ntagerura et al 2004: par.119 et ss.). Witness LAI was called again to testify on the same false fact in Military II case

---

2 This letter was tendered into evidence in Military One Case as P 232 E (K0241017) (English version) and K0260771 (French version) on 7 June 2004.
from 31 May 2004. It is likely that this witness was also to be used in Munyakazi’s case having regard to the disclosed material, particularly transcripts in Ntagerura case.

Having regard to the organizational structure of the OTP as discussed above, anyone working in the office and in charge of either case could not ignore that the event of 28 January 1994 was false. Calling witnesses to testify on a false event is first of all unprofessional, but most importantly calls in question the prosecutor’s ethics and integrity. The prosecutor unaccountably misused the funds it could have used for a proper case. The Trial Chamber judges likewise did not apply their mind to this particular issue and their silence can only be suspicious. The judges indeed encourage the practice of prosecution misconduct. Davis writes again that: ‘when misconduct is neither acknowledged nor punished, the line between acceptable behaviour and misconduct begins to blur. […] When the law is broken by the very people the public trusts to enforce the law, meaningful action must be taken (Davis 2007: 141)’. Nothing was done in the cases of General Kabiligi and Minister Ntagerura.

Conclusion

This article has highlighted and emphasised the central role the prosecutor plays in any criminal proceeding whether at domestic or international level. Before a criminal case can reach the bench, it is the prosecutor who investigates criminal allegations and proceeds to arrest where warranted. The prosecutor drafts indictments and includes any kind of charges he deems befits the factual allegations. He qualifies those facts in law.

The prosecutor can decide to pursue or to abandon a case. It is only when the indictment has been confirmed that the prosecutor seek leave from the judges to amend it by dropping, including charges or facts upon which charges are based. In domestic jurisdictions however, the prosecutor is not alone in the pre-confirmation stage. He relies on the work of the police or any other law enforcement agency.

The international criminal tribunal prosecutor heads investigation and prosecution. The public expectation would therefore be to find a prosecutor who acts independently; who is accountable and who is professional. Yet, many flaws are still registered. They are not due to the fact that the prosecutor does not know all that it requires to be independent, accountable or professional. The international prosecutor benefits from his unaccountability to anyone or to any institution. The prosecutor abuses not only his powers but also his discretion.

Such abuse was clearly illustrated in the cases of Mr. Ntagerura and General Kabiligi from whom the prosecutor hid favorable evidence and instead brought fabricated testimonies from manipulated witnesses; going beyond the abuse of the process, but also reaching the stage of abusing the funds and other resources entrusted to him. Prosecutors’ misconduct is therefore a troubling and embarrassing situation judges should not ignore; rather judges should be much concerned when situations of misconduct occur and act accordingly. If judges fail to discipline prosecutors, they should also be accountable of this complicity. Research is warranted to suggest which
additional institutions and mechanisms should take up oversight on the international prosecutor’s work without interfering with his legitimate assignment.

References


Arbour L. 1999. Prosecutor’s Regulation No. 1, as amended on 21 October 1999, titled ‘The procedure to be adopted following a request by a national authority to take evidence from a person inter alia in the custody of the International Criminal Tribunal for Rwanda.


Dandurand, Y. 2005. ‘The Role of Prosecutors in promoting and strengthening the
rule of law’. In Second World Summit of Attorneys General, Prosecutors General and Chief Prosecutors, Doha, Qatar, November 14 – 16.


Commission of Jurists, Geneva, Switzerland.


Letter dated 12 March 2002 authored by Laurent Walpen, Deputy Prosecutor and cc to Chief Prosecutor, Ms Carla Del Ponte and addressed to His Excellency the Ambassador of Egypt in Rwanda.


*Prosecutor’s Regulation* No. 2(1999), Standards of Professional Conduct, Prosecution Counsel. This Regulation was signed by chief Prosecutor Louise Arbour on 14 September 1999 in New York, United States of America.


Shetreet, S 2009 – 2010. ‘The Normative cycle of shaping judicial independence in...


