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**Abstract Presentation
From**

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**INTERNATIONAL CRIMINAL COURT, PRE-TRIAL PROCEEDINGS,
PRE-TRIAL FUNCTIONS AND POWERS OF THE ICC PROSECUTOR**

A 3 Dimension Comparative Perspective:

Rome Statute of the International Criminal Court,

Common and Civil Law National Systems of Criminal Justice and

International Standards of Professional Responsibilities and Rights of the Prosecutor

1. Introduction

The newest evolutions of the international criminal law envisage an European legal order as conceived in a future European Criminal Law System. Sufficient international and European legal basis exists to reach the conclusion of the high legitimacy of an International and European Criminal Law System dealing with trans-national crimes risen at the level of International/European crimes and creating the obligation to prosecute.

Internationally the civil society has reached the point where it no longer accepts the borders limitations and the sovereignty of the national jurisdiction which are no longer obstacles for committing a crime but rather for its prosecution.

The purpose of a '*truly European judicial space*' is to combine the efficiency of the national level prosecution of traditional crimes, the respect of human rights values and national policy considerations, (which are essential for justice, redress, victims compensation and crime prevention), with the need to fight international crime internationally and to **move towards a greater integration of criminal law policy.**

Given the present international and European order, no judicial institution or mechanism can yet achieve all of these goals; however, a future European Criminal Law System can significantly contribute to their attainment: 'the longest

journey starts with the first step'; though we may not always achieve them, wisdom requires that we should simply pursue higher ideals.

At the end of the 20th century, important international circumstances¹ have imposed, at world, regional and national level, on decisional factors, State institutions, international governmental and non-governmental bodies, a series of concrete measures aiming to exercise as efficient riposte as possible against international crime.

The phenomena are:

1. Globalization,
2. b. 'White - collar' crime and corruption,
3. c. Explosion of some internal armed conflicts,² and terrorist attacks, which by the amplitude, gravity, extended and planned character of the committed crimes have shocked the conscience of international community having caused to the fundamental, recognized values of humanity.

As a response to these and other major '*new challenges to Criminal Law Policy*' the most recent and significant development in international criminal law has been the creation of the International Criminal Court on 17 July 1998 at the end of Rome Conference of Plenipotentiaries where 120 nations States agreed on the Statute creating the ICC.

The permanent international court, with subject matter jurisdiction over genocide, crimes against humanity, war crimes and the crime of aggression, will underpin the international community's resolve to hold those accountable for committing these types of crimes. In cases of gross violation of international humanitarian law, the notions of State sovereignty will be forever altered; no longer will systematic and flagrant violations of individual rights be the sole internal policy of States.

¹ Laborde Jean-Paul, *Les Apports Des Institutions et Instruments Internationaux aux Systèmes de justice Pénale Nationaux*, International Review of Penal Law, Vol.68, 1997, p. 14: "*Les enjeux du monde nouveau liés à l'augmentation exponentielle de la criminalité organisée, à la réapparition de conflits armés au cours desquels les règles élémentaires liées aux valeurs universelles ne sont pas respectées poussent les Etats à unir contre le crime sous toutes ses formes.*"

² O'Connell Ellen Mary, supra note 9, p. 339: "*Looking just at 1990s, one finds numerous conflicts that were predominantly civil wars and which atrocities were committed, including but not limited to those in Afghanistan, Algeria, Azerbaijan, Bosnia, Burundi, Cambodia, Congo, Guatemala, Indonesia, Liberia, Nicaragua, Russia, Rwanda, Sierra Leone, South Africa, Sri Lanka, Tajikistan, Turkey and Yugoslavia.*"

ICC's creation also marks the permanent elevation of international criminal law to a statute that was first contemplated in the 15th century of the Holy Roman Empire.³

International criminal law (ICL) constitutes the fusion of two legal disciplines: international law and domestic criminal law.

The criminal laws of nations, expressed both through legislative action and common law, constitute a vital component of ICL. International rules are generally imperfect and imprecise, not least because of the political difficulties in their drafting and agreement among competing national interests. With few exceptions, and in correlation to the preceding argument, international treaties rely on signatory States to further implement their provisions with precision at the domestic level, not necessarily in identical manner, but with a certain degree of consistency and uniformity based on the object and purpose of each particular treaty.

What is the relevance of the prosecution at the international level for trans-national crimes?

Why is trans-national prosecution necessary, and which are the differences between international and national prosecution for international crimes?

2. The international criminalisation process

The establishment of international offences is the direct result of interstate consensus, all other considerations bearing a distinct subordinate character.⁴ Bassiouni analyzing 22 categories of international crimes, revealed 10 penal characteristics:

1. Explicit recognition of proscribed conduct as constituting an international crime, or a crime under international law, as a crime; (
2. Implicit recognition of the penal nature of the act by establishing a duty to prohibit, prevent, prosecute, punish, or the like; (
3. Criminalisation of the proscribed conduct;
4. Duty or right to prosecute;
5. Duty or right to punish the proscribed conduct;
6. Duty or right to extradite;
7. Duty or right to cooperate in prosecution, punishment (including judicial assistance in penal proceedings);

³ See Mark Ellis, Executive Director, International Bar Association in *International Criminal Law*, Cavendish Publishing Limited, Bantekas I., Nash S., Mackarel M., 2001, p.vi.

⁴ *International Criminal Law*, Cavendish Publishing Limited, Bantekas I., Nash S., Mackarel M., 2001, p 4.

8. Establishment of a criminal jurisdiction basis (or theory of criminal jurisdiction or priority in criminal jurisdiction);
9. Reference to the establishment of an international criminal court or international tribunal with penal characteristics (or prerogatives);
10. Elimination of defenses of superior orders.⁵

Enforcement of international criminal law takes two forms:

A. Direct enforcement by international tribunals, which implies prosecutorial and judicial action against persons suspected of having committed an international offence.

The notion of international prosecutions, includes both the prosecutions before a permanent international criminal court and the prosecutions before ‘ad hoc’ international criminal Tribunals, limited to leaders, policy-makers and senior executors, for at least the four ‘jus cogens’⁶ crimes of genocide, crimes against humanity, war crimes, and torture, for which there can be no impunity.⁷

International prosecution is only possibility to reach the leaders, senior executors and policy makers, who may otherwise be ‘de facto’ and even ‘de jure’, beyond the reach of local law.

B. National prosecutions, for international crimes includes the prosecution before national court of all persons who have committed, the four ‘jus cogens’ crimes of genocide, crimes against humanity, war crimes and torture; even these criminal acts are however subject to reasonable and justified prosecutorial discretion, there should be a principle of non general amnesty for these four crimes. For other crimes, the national systems may develop criteria for selectivity or symbolic prosecution consistent with their laws.⁸

In the last decade, in international reunions organized at world and regional levels there were analyzed, debated and discussed concrete measures and strategies, in

⁵ Bassiouni M. Cherif International Criminal Law, 1986, Dobbs Ferry , New York, Transnational (1986b), p3.

⁶ Bassiouni M. Cherif, supra note 1, p.11:”*International crimes that rise to the level of ‘jus cogens’ constitute ‘obligatio erga omnes’ which are inderogable. Legal obligations which arise from the higher statue of such crimes include the duty to prosecute or extradite, the nonapplicability of statutes of limitations for such crimes, the nonapplicability of any immunities up to including heads of state, the nonapplicability of the defense of ‘obedience to superior orders’ ... the universal application of these obligations whether in time of pace or war, the nonderogation under ‘states of emergency’ and universal jurisdiction over perpetrators of such crimes.*”

⁷ Bassiouni M. Cherif, supra note 1, p.22-23.

⁸ Bassiouni M. Cherif, supra note 1, p 24

order to increase the efficiency, effectiveness, adaptability, and quality of the pre-trial proceedings, and in particular of the investigation and prosecution.⁹

Two **essential questions** having a particular importance and a profound impact upon the creation of a global criminal justice system, emerged:

- a) Does exist a process of convergence, harmonization or symbiosis, between the two main common and civil law models, systems and traditions, sufficient strong to build an efficient and coherent global international criminal justice mechanism, based on an real international co-operation and judicial assistance?
- b) Is it recognized the important role played by the prosecutor during the criminal investigation, and are there insured and guaranteed the prosecutor's independence and statute accordingly with the international standards?¹⁰

Three main attributions are related to the essence of the prosecutorial functions¹¹:

1. **to determine**, based on the information provided by specialized investigative authorities, **the existence of a crime** committee in the jurisdiction of the national court;
2. **to identify** the person who has committed the crime and to formulate the charges;

⁹ The expression of this, without precedent international activity, it's materialized in the following organizations works and documents:

- UN specialized bodies: Vienna, UN Commission on Crime Prevention and Criminal Justice; the 8th Havana 1990, and the 9th Cairo 1995, UN Congresses on Criminal Justice and the Treatment of the Delinquents; the Preparatory Commissions and the Committee on International Criminal Court; the 1998 UN Rome Diplomatic Conference of Plenipotentiaries on the establishment of the ICC;

- Regional organizations: European Commission, the "Third Pillar - Justice and Home Affairs" or Council of Europe labor in the Criminal Justice Committee.

As a response to the need "...to assist prosecutors internationally in the fight against organized or other serious crime...to promote international co-operation in gathering and providing evidence; in tracking, seizing and forfeiting the proceeds of serious crime; and in the prosecution of fugitive criminals; to promote speed and efficiency in such international co-operation; to promote good relations between individual prosecutors and prosecution agencies; to promote an examination of comparative criminal law and procedure and to assist prosecutors engaged in justice reform projects; to co-operate with international and juridical organizations in furtherance of the foregoing objects " in 1995, in Vienna, Austria, was formally established the International Association of the Prosecutors; the venue of the association is in The Hague, The Netherlands.

¹⁰ The International Standards on the Role of the Prosecutor are stipulated in the following documents:

- United Nations Guidelines on the Role of Prosecutors, adopted in 1990 by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders and welcomed by the General Assembly by resolution 45/121;

- The Constitution of International Association of Prosecutors, [hereinafter IAP Constitution];

- International Association of Prosecutors' Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, adopted in Beijing 1999,[hereinafter IAP Standards]; last two documents could be found on Internet page <http://www.iap.nl.com/documents/html>.

¹¹ IAP Standards supra note 32, Section 4.2(a)(b)(c).

3. **to support each charge** with sufficient evidence establishing substantial grounds to believe that the person committed or not the crime charged.

Giving answers to those questions generates high pressures on the prosecutor who has to deal with contrary interests. Prosecutor's activity become more difficult in cases which the person charged with the commission of a crime is a prominent public personality or the case generated a strong emotion or concern in the public opinion.

The ICC Prosecutor' Office, is the body entitled to pass final decision concerning carrying out of investigations and exercise criminal action.

Provisions of ICC Statute Article 42 submit the essential elements for the reconstitution of the functions and role of the ICC Prosecutor. As an independent and separate organ of the Court, enable to seek or act on instructions from any external source, the Prosecutor is responsible for:

- 1 - receiving and examining referrals and any substantiated information on crimes within the jurisdiction of the Court;
- 2 - conducting investigations;
- 3 - conducting prosecutions before the Court;

Analyzing the text results **three essential phases that characterize ICC Prosecutor's pre-trial activity:**

- the 1st – receiving, gathering and collecting information, preliminary examination, evaluation and analyze of the information;
- the 2nd – initiation and conduct of the investigation or prosecution;
- the 3rd and last phase – institution of the proceedings of charge before the Pre-Trial Chamber.

3.1 Political Independence and Accountability of the Prosecutor - International Standards, Common and Civil Law Prosecutor

Essentially, national and international prosecutorial functions should be exercised independently and be free from political interference; the prosecutors should be protected against arbitrary action by political entities or governments, and they should be able to perform their professional functions without intimidation,

hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.¹²

Protecting the prosecutor's independence is the single way to guarantee the equity and objectivity of the criminal justice, equality in front of the law and the effective protection of the honest citizen against crime.

The most important criteria to evaluate the professionalism of a prosecutor's office is considered to be the degree of political independence assumed by the national prosecutor and the insurance of an appropriate balance between the prosecutor's obligations and duties as a citizen and as a public official, when he deals with political cases.¹³ In the internal context of each democratic country, the implementation of such a delicate balance goes from the public assumption of the political group belonging, to a scrupulous protection of the political neutrality and independence. Even various organizational structures, statutes and functions of the prosecutorial offices can be followed from country to country¹⁴, due to the impact of the civilization and modernization, economic transition to capitalism, and the global move towards democratization¹⁵, the criminal justice systems across the world have also converged and harmonized.¹⁶

In that context, one of the first question we have to answer, is what role do play, and to what extension do the political or executive powers interfere in initiating and terminating criminal proceedings; in fact **to whom are the prosecutors responsible for the exercise of investigative and prosecution powers?** Should the prosecutors enjoy the **same independence as the judges** or a **separate authority**, which could be the minister responsible with the administration of justice should reviewed the prosecutors' decisions and ordinances?

¹² United Nations Guidelines on the Role of Prosecutors, adopted in 1990 by the 8th United Nations Congress on the Prevention of Crime and the Treatment of Offenders and welcomed by the General Assembly by resolution 45/121 and IAP Standards, supra note 32.

¹³ Preparatory document for the 9th UN Congress on Crime Prevention and Treatment of the Offenders, Discussion Guide A/CONF.169/PM.1/27 July 1993, paragraph 77.

¹⁴ See Annex 4.

¹⁵ Swygart Amanda, Deflem Mathieu, Comparative Criminal Justice, p.3-5, Purdue University, 1998.

¹⁶ Harding Ch., Swart B., Jrg N., Fennell Ph., Criminal Justice in Europe, a Comparative Study, Conclusion: Europenization and Convergence: The Lessons of Comparative Study, 1995, p. 379: "*.. the process of 'Europenization'.. may be perceived as an important potential tendency in the development of criminal justice in western Europe: the convergence of different systems, either as a response to external forces such as 'Europenization' or for reasons associated with the internal dynamic of individual systems.*"

The difficulty to address these questions was recognized in numerous international documents.¹⁷

Many believe that prosecutions of grave international crime present difficult conflicts with other objectives of international legal and political systems and highlight tensions between international politics on the one hand and the enforcement of the law's natural-justice goals on the other.¹⁸

It was also expressed the necessity that prosecutors should be invested, at some extent, with a certain degree of authority and immunity in initiating and finalizing an investigation, based on legal or factual basis and subject to a judiciary review.¹⁹

Prosecutors, are considered to be, essential agents of the administration of justice,²⁰ and the States shall at all times ensure and maintain condition to ensure that prosecutors can perform professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.

However, although the prosecutors are magistrates, and independent in the sense that their decisions are autonomous, they are also government employees, accountable to those higher up, who are expected to execute government policy and who, in extreme cases, may find themselves on the carpet or under pressure to conform.²¹

At the international level, because international crime almost always occur in a political context, states commitment to support international prosecution of such crimes in relative independence from the political context is essential.²²

¹⁷ Preparatory meeting of the West-Asia States, for the 9th UN Congress on Crime Prevention and Treatment of the Offenders, Report on the Role of the Prosecutor A/CONF.169/RPM.5/1994, paragraph 54.

¹⁸ Charney I. Jonathan, *supra* note 117, p. 452-453.

¹⁹ The Secretariat of the 9th UN Congress on Crime Prevention and Treatment of the Offenders, Working document A/CONF/169/6/31 January 1995, chapter II, paragraph 32.

²⁰ UN Guidelines on the Role of Prosecutor *supra* note 32.

²¹ Stewart Field, Chrisje Brants, *Criminal Justice in Europe A Comparative Study 1995*, Discretion and Accountability in Prosecutions, p.144.

²² Charney I. Jonathan, *supra* note 117, p.459.

The ICC will be very different from the ad hoc international criminal courts that have preceded it. Prosecution²³ can be initiated by the prosecutor and a Pre-Trial Chamber of the Court alone, or by reference to the prosecutor from any state party or cooperating state so long as the required nationality or territorial jurisdiction exists, or by reference from the Security Council. Accordingly, unlike past international criminal prosecutions, an ICC prosecution may proceed without the political support of the most states, or even a significant group of states. Supporters will argue that this arrangement depoliticizes the enforcement of international criminal law. Others will argue that politics must always be considered because such criminal behavior is closely connected to difficult and highly political situations whose resolution may be incompatible with criminal prosecutions.²⁴

Comparing the competence of the States or the Security Council with the role of the political, governmental or executive authorities in national criminal justice systems in commencing an investigation, the main question is whether the executive, in national systems is allowed to intervene, and has the power to initiate or to restrict criminal investigations; in other words or we can ask whether national criminal justice systems allow the government or its organs to initiate or restrict proceedings.

The answer is that only in exceptional procedures, government itself or its organs initiate or restrict criminal proceedings.²⁵ The executive is allowed to intervene only in cases involving offences considered to be of public or national interest. However, this interference is not really comparable with State or Security Council powers.

3.2 The 3D perspective

International documents vested the national prosecutor with the exercise of discretionary functions as waiving prosecution, discontinuing proceedings or diverting criminal cases from formal justice systems.²⁶ As a grave and serious

²³ Freiburg Declaration on the Position of the Prosecutor of a Permanent International Criminal Court, 28 – 29 May 1998, [hereinafter Freiburg Declaration], in *European Journal of Crime, Criminal Law and Criminal Justice*, Vol.6/3, 1998, p. 301-303, considered the minimum standards of independence that the prosecutor of an international criminal court should enjoy and the minimum standards of accountability to which such an international prosecutor should be subject.

²⁴ Charney I. Jonathan, *supra* note 117, p.460.

²⁵ Kai Ambos, *The role of the Prosecutor of an International Criminal Court, from a comparative perspective* *International Commission of Jurists Review*, no.58 -59, 1997.

²⁶ UN Guidelines, *Discretionary functions* *supra* note32.

responsibility, prosecutorial discretion should be exercised independently and free from political interference, subject to guidelines to enhance fairness and consistency in taking decisions including institution or waiver of prosecution.²⁷

It seems that the discretionary powers not to proceed with an accusation, such as those available to the ICC Prosecutor are usually attributed to the organs of the prosecution in common-law trial systems. This opinion shared by a majority of authors is founded on different arguments. One, is the assumption that none can force anyone else to support an indictment without being absolutely convinced of its being well founded.²⁸

Another writer²⁹ expresses the opposite opinion that there exists no logical or functional link, between the theoretic accusatorial model and the discretionally of criminal prosecution, which has characterized the experience of the accusatorial trial, both in ancient times and today. The author even states that the discretionally of criminal prosecution and the consequent availability of the charges, as well as of the evidence, represents a wreckage of the original private nature, and later on only civic or popular, of the initiative of criminal prosecution, and could also give way to arbitrary acts or favoritism. Only the principle of a mandatory and irrevocable criminal prosecution would be able to assure fairness and the equality of citizens before the law, the rule of law and the protection of the weakest party and victim.

From a balanced view, the ICC Prosecutor functions are characteristics to 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.”*³⁰

There are important differences in both the formal role assigned to prosecutors and the very different cultural assumptions about how they approach that role. In focusing on the causal relationship between culture, institution and discretionary practice, we cannot ignore the arguments for and against the expansion of discretion in particular contexts, and especially in the context of international

²⁷ IAP Standards supra note 32, paragraphs 2.1 and 4.3, last part.

²⁸ Retico Vincenzo, The Trial of First Instance Before the International Criminal Court: From the Investigation to the Hearings, in The ICC Comments on the Draft Statute, Ed. By Flavia Lattanzi, 1998, p. 204.

²⁹ Ferrajoli, Diritto e ragione, teoria del garantismo penale, Bari, 1996, p. 79.

³⁰ Cassese Antonio, supra note 35, p.163.

crime. Crimes against humanity, genocide, war crimes, and torture are international crime which have risen to the level of 'jus cogens'; as a consequence arise the obligations to prosecute and extradite, to provide legal assistance, to eliminate the statute of limitation, and the immunities of superiors.

These obligations are considered as '*obligatio erga omnes*' the consequence of which is that impunity cannot be granted.³¹

It is useful to define³² what mean **prosecutorial discretion**, for, interestingly, the meaning changes according to the criminal justice culture of the country concerned. Therefore is useful to restrict the concept of discretion to those forms that do not involve decisions by an independent court³³ and are intended to keep offenders out of court and out of prison.

In the **United Kingdom**, the most formal mechanism of discretion, is the police caution, which is an official warning which may be cited in court as part of a criminal record and which will affect subsequent prosecution decisions. In addition the Crown Prosecution Service (CPS) may discontinue proceedings after the police have charged, inter alia, because prosecution would not be in the public interest; however the CPS lacks the effective power to discontinue regularly on such grounds because it is highly dependent on the files and information provided by the police. Armed with information about the circumstances of the offence and offender the CPS could discontinue proceedings on the ground that they are not in the public interest.

In **Dutch Criminal Law**, the decision on whether or not to take a case further than the investigative stage, and to initiate court proceedings against a person suspected of a criminal offence, lies solely with the public prosecutor – principle

³¹ Bassiouni M. Cherif, supra note 2, p. 11: "*These crimes establish inderogatable protections and the mandatory duty to prosecute or extradite accused perpetrators, and to punish those found guilty, irrespective of locus since universal jurisdiction presumably applies. And, as stated above, there can be no statutory limitations for these crimes.*"

³² Chrisje Brandts, Steward Field, Discretion and Accountability in Prosecution: A Comparative Perspective on Keeping Crime out of Court in Criminal Justice in Europe, A Comparative Study Ed by Phil Fennell, Christopher Harding, Nico Jrg, Bert Swart, 1995, p. 130: "*Diversion from prosecution therefore means all decisions regarding the reaction to criminal offences by a duly-empowered authority. Within the criminal justice system, the purpose of which is to avoid court proceeding. Specifically excluded are decisions not to prosecute because of lack of evidence.*"

³³ Id. p. 128: "*This notion of diversion does not necessarily exclude decisions by (a criminal) court; typical Dutch reactions to crime that are diversionary in the Dutch sense include community service orders imposed by a judge... at the same time, ... the Dutch criminal justice system itself has a number of principles in combination with legal mechanisms that allow a grat deal of crime to pass through the system without reaching court..*"

known as the monopoly of prosecution. The prosecutor not only has a monopoly on the decision to prosecute: he/she is also free to decide how to use that monopoly – known as principle of expediency or opportunity, prosecution must be expedient or opportune.³⁴ This requirement may lead a prosecutor to decide not to prosecute and in that case he may drop the case: unconditionally – unconditional waiver; conditionally – conditionally waiver; enter into a financial settlement with the suspect which will guarantee non-prosecution in exchange of certain sum of money – known as “transactie” article 74 of the Dutch Criminal Code – the prosecutor waives the right to prosecute, in exchange for payment of certain sum and sometimes the fulfilling of other conditions such as financial compensation for victims; formally transactie is not a penalty that is imposed, but a proposal by the prosecutor that is accepted by the offender.³⁵

Means of control and supervision of the Dutch public prosecutor’s freedom of decision are subtle and indirect; at the top of the hierarchical pyramid, the Minister is politically answerable to Parliament for decision within the criminal justice system; the heads of prosecution answer to the Minister and so on down the line.

An individual adversely affected by a prosecutor’s decision to divert an offender from prosecution may have that decision reviewed by the Court of Appeal – article 12 of the Code of Criminal Procedure. This is the only instance in which the law gives any other agency but the Prosecution Service itself the right to decide on (non) –prosecution; it is a complicated and little used procedure, but the Supreme Court (1990) has accepted that because of general principles of fair trial and due procedure.³⁶

This suggests similarities with the Anglo-American practice of plea bargaining; both operate in a semi-private nether-world of bargaining and tactical exchange; both lack development mechanisms for public accountability; both if they are to be viewed as acceptable in their present form, require great faith in the integrity and competence of professional role-playing. The Dutch must trust the judicial impartiality of the prosecutor despite the evidence of bureaucratic pressures; the

³⁴ Chrisje Brandts, Steward Field, *supra* note 155, p. 134.

³⁵ *Id.* p.134.

³⁶ Chrisje Brandts, Steward Field, *supra* note 155, p.146 : “*But apart from such individual rights, the answer to the question who controls the prosecutor must be, inconceivable as it may seem to British readers, “nobody, really”. Although guidelines and policy plans are publicly accessible, the visibility of what actually goes on as far as decisions not to prosecute are concerned, is practically nil. This has meant that one of the traditional means of control of criminal justice system – the fact that the criminal trials are public – is less and less effective, as more and more goes on behind the scenes.*”

British must trust to the combative competence of defense lawyers to ensure suspects' interests are preserved in the bargaining process. (p.147)

The investigating judge "*Rechter-Commissaris*" plays a rather more limited role than the **French** *juge d'instruction*; in most cases the involvement of the Rechter-Commissaris would not go beyond authorizing the use of certain coercive powers; the main coercive powers are extended Pre-Trial detention, wire-tapping, search and seizure of evidence from homes, and opening of mail. In this context, RC plays a more passive, quasi-judicial role, which may be seen as an extended version of what key magistrates do in England and Wales.

Contemporary public prosecutors in the **United States** have significant discretion: they decide whether a case will be carried forward, what the formal charges will be, and even if the charges should later be dropped. The result is that the American prosecutor at last 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.³⁷

In **Germany** the prosecutor constitutes the so-called 'master of the investigatory stage' ("*Herrin des Ermittlungsverfahrens*").³⁸ The position of the prosecution authorities is special as it co-operates with the judiciary and performs a number of quasi-judicial decisions, among essential is the decision to drop charges for insufficient evidence or to discontinue the proceedings for other legal reasons. The prosecutor can only exercise discretion in the context of less serious offences ("*Vergehen*") and where the law provides for. The Code of Criminal Procedure specifies the circumstances under which the prosecution has the power not to press charges. These situations include, for example, incidents where the offence is trivial, the degree of the offender's culpability is minimal and there is no public interest for a prosecution or the public interest can be satisfied in another way. Throughout the investigatory stage, the prosecutor's decisions to discontinue proceedings and to terminate the investigations are subject to supervision by a judge.

Like in Germany, in **Italy** the prosecution is bound by the legality principle, as a direct consequence the Public Ministry has the legal obligation to exercise the criminal action.³⁹ The prosecutor has no discretionary power to terminate a case;

³⁷ Reichel L. Philip, *Comparative Criminals Justices Systems, A Topical Approach*, Sec.Ed.1999, p. 211.

³⁸ Reckwerth Sven, *The role of the Prosecution in German Criminal Procedure*, *Tilburg Foreign Law Review*, Vol.7, No.1, 1998, p. 70.

³⁹ Delmas-Marty Mireille, *Procédure pénales d'Europe*, 1995, p. 383.

the entire phase of investigation is under the supervision of the judge in order to control and prevent eventual lacunas in the proceedings.⁴⁰

France provides a good example of the prosecutorial role under civil legal tradition. There are three actors in the French prosecution process: the judicial police, the procurator, and the examining magistrate. The procurators determine appropriate charges against the accused, prosecute less serious felonies and most misdemeanors, and direct the work of the judicial police. Examining magistrates have the role of an investigation director who assigns and supervises activities of the judicial police and the procurator, but he cannot open an investigation unless requested to do so by procurator or the victim.

In two types of investigations, the prosecutor is more involved: in flagrant offenses and in formal judicial investigations. In France, the principle of “*opportunité*” leaves open to the prosecutor to desist from prosecutions at his discretion.⁴¹ A decision to abandon a prosecution may be challenged by the “*partie civile*”. In addition to these various methods of withdrawal the charges, a more radical solution was adopted in the Netherlands where a consensual disposal is achieved by allowing the defendant to make a payment to prevent a prosecution.⁴²

In **Romania** the criminal prosecution is governed by the legality principle, the criminal action having as main goal to find the truth and make criminally responsible the persons having committed crimes, by indicting them under the law provisions.

The criminal action can be initiated only by the prosecutor, at the criminal investigation authority’s proposition, when the prosecutor orders the defendant’s preventive arrest or by indicting him.

Any person can file a complaint against the criminal prosecution measures and decisions, if they brought a prejudice to his legitimate interests. 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.

⁴⁰ Id. p. 384.

⁴¹ Id. p. 241: “*Le ministère public peut à tout moment de l’enquête décider de classer l’affaire, soit parce qu’il existe une cause légale d’extinction de l’action publique, soit en vertu de son pouvoir propre d’appréciation de l’opportunité des poursuites (la décision de classement est révoicable.*”

⁴² Hatchard John, Huber Barbara, Vogler Richard, Comparative Criminal Procedure, 1996, B.I.I.C.L. p. 236.

In compliance with art. 209 from Romanian Code of Criminal Procedure, “ *The prosecutor shall exert the surveillance over the police criminal investigations; when exerting such attributions, the prosecutors direct and control the criminal investigation of the police and other authorities. The prosecutor may carry out any criminal prosecution act in the cases he surveys*”. There are a few crimes such as: homicide, infanticide, depriving of freedom. bribery giving and receiving, etc, where the criminal prosecution is compulsory to be carried out by the prosecutor.

4. ICC Prosecutor’s duties and powers⁴³

The aim of the Prosecutor’s pre-trial activity is the establishment of the truth; to that purpose, he or she has to apply during the investigation and prosecution clear statutory standards, principles and obligations. The Prosecutor has a duty to investigate equally all the incriminating and exonerating circumstances; that means that the Prosecutor’s role extends beyond that of a mere party which has to ensure his or her success, i.e. the conviction of an accused.

Both duties of the Prosecutor to establish the truth and to examine, all incriminating and exonerating circumstances, together with the power to appeal against a decision on behalf of the convicted person,⁴⁴ and the duty to disclose any information favorable to the accused⁴⁵ are the best examples for the new ‘**sui generis’ structure and convergent⁴⁶ working system of the ICC.**⁴⁷ The

⁴³ ICC Statute, supra note 24, Art.54.

⁴⁴ Id. Art.81 (1) (b).

⁴⁵ Id. Art.67 (2).

⁴⁶ Zappala Salvatore, supra note 34, p.71-72 states that according to the provisions of Article 54(1), the prosecutor is bound to furnish evidence both in favor and against the accused, to assure an effective and efficient investigation and criminal prosecution, to observe the rights of the persons mentioned in the Statute; these provisions confirm evidently that the international prosecutor is not acting from the position of one party, but exercises the powers of a legal body, since he is not sustaining only the charge, having the obligation to present the facts objectively:” *..il procuratore non ha solo un ruolo di parte me esercita la funzione di organo di giustizia; esso cioè non deve solo sostenere l’acusa ma deve accertare i fatti oggettivamente, tenendo anche conto, delle esigenze del complessivo funzionamento dell’ntituzione giudiziaria e nel pieno rispetto dei diritti individuali.*” For the same opinion, Antonio Cassese, former president of ICTY The Statue of International Criminal Court: Some preliminary reflections, European Journal of International Law Vol.10 No.1/1999, p. 168:“*The Prosecutor is rather conceived of as both a party to the proceedings and also an impartial truth-seeker or organ of justice.*”

Statute⁴⁸ spells out the duties to take the appropriate measures for the protection of victims and witnesses and to respect the rights of persons involved in the proceedings, which are set out in the Statute.

The rights of the Prosecutor could be structured in four categories.

The 1st contains powers related to the evidence gathering activity:

1. to conduct on site investigations on the territory of a State (art.54 para.2), in accordance with the provisions of Part 9, International cooperation and judicial assistance art 93, 96 and 99; or if is authorized by the Pre-Trial Chamber under article 57, paragraph 3 (d);
2. to collect and examine documents and material evidences;
3. to request the presence of and questioning investigated persons, victims and witnesses in order to obtain oral or written statements or testimonies;
4. to take or request necessary measures for the preservation of evidence.

The 2nd group refers to the powers of the Prosecutor to initiate and consent upon arrangements and agreements seeking or facilitating the cooperation with States, intergovernmental organizations or persons in accordance with the Statute and its respective competence and/or mandate.

The 3rd type consist in ensuring at any stage of the proceeding the confidentiality of information and documents; when these were obtained on the condition of confidentiality for the purpose of generating new evidence, the Prosecutor may agree not to disclose them without the provider's consent. Article 54 paragraph 3, (e) should be corroborated with article 93 paragraph 8, (a -c) - the Court shall ensure the confidentiality of documents and information, except as required for the investigation and proceedings described in the request.

The requested State may, when necessary, transmit documents or information to the Prosecutor on a confidential basis; the Prosecutor may then use them solely for the purpose of generating new evidence; the requested State may, on its own

⁴⁷ Behrens Hans-J?rg, supra note 115, p. 438: “When comparing the procedural part of the Statute of the International Criminal Court to the provisions on procedure in the Statutes of the two Ad Hoc Tribunals or to the procedures in Common Law systems, one striking difference is the description of the role of the Prosecutor. In the Statutes of the ICTY and the ICTR, there is no mention of a duty of the Prosecutor to establish the truth or to investigate equally exonerating and incriminating circumstances. Both these elements.... Taken together with the power of the Prosecutor to appeal against a decision on behalf of the convicted person, and his duty to disclose any information favorable to the accused... show quite clear that the role of the Prosecutor in the structure of the Court is not of a mere party with narrowly defined aim for the overall outcome of proceedings. The Prosecutor has, as an organ of the Court, the duty to establish, to the best of his powers the truth, even if that means that the accused can not be punished..”

⁴⁸ ICC Statute, supra note 24, Art. 54 (1)(b)(c).

motion or at the request of the Prosecutor, subsequently consent to the disclosure of such documents or information; they may then be used as evidence pursuant to the provisions of Parts 5 and 6 and in accordance with the Rules of Procedure and Evidence.

The 4th task is to take or request to be taken all necessary measures to ensure the protection of any person.

4.1 The 3D perspective

The Pre-Trial Chambre, another ‘sui generis’ construction, which takes the main decisions on investigation and prosecution, is the result of the incorporation in the ICC Statute, of ‘ad hoc’ tribunals jurisdictional experience.

During the pre-trial proceedings the ICC Prosecutor, acting in an accusatorial procedural environment, does not appear the unique interlocutor of states, accused persons or victims; Pre-Trial Chamber’s judges shall supervise the entire evolution of the investigation. Though these provisions may be confusing for the accusatorial model partisans, the inclusion of the Pre-Trial Chambre represents an important concession obtained by the continental system states, which 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.⁴⁹

During investigation and prosecution the interventions of Pre-Trial Chamber may be structured in three main categories of functions:

- a) authorizes ‘ex ante’ upon application of the Prosecutor the exercise of: *“intrusive and coercive powers of investigation that interfere with individuals rights and liberties, in particular detention and search and seizure...”*⁵⁰;
- b) ‘post factum’ judicial review of: *the legality of ... prosecutorial actions with respect to investigation and the conduct of proceedings*⁵¹ ;
- c) filters those charges, which appear unfounded and not susceptible of further developments even prior to the hearings, thus representing a guarantee for the accused person.

⁴⁹ Weckel, Philippe supra note 186, p. 983-993

⁵⁰ Freiburg Declaration supra note 129, Article 8, p. 302.

⁵¹ Id. 9, p. 302.

This form of guarantee is, in the accusatorial system, called ‘jurisdictional review over the correct exercise of criminal prosecution’ and acquires more or less significance depending on whether the defense has more or less opportunities of being heard by the judge.⁵²

The Pre-Trial Chamber, to a large extent resembles the “Giudice per la indagini preliminari” (judge dealing with preliminary matters) provided for in the 1989 Italian code of Criminal Procedure (that basically opts for the adversarial system, subject however to some major concessions to the inquisitorial approach).⁵³

5. The rights of persons during ICC investigation

Unlike the constitutional documents of most international organizations, the ICC Statute contains a broad provision to protect individuals from human rights abuses by the organizations.

On the one hand, the basic scheme of procedural protections in the ICC Statute brings forward from the ICTY and ICTR Statutes the procedural protections for fair trials of the accused⁵⁴ and on the other hand adds an important new set of procedural protections labeled “Rights of Persons During an Investigation.”⁵⁵

The ICC Statute protects persons from violations both of substantial human rights, such as in the definition of crimes and defenses, and of rights to fair procedure⁵⁶; the requirement of protecting human rights applies to the entire functioning of the ICC.

The Prosecutor must “*fully respect the rights of persons arising under this Statute.*”⁵⁷ That means that the ICC Prosecutor has to respect not only the specifically criminal procedure identified rights of persons, including the

⁵² Retico Vincenzo, supra note 151, p. 207.

⁵³ Cassese Antonio, supra note 35, p.169.

⁵⁴ ICC Statute, supra note 24, Art. 67, is based upon ICTY Statute Art.21 and ICTR Statute Art.20.

⁵⁵ Id. Art.55.

⁵⁶ Id. Art.21(3): “The application and interpretation of law pursuant to this article must be consistent with internationally recognised human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.”

⁵⁷ Id. Art.54 (1)(c).

accused, victims and witnesses, but also those general internationally recognized human rights and those protections incorporated in the ICC Statute as well.⁵⁸

This article sets forth a number of rights particularly specifying a set of rights concerning questioning during the investigation phase.

The first paragraph contains the more general rights which apply to anyone involved in an investigation, be it as a witness, a person under investigation or otherwise: the right against self-incrimination⁵⁹ or forced confession of guilt; the right not to be subject to coercion, torture, threat or cruel, inhuman or degrading treatment or to unlawful arrest or detention, and to be provided with translation and interpretation, if necessary.

Protective measures and security arrangements, counseling, assistance for witnesses victims, and other who are at risk on account of testimony given by such witnesses are provided by the Victims and Witnesses Unit in consultation with the Prosecutor.⁶⁰

Second paragraph deals with the rights, which are usually defined as the rights of the suspect. According to this, the rights apply to anyone who is about to be questioned by the Prosecutor, if there are grounds to believe that the person has committed a crime within the jurisdiction of the Court. They include the right to be informed that there are such grounds, to remain silent without such silence being a consideration in the determination of guilt or innocence, to have a legal assistance (assigned free if necessary) and to be questioned in the presence of counsel.⁶¹ Some of these rights concerning questioning of a suspected person, apply specifically against both the Court and national authorities fulfilling the request of the Court. The Prosecutor cannot allow questioning to be done by national authorities in hopes that they could use measures on a suspect that the Prosecutor would not be permitted to use directly. The other investigatory rights, including the rights against arbitrary arrest and detention, against torture, and to

⁵⁸ Gallant S. Kenneth, Individual Human rights in a New International Organization: The Rome Statute of the International Criminal Court, in *International Criminal Law*, 2^d ed. 1999, Vol.3, Enforcement, ed. M. Cherif Bassiouni, p.702.

⁵⁹ The Article 55(1)(a) on Prosecutor's investigative rights protects the right "not to be compelled to incriminate" oneself, while the Article 67(1)(g) on general rights of the accused protects the right "not to be compelled to testify.."

⁶⁰ ICC Statute supra note 24, Art.43.

⁶¹ Alastair Brown supra note 133,1998: "*The accused has an absolute right to silence, without this silence being a consideration in the determination of guilt and innocence. The accused is entitled to be questioned in the presence of counsel, though the Statute is silent on the extent to which that counsel may intervene.*"

interpretation apply, “...in respect of an investigation under this Statute” and they regards not just the suspect but also any “person”.

The Statute provides mechanisms for enforcing individual rights in the investigative process: an exclusionary rule prohibiting the admission of certain evidence obtained in violation of the Statute and internationally recognized human rights⁶² and additionally, there is the provision for compensation to any “victim of unlawful arrest and detention.”⁶³

Accordingly to the Statute a Prosecutor’s special characteristic is the affirmative obligation to protect witnesses and victims, mandated by Article – the victims and witness unit. The term ‘protection of victims and witnesses’ received length comments that this qualification is not found in the human right conventions, but the interest in the safety of victims and witnesses it is a part of the broader interest of the international community in the pursuit of justice.⁶⁴

The interest in the safety, security and protection of victims and witnesses is confronting sometimes with the requirements of a fair trial and the rights of the accused: “*The crucial question, therefore, is whether a fair trial includes an absolute right to know the identity of one’s accuser.*”⁶⁵ The problem of witness and victims’ anonymity as a measure of protection received great support when is specifically related to charges of rape and sexual assault.

Supporters of anonymity in conjunction with sexual abuses as a crime against humanity, suggested that an international prosecution should be carefully balanced to give appropriate weight to both sets of interests and not to give automatic priority to those of the accused.

The argument is the existing conflict between the rights of the accused to a fair trial and the right of the victim to equality before the law and to be free from fear of further abuse; the cause of this conflict derive from the definition by men of

⁶² ICC Statute, supra note 24, Art. 69 (7).

⁶³ Id. Art. 85(1), referring to that issue Gallant S. Kenneth, supra note 176, p.713: “*Rights of persons during the investigatory stage other than the right against unlawful arrest or detention are not clearly within the provisions for compensation to arrested or convicted persons unless their violation brings them within the category of “miscarriage of justice”. ICC Statute, Art. 85 (2)(3). This would seem possible where a violation of the provisions on questioning of persons leads to the inducement of false confession.*”

⁶⁴ Chinkin M. Christine, Due process and witness anonymity, *The American Journal of International Law*, Vol.90, 1997, p. 76.

⁶⁵ Id. p. 76.

the human rights standards, *“in accordance with male assertions of what constitutes the most fundamental guarantees required by individuals.”*⁶⁶

In response, was expressed a critique point, considering that the right of accused should be not curtailed in order to protect the witness and the victims, and appreciating as a *“radical proposition to suggest that the minimum rights of the accused to a fair trial can be diminished in order to protect witnesses and victims.”*⁶⁷

6. Inquisitorial and Adversarial

6.1. Converging or permanently divergent systems, critical demarcation lines, domination and points of no return

Important variations exist between the criminal justice systems of the nations of the world. These national systems, moreover, have undergone important transformations over the course of history. In terms of systems of criminal justice as whole, key differences exists between inquisitorial and adversarial models.

In a comparative analysis of pre-trial proceedings⁶⁸ could be identified classical distinctions between adversarial and inquisitorial systems of criminal law: ‘adversarial’ proceeding, 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; ‘inquisitorial’ system 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 truthfinding.

⁶⁶ Chinkin M. Christine, supra note 182, p. 78 - 79, and the author further developed the idea: *“Women typically feature in a criminal trial as victims and witnesses, while more men than women appear as accused. It is not surprising that the guarantee of a fair trial is seen by many as more fundamental than the victim’s interests, and those of other potential victims.”*

⁶⁷ Leigh Monroe, Witness Anonymity Is Inconsistent with Due Process, The American Journal of International Law, Vol.91, 1997, p. 81 and at page 83: *“In my view, international law has not yet accepted the position that the accused’s right to fair trial is subject to discount and ‘balancing’ in order to provide anonymity to victims and witnesses.”*

⁶⁸ See ANNEX 3.

In common, both systems have as fundamental aim the finding of truth; differences are in their fundamental assumptions as to the best way of going about the truth.⁶⁹

From a comparative angle, the intriguing question arises whether the legal systems of continental and common law countries are gradually converging.⁷⁰ This perspective implies three possibilities: a) ‘the ideal mixture between optimal truth-finding and fundamental fairness’⁷¹ - both systems will adopt so many of each other’s characteristics that their differences are no longer essential, as to become no more than variations on a theme; b) ‘harmonization’, each system will retain its own essential characteristics - these systems are the embodiment of such divergent norms and values and reflecting such profound social values, that they can never be brought together entirely; the two systems are moving towards each other, but the convergence beyond a certain point or the critical limit will generate the disintegration of each system; c) the ‘most radical possibility’ – one system will in the end come to dominate the other which will lose its unique features.⁷²

6.2. *Exists a convergence or coexistence between two systems in the ICC Statute*

The ICC Statute, this basic code of international criminal procedure will have a lasting impact on international criminal law. For the first time, and despite some

⁶⁹ Nico J?rg, Stewart Field, Chrisje Brants, supra note 155, p. 42-43: “*Within the adversarial culture, the most common and traditional assumption is that real equality of parties and the dialectical process of persuasion involved in courtroom procedure will somehow lead to the truth emerging. Thus fairness of procedure and truth finding are unproblematically related, and is no need to face issues of priority between the two... An inquisitorial system assumes that the truth can be, and must be, discovered in an investigative procedure and is in the interest of the parties to conceal it to the state which is best equipped to carry out such investigations. This presupposes that the system is fair and legitimate because it aims at a version of the truth that will be as nearly objective as possible...Determining the ‘legal quality’ of the truth is seen as best left to legal professionals.*”

⁷⁰ Id. An example of progressive convergence: The Netherlands, England and Wales systems, p.54: “*Changes are occurring in both systems (Netherlands and England & Wales), in the composition of the mixture between truth and procedural fairness, and these are reflected in piecemeal changes in the organization of criminal proceeding. They seem to point more to convergence than to divergence; inquisitorial procedure is increasingly influenced by the necessity of fairness in truth-finding at the trial stage, while there are some – less developed – indications that adversarial procedure is beginning to take on more direct truth-finding characteristics, or is at least beginning to avail itself of the instruments of truth-finding*”.

⁷¹ Id. p.55.

⁷² Id. p. 41.

pessimist provisions,⁷³ the major legal systems in the world have managed to agree upon a code of procedure acceptable to all of them – the fight between common law and civil law has been replaced by an agreement on common principles and civil behavior.⁷⁴ In creating the this hybrid institution⁷⁵ the international community fused elements of the adversarial and inquisitorial systems of criminal justice

It is evident from even a cursory examination of opinions expressed about the text of the ILC Draft, 1998 Draft and the Rome Statute,⁷⁶ that states have basically opted for the common law approach; although the common-law system has been basically adopted, a number of fundamental elements typical of the civil law approach have been incorporated.

No investigating judge or chamber has been instituted, and the investigations and prosecutions are entrusted to the Prosecutor, to whom it falls to search for and collect the evidence and prosecute the case before the Court. In addition one can discern in the Statute the typical feature of adversarial proceedings, namely the fact that the evidence, instead of being submitted to the Court by an investigating judge, is presented in oral proceedings and exhibits tendered by each party to the trial are admitted into evidence if and when it is so decided by the Court.

⁷³ Pradel Jean, Inquisitoire-Accusatoire: Une redoutable complexité, *Revue Internationale de droit pénal*, 1-2 trim. 1997, p. 216: “*La procédure pénale fait partie de la culture d’une peuple, comme la langue et la musique, les usages ou la littérature. Elle est donc, dans une large mesure un produit national. Il faut par conséquent exclure, et certainement pour très longtemps, le schéma d’une procédure mondiale qui serait, inquisitoire, accusatoire ou mixte.*”

⁷⁴ Behrens Hans-J?rg, supra note 115, p. 429.

⁷⁵ Mac Sweeney Daniel, International Standards of Fairness, Criminal Procedure and the International Criminal Court, *International Review of Penal Law*, Vol.68, 1997, p. 233.

⁷⁶ Zappala Salvatore, supra note 34, p. 45: “*Il modello verso cui ci si è orientata [la Conferenza] è quello di un processo penale di stampo tendenzialmente accusatorio, in cui il compito di svolgere le indagini, decidere circa l’esercizio dell’azione, portare le prove in giudizio e sostenere l’accusa è assegnato integralmente al procuratore, ma nel quale sono attribuiti al giudice poteri di controllo e di intervento lungo tutto il corso del procedimento.*” See also: Kai Ambos, Establishing an International Criminal Court and an International Criminal Code, Observations from an International Criminal Law Viewpoint, *European Journal of International Law* vol.7, no.1, 1996, p. 526: “*The procedural rules are accusatorial as the prosecutorial organ investigates and prepares the accusation. The tribunal intervenes in a kind of intermediate procedure at latest after the filing of the accusation; it can confirm, refuse or modify the accusation.*” and Retico Vincenzo, The Trial of First Instance before the International Criminal Court: From the Investigation to the Hearings, in *The ICC Comments on the Draft Statute*, Ed. By Flavia Lattanzi, 1998, p. 208: “*The trial defined by the (1998) draft Statute, reproduces, in general terms, the same dialectic scheme which characterizes, in particularly “accusatorial” sense, those proceedings where the decisions always follow the impulse of the parties and represent the results of a choice between divergent conclusions.*”

It is clear from the Statute that the Prosecutor, is not simply, or not only, an instrument of executive justice, a party to the proceedings whose exclusive interest is to present the facts and evidence as seen by him or her in order to accuse and to secure the indictee's conviction. The Prosecutor is rather conceived of as both a party to the proceedings and also an impartial truth-seeker or organ of justice.

Powers of the prosecutor constituting elements indicating the adherence to the prevailing accusatorial model, containing the necessary guarantees: collection and examination of evidence, request for the presence of the accused persons, victims and witnesses in view of hearings and interrogations, demand for the co-operation of States and international organizations, conclusion of agreements, in accordance with the Statute, for enabling the co-operation with the States, an intergovernmental organization or a person; achieving an agreement in view of keeping confidentiality of information meant to obtain new proofs; taking all necessary measures to assure protection of confidential information, evidence elements and persons, the prosecutor being responsible for the protection of witnesses during investigation stage.⁷⁷

Generally speaking, the Prosecutor is the master of the investigative stage, the prevailing procedural model adopted by the Statute being the accusatorial one. However, out of the total provisions of the Statute and those referring to the Pre-trial Chamber institution derives also certain features underlining the independence and impartiality of the prosecutor defining its image of a body administering justice, rather than of a simple exponent of a subjective truth. At the pre-trial stage, the Prosecutor normally acts under the scrutiny of the Pre-Trial Chamber, which to a large extent resembles the 'Giudice per la indagini preliminari' (judge dealing with preliminary matters) provided for in the 1989 Italian code of Criminal Procedure (that basically opts for the adversarial system, subject however to some major concessions to the inquisitorial approach).⁷⁸

As in civil law systems victims may take part in the proceedings, even at the pre-trial stage, and seek compensation and reparation; civil proceeding are designed to claim reparation for the injuries caused by a crime are made part and parcel of criminal proceeding (designed to establish weather the accused is liable for the crime).

⁷⁷ Zappala Salvatore, *supra* note 34, p. 72.

⁷⁸ Cassese Antonio, *supra* note 35, p. 169.

Having stressed the points of convergence between the two systems should add that in many areas the Statute does not provide any clue as to whether the proceedings will be adversarial or inquisitorial. Thus for instance, it does not indicate whether the order of presentation of evidence will be that typical of common law systems (examination-in-chief, cross-examination and re-examination). Nor does the Statute indicate whether appeals will follow the continental or the common law system i.e. whether appellate proceedings will entail a complete rehearing on facts and law, or cassation on a point of law, or will be confined to the judicial review of specifically alleged grave errors of fact or law.”⁷⁹

10. Conclusions

The objective of any pre-trial criminal proceedings at its most basic level **is to assess the guilt or innocence of the accused in regard to any specified illegal, criminal behavior.**

This preliminary research of the role of ICC Prosecutor during the pre-trial proceedings cannot do justice to numerous and complex questions, which they raise and which will be made the subject of considered discussion and careful analysis over the years ahead. It is too early to draw far-reaching conclusions on the pre-trial regime of the ICC, as the ICC Prosecutor starts his activity on June 16, 2003.

The provisions referring to the pre-trial role of the ICC Prosecutor, while often strong are inconsistent. The strength of some rights - like ex officio power to initiate the investigation - is let down by the weakness of others – state cooperation regime.

The ability of the Prosecutor to receive and verify information directly and to initiate investigations ‘proprio motu’ - but not to launch investigations without the authorization of the Pre-Trial Chamber, empowers the Prosecutor to do timely preliminary analysis of reports of alleged crimes early in conflicts.

However, the State co-operation regime is so weak that it is questionable if the Prosecutor will be able to prepare cases effectively, in normal situations, without Security Council referral of situations under UN Charter Chapter VII.

⁷⁹ Id.

The strongest power to execute a request directly on the territory of a state is virtually blocked by the fable State co-operation regime; the draftsmen have left too many loopholes permitting states do delay or even thwart the Court's proceedings.

ANNEX 1

DECISIONS, ORDERS AND RULINGS GIVEN TO THE PROSECUTOR BY THE PRE-TRIAL CHAMBER

I. To commence or not an investigation or prosecution; authorizations and reviews

1 - Authorizes or not, the commencement of an investigation:

- a) requested by the Prosecutor after "proprio motu" preliminary examination - Art.15 (4); or
- b) after the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation - Art.15 (5); or

c) based on the Prosecutor's application against a State's request for deferral - Art.18 (2);

2 - Reviews Prosecutor's decision not to investigate or prosecute, at the request of the State or the Security Council, and to request the Prosecutor to reconsider that decision - Art.53 (3)(a).

3 - Reviews, on its own initiative, a decision of the Prosecutor not to investigate or prosecute solely because the investigation or prosecution is not in the interest of the justice; in such a case, the decision of the Prosecutor shall be effective only if confirmed by the Pre-Trial Chamber - Art.53 (3)(b).

II. Decisions referring to collecting proofs, preserving evidences, protection of persons and sensitive information

1 - Pending a Pre-Trial Chamber ruling on a deferral to State or during the suspension of the investigation, on the Prosecutor's request, to pursue necessary investigative steps for the purpose of preserving evidence when exists a significant risk and unique opportunity - Art.18 (6).

2 - Pending a ruling on a challenge of jurisdiction or admissibility, referred prior to the confirmation of the charges, on the Prosecutor's request, authorizes the following measures:

- a) to pursue necessary investigative steps for the purpose of preserving evidence when exists a significant risk and unique opportunity
- b) to take a statement or testimony
- c) to complete the collection and examination of evidence
- d) to prevent the absconding of persons in respect of who were requested arrests warrants - Art.19 (8).

3 - When exists a significant risk and unique opportunity, for the purpose of preserving evidence, at the Prosecutor's request, gives recommendations or orders regarding procedures to be followed by the Prosecutor:

- made a record of the proceedings.
- to appoint an expert to assist the Prosecutor.
- to name available judge to observe and make recommendations or orders to the Prosecutor regarding the collection and preservation of evidence, and the questioning of persons - Art.56 (1)(b) and (2); * should be corroborated with Art.72(1) protection on national security information.

4 - Orders the Prosecutor not to provide the relevant information to the arrested or summoned person in connection with the unique opportunity investigation - Art.56 (1)(c).

5 - Authorizes the Prosecutor to conduct investigation on the territory of a State - Art.54 (2);

6 - Authorizes the Prosecutor to take specific investigative steps within the territory of that State Party without having secured the cooperation of that State under Part 9, after the Pre-Trial Chamber has determined that in a specific case, the State, is clearly unable to execute a request for cooperation - Art.57 (3)(d), * entire paragraph 3 should be corroborated with Art.72 (1) protection on national security information.

7 - Consults with the Prosecutor when considers that some measures required to preserve essential evidence for the defense at trial, were not requested, and to take such measures on its own initiative if after the consultations concludes that the Prosecutor's failure is unjustified - Art.56 (3)(a).

8 - Provide protection and privacy of victims and witnesses, the preservation of evidence, protection of arrested or cited persons, protection of national security information - Art.57 (3)(c).

III. Rulings on jurisdiction and admissibility

1 - Decides the rulings seek by the Prosecutor regarding a question of jurisdiction or admissibility, prior to the confirmation of the charges - Art.19 (6).

V. Decision referring to arrest and summons

1 - Issues, at the request of the Prosecutor, in the conditions provided in Art.58, orders and warrants required for the purposes of an investigation - Art.57 (3)(a).

2 - Issues, upon the request of an arrested or summoned person, orders or takes measures including such as those described in article 56, or seeks cooperation pursuant to Part 9 necessary to assist the person in the preparation of the defense - Art.57 (3)(b).

3 - Amends, modifies or adds, the arrest warrant at the request of the Prosecutor - Art.58 (6).

4 - Reviews its ruling on release or detention on the request of the Prosecutor the - Art.60 (3).

5 - Verifies that a person is not detained for an unreasonable period prior to trial due to inexcusable delay by the Prosecutor. If such delay occurs, the Court shall consider releasing the person, with or without conditions - Art.60 (4).

V. Hearings

1 – Holds hearings, in the presence of the accused, to confirm the charges on which the Prosecutor intends to seek trial - Art.61 (1).

2 - Holds hearings, in the absence of the accused, upon request of the Prosecutor - Art.61 (2).

3 - Issues orders regarding the disclosure of information for the purpose of the hearing - Art.61 (3), * should be corroborated with Art.72 (1) protection on national security information.

4 - Confirms the Prosecutor's charges and commits the person to a Trial Chamber for trial on the charges as confirmed - Art.61 (7)(a).

5 - Declines to confirm the charges, but Prosecutor shall not be precluded from subsequently requesting its confirmation if the request is supported by additional evidence - Art.61 (7)(b).

6 - Adjourns the hearing and request the Prosecutor to consider:

(a) providing further evidence or conducting further investigation with respect to a particular charge; or

(b) amending a charge because the evidence submitted appears to establish a different crime - Art.61 (7)(c).

7 - Gives to the Prosecutor the permission to amend the charges after the charges are confirmed and before the trial has begun; to hold a new hearing if the Prosecutor seeks to add additional charges or to substitute more serious charges - Art.61 (9).

ANNEX 2

ICC PROSECUTOR'S DISCRETIONARY POWERS

1. To initiate an investigation or prosecution without seeking the Pre-Trial Chamber's authorization:
 - a) When, the Security Council acting under Chapter VII of the Charter, refers a situation - Art 13 (b);

- b) When, receiving a referral from the State, at the end of one month after the Prosecutor's notification, no State requests the deferral of the investigation – results from 'per a contrario interpretation' of Art. 18 (2) provisions.
2. To receive and verify information directly, on crimes within the jurisdiction of the Court – Art. 13 (c) and Art. 15.
 3. To close the case, and inform those who provided the information, if after 'proprio motu' preliminary examination, concludes that there is not a reasonable basis for an investigation decision which is revisable, controlled and amendable only by the Prosecutor - Art. 15 (6).
 4. Has no obligation to inform the State making a referral or the Security Council about the decision not to initiate an investigation, based on new facts or information. – Art. 53 (1)
 5. Has any time the possibility to reconsider a decision not to initiate an investigation or prosecution – Art. 53 (4)
 6. To amend or withdraw any charges, before the hearing, with the notification of the reasons for the withdrawal to the Pre-Trial Chamber and accused person - Art.61 (4) the decision to withdraw is not controlled by the Pre-Trial Chamber.
 7. Execution of a request, which not implies compulsory measures, directly on the territory of a State – Art.99 (4).

**PRE-TRIAL FUNDAMENTAL DIFFERENCES
BETWEEN ACCUSATORIAL AND INQUISITORIAL MODELS**

The fundamental differences existent between the two traditional models of the accusatorial and inquisitorial pre-trial criminal proceedings⁸⁰ are generated by the different sense and meaning given to the notion of charge.⁸¹

The inquisitorial system

The accusatorial system

The pre-trial key words are: public interest not self-interest, and establishment of truth	Investigation is motivated by self-interest rather than public interest and by the fairness of procedure
The objective of the activity carried out by the Public Ministry aid by state-employed police officers or state-founded institutions, consists in finding the truth; ⁸²	The investigation activity carried out by the Public Ministry is considered the activity of one party; assumes the equality of parties in conflict, which are exponents of their own subjective truths before a third party; ⁸³ the public accuser is the bearer of an own, subjective truth, belonging to the party,

⁸⁰ Hatchard John, Huber Barbara, Vogler Richard, supra note 165 p. 7 :“To begin at pre-trial stage, where the differences of approach are the most profound, the French model entrust the collection of evidence entirely to judicial or para-judicial officials of the state, working without significant challenge (except over issues of bail or custody) from defense. The actions of these officials are subject only to judicial appellate scrutiny by way of the ‘nullity’ procedure. In the German model, the responsibility for the collection of evidence lies primarily with the prosecution, acting under the loose overall authority of a pre-trial judge. The possibility of defense intervention is much stronger than in France, however. Finally, in the English model, it is the parties (without any judicial intervention at all except in issues of bail and custody) who dominate the pre-trial, each playing an indispensable role in evidence collection and preparation.”

⁸¹ Zappala Salvatore, supra note 34, p.43 considers that charge notion implies three meanings: functionally, the function, the activity; organizationally, the body, the institution and documentary, the act, the document.

⁸² Pradel Jean supra note 223, p. 229: “*Vive l’inquisiteur car après tout une vérité recherchée objectivement par un magistrat (aidé par la police) vaut sans doute mieux que ces deux demi-vérités recherchées subjectivement par les parties dans le cadre d’un duel d’un match dirait-on aujourd’hui, où la passion n’est pas forcément asente.*”

⁸³ Harding Ch., Swart B., J?rg N., Fennell Ph., supra note 122, p. 47: “.. *each party is responsible for developing evidence to support its arguments.*”

	which has to be counter-proposed to the truth belonging to the accused;
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The inquisitorial system

The accusatorial system

The existence of the examining judge ⁸⁴ having powers in jurisdictional and evidence gathering domain;	No investigating judge;
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⁸⁴ Id. p. 46: “..the investigative judge, whose original role is to determine sufficiency of evidence and seek on truth using special investigative powers given to him for that purpose. There are plans to cut back the truth-finding role and corresponding powers of the investigating judge (several countries with inquisitorial procedures have already done so), which will render the public prosecutor the sole functionary responsible for the collection of evidence, with the investigating judge merely authorizing the use of intrusive investigative techniques by others. This corresponds with the development of the prosecution service as rapidly becoming the central government organization where policy decision are made on how to deal with crime, while undermining the quasi-judicial and impartial position of the prosecutor in safeguarding the due administration of substantive justice. The end result may be a more adversarial relationship between defense and prosecution, as the possibly diminishing of the dossier as a reflection of Pre-Trial truth inevitably involves the defense more in truth-finding.”

The inquisitorial system

The accusatorial system

<p>The investigation stage is lasting for a long time, is carried out along several phases, in secrecy, in written form, resulting documents and a pre-prepared version, which afterwards are used by the judge in view of establishing the responsibility of the accused;</p>	<p>The pre-trial investigation⁸⁵ is carried out by an institution of the party, which is not a member of judicial power and which holds absolute control of the investigation stage, being able to obtain documents, serve summons, hear witnesses, but all information obtained do not hold evidence value;⁸⁶</p>
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⁸⁵ Harding Ch., Swart B., J?rg N., Fennell Ph., supra note 122, p. 48: “*Procedural regulation and structuring of the Pre-Trial process is traditionally limited. The system starts from a model of contest between equal and private parties and therefore the assumption that the state need merely provide an arena for the resolution of the conflict. This model is mentained by resistance to, the development of a state police and the use of terrible inquisitorial techniques under detention; the development of an organized public party to the Pre-Trial process equipped with privileged powers .In the absence of these state institutions and powers, the suspect, with his right to refuse to testify or to co-operate, is in a position to mentain his interests without detailed Pre-Trial procedural rules.*”

⁸⁶ Id. p. 48: “*There is no investigating judge to seek out truth and despite official rhetoric about impartiality in prosecution, the concrete legal duties of prosecution lawyers do not extend to seeking out exculpatory evidence. The parties develop separate and competing dossiers. The evidence that counts is oral evidence at trial. What constitutes the truth is subject to negotiation by the parties – extensive plea bargaining simply produces an agreed approximation of events on which to base conviction and sentence*”.

The inquisitorial system

The accusatorial system

<p>The trial is the only public stage, it has an official character, contradictory as concerns the parties and is limited to the assessment of the already furnished proofs and not to their constitution; the proofs by themselves are not subject to the contradictory debates as they have been obtained by an independent and impartial body, which by definition is seeking to objectively find the truth.</p>	<p>For becoming proofs, all these elements have to be officially introduced in the public trial, orally presented to the judge, and submitted to the examination of the accused – contradictorality;</p>
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As recognized by the criminal processual doctrine, all legal systems are generally joint ones: accusatorial and inquisitorial are the two extremes of an ideal line on which we permanently find points of equilibrium.⁸⁷

In modern times the adversarial system has increasingly adopted the instruments of inquisitorial investigation: an organized police force and overt acceptance of police power to detain and interrogate in order to generate evidence against the suspect. This makes the traditional adversarial view of two equal private parties difficult to sustain. To balance extended power for the police necessitate extended rights for the defense. But fundamental change on

⁸⁷ Pradel Jean, supra note 223, p.216: “... *les frontières entre inquisition et accusation ne sont plus aussi nettes que par le passé (m? me si elles n’ont jamais été absolutes). Aujourd’hui tout se brouille m? me si dans le principe, il y a encore ?à et là des pans de procédure plut? t accusatoire ou plut? t inquisitoire. Bref, les rapprochements se multiplient...*”

the status of parties has not yet occurred: the system still relies on technical procedural rules at the trial to redress imbalances of institutional power that will remain for as long as funds preclude two detailed investigations of each incident

Fairness of procedure and establishment of truth must be seen as distinct but related aspects of criminal justice which, at their most abstract, share no necessary relationship: they are neither necessarily complementary nor contradictory.⁸⁸

⁸⁸ Harding Ch., Swart B., J?rg N., Fennell Ph., supra note 122, p. 49.

**PUBLIC MINISTRIES AND PROSECUTION OFFICES' RELATIONS WITH THE POLITICAL POWERS
AND ROLE IN THE PRE-TRIAL INVESTIGATION PROCEEDINGS⁸⁹**

Country	Relationship with governments or political authorities			Role in the investigative process	
Argentina civil law system	Institutional independence and functional autonomy	Institutional dependence and functional autonomy	Institutional dependence and functional subordination	no role	Supervising the police or other investigative agencies
Australia (Commonwealth of Australia) common law system	The DPP's Office within the portfolio of the Attorney General operates independently of the political process.			Investigations are conducted by police co-ordinated by Judges and First Instance Attorneys DPP is not an investigative agency; it depends upon police and other investigative agencies	

⁸⁹ For detailed information see: Directory of Prosecution Services, published by the International Association of Prosecutors 1999; Reichel L. Philip, Comparative Criminals Justices Systems, A Topical Approach, Sec.Ed.1999; Hatchard John, Huber Barbara, Vogler Richard, supra note 165; RAPORTS ENTRE LE MINISTERE PUBLIC, LES TRIBUANUX ET LE MINISTERE DE LA JUSTICE. Conseil de l'Europe DIR/JUR (95)7/13.03.1995; ORGANISATION DU MINISTERE PUBLIC, Conseil de l'Europe, DIR/JUR (95)4/22.09.1995; LE ROLE DU MINISTERE PUBLIC DANS UNE SOCIETE DEMOCRATIQUE, Conseil de l'Europe THEMIS, 2(96) SYNTHESE.REV.; REPLIES TO THE QUESTIONNAIRE – MULTILATERAL MEETING – THE TRANSFORMATION OF THE 'PROKURATURA' INTO A BODY COMPATIBLE WITH THE DEMOCRATIC PRINCIPLES OF LAW' THEMIS-PROK (95)1 Quest. Strasbourg 28 June 1995; International Association of Penal Law – 'Contribution on the Ninth UN Congress' Cairo 1995, A/CONF.169/NGO.6; Delmas-Marty Mireille, supra note 162.

	Institutional independence and functional autonomy	Institutional dependence and functional autonomy	Institutional dependence and functional subordination	no role	Supervising the police or other investigative agencies
Austria civil law system			The prosecution departments attached to each court are under the supervision of the Federal Minister of Justice, who may give even in individual case instructions to the prosecutors who unlike the judges are not independent from the government.	The public prosecutors never personally conduct investigations but are authorized to contact directly and entrust the support of police authorities	
Canada Common law system			The Federal Prosecution Service is an integral part of the Department of Justice; in every province except Nova Scotia the prosecution service is part of the Provincial government and the chief prosecutor is answerable to the Attorney General. The Public Prosecution service of Nova Scotia is an independent agency; it was the first jurisdiction in Canada to create a statutorily based prosecution	Prosecutors do not normally become involved in investigation process except situations where pre-charge legal advice is required.	

service.

	Institutional independence and functional autonomy	Institutional dependence and functional autonomy	Institutional dependence and functional subordination	no role	Supervising the police or other investigative agencies
China	The Chinese prosecutorial organs have an independent constitutional position in the state institution system.				Public security organs and People's Procuratorates exercise the right to investigate criminal cases
Cyprus	The Law Office headed by the Attorney General is wholly independent and comes under no Ministry			Investigation of criminal cases is carried out by the police, the prosecutor is not involved in the investigative process or the collection of evidence	
Czech Republic			Prosecutorial functions are part of the executive power, the Minister of Justice is the superior, supervises and controls the activity and functions of the prosecutors		The police investigator and the prosecutor are authorized to conduct investigations into all criminal cases; a prosecutor can conduct investigations by himself
Denmark			The Minister of Justice has overall responsibility for the prosecution service and is authorize to interfere with issues relating to the prosecution both in general and specific matters		The Chief Constables are chiefs of the local prosecution service and chiefs of the police who are responsible for the conduct of the investigations.



	Institutional independence and functional autonomy	Institutional dependence and functional autonomy	Institutional dependence and functional subordination	no role	Supervising the police or other investigative agencies
England & Wales Crown Prosecution Service ⁹⁰		The CPS is headed by the Director of Public Prosecution (DPP) who is responsible to the Attorney General (AG), who in turn is responsible to Parliament, the AG is appointed by the Queen, is a member of the Parliament and a politician, yet in his role as AG acts as an independent legal advisor of the government. The government does not control the CPS.		The CPS has no control over the police inquires and is not empowered to give instructions on collecting evidence; it does have a statutory duty to advise the police on the relevance, weight and admissibility of the evidence gathered.	
England Wales & Northern Ireland Serious Fraud Office		The SFO is an independent body answerable to Parliament through the Attorney General			It is a constitutional right for private citizen to bring private prosecutions; however, if the Director of SFO considers that a private prosecution for a matter involving serious or complex fraud is contrary to

⁹⁰ Particularly, in Anglo-Saxons countries there are no executive authorities responsible for the administration of the court activities; in a sense, in these countries do not exist Ministries of Justice. The courts are self-administrated based on a budget approved by the legislative bodies; the courts of justice have its own leadership, and the judges are administrative, disciplinary and managerial absolute independent.

Such countries are Great Britain and United States.

The establishment of the Crown Prosecution Service in 1986 represented a real revolution of the British criminal law system. Crown Prosecution Service has been created as an institution of the British Government, led by the Director of Public Prosecutions who is accountable only in front of the Attorney General - a member of the Cabinet – who at his turn is responsible in front of the Parliament. The DPP is appointed by the Parliament, and he is not responsible for the decisions taken by the subordinated prosecutors.

	Institutional independence and functional autonomy	Institutional dependence and functional autonomy	Institutional dependence and functional subordination	no role	the public interest, may intervene and assume control of the prosecutions and SFO may proceed to investigate such cases by themselves.
Finland	The prosecution system is organized so as to enjoy maximum independence from other administrative bodies and from political decision-making, no political body may interfere with or is responsible in respect of concrete criminal cases.			The pre-trial investigation authority is the police, there is a desire in Finland to emphasize the mutual independence of the prosecution and the investigation phases, however a prosecutor may always order the police to perform a pre-trial investigation and further investigations in certain cases.	Supervising the police or other investigative agencies
France			The Public Prosecution members are magistrates belonging to the judicial authority; in the top of the pyramid is the Minister of Justice, a member of the government who can give instructions to sue a person but in no case to dismiss a procedure		The prosecutor has the power to conduct and direct the actions of the Judicial Police; as a rule, the police can conduct certain investigations when they are informed about an offence; in more complex cases or when a measure interfering with individual freedom, the prosecutor refers the case to an Examining Judge who then

becomes the director of the investigations.

	Institutional independence and functional autonomy	Institutional dependence and functional autonomy	Institutional dependence and functional subordination	no role	Supervising the police or other investigative agencies
Germany			The public prosecution belongs on the one hand to the executive and is on the other hand an administration of justice that is assigned to the jurisdiction; the highest supervision authority is the state ministry of justice.		The prosecutor decides upon initiating and ending of preliminary proceedings; in order to conduct the preliminary proceedings the public prosecutor in principle uses, if he does not carry out the investigation himself, the police.
Hungary	Hungarian Prosecution Service is independent from the government which has not right to interfere with the proceedings of prosecutors				The prosecutors and police are both authorized to conduct investigation; there are some cases in which the investigations should be conducted exclusively by the prosecution service.
Italy	The Public Ministry has an unrestricted independence. The judges and prosecutors are irremovable and the Public Ministry received all the guaranties and rights judges				Investigative functions are developed by the judicial police 'polizia giudiziaria' under the direction of the Public Ministry

Ireland	<p>received. The Office of the Director of Public Prosecutions is a freestanding office, which is not answerable to or subject to the direction or the supervision of any Government authority; it is by law completely independent in the performance of its functions.</p>	<p>Institutional independence and functional autonomy</p>	<p>Institutional dependence and functional autonomy</p>	<p>Institutional dependence and functional subordination</p>	<p>no role</p>	<p>Supervising the police or other investigative agencies</p>	<p>The police will conduct an investigation where the commission of a criminal offence is suspected; they will submit an investigation file to the DPP for directions as to prosecution.</p>
Japan				<p>Prosecutorial functions are part of the executive power; the Minister of Justice has power to supervise public prosecutors; prosecutorial functions have a quasi-judicial nature inevitably exerting an important influence on all sectors of criminal justice.</p>			<p>The police and the public prosecutors conduct investigations into all criminal cases; in practice the police initiate investigations in most cases; when the investigation is completed, the police must refer the case to prosecutor who directs the police and when necessary conducts an investigation himself.</p>
Malawi			<p>Public Prosecution is an independent organ of state falling administratively under the executive branch. The DPP is not subject to the control or authority of the Minister of Justice or Attorney General</p>				<p>The police initiate investigations in most cases; when the investigation is completed the police must refer the case to the prosecutor; thereafter the prosecutor frequently directs police to investigate further.</p>

The Netherlands ⁹¹	Institutional independence and functional autonomy	Institutional dependence and functional autonomy	Institutional dependence and functional subordination	no role	Supervising the police or other investigative agencies
			The Minister of Justice is political responsible for the Public Prosecution Service's conduct and performance; as a rule the Minister is engaged in , and concern with, general policy on investigation and prosecution; rarely he intervene in individual cases		The police are responsible for the practical side of criminal investigation, but every investigation is carried out under the instructions of the prosecutor who ensures that the police observe all the rules and procedures provided by law.

⁹¹ The Netherlands. From an organizational point of view the situation in the Netherlands is close to the ideal type: the police are locally organized and accountable to the public prosecutors at the district courts as far as the investigation of crime is concerned; the public prosecutors are accountable to one of the five heads of the prosecution service, the procureurs-generaal at the five appeal courts; in their turn the procureurs-generaal are accountable to the Minister of Justice who, at the end of the chain of accountability must answer to Parliament.

The Public Prosecution Service in the Netherlands is a hierarchical and bureaucratic organization, at the head, which stands the Minister of Justice. Under him come the five procurators-general, then the chief prosecutors in the nineteen districts of the district courts, then the prosecutors in each district. The procurators-general formulate criminal policy in consultation with the Ministry and also produce guidelines for the prosecutors. The system is hierarchical in the sense that higher official – including the Minister – can give orders to

Norway	The Director General of Public Prosecutions is the head of the prosecuting authority; in order to secure the independence and impartiality of the Prosecutions Service it can be supervised only by the King Council; the principle that political authorities shall not be able to make decisions within the sphere of prosecuting authorities is considered to be fundamental.				The investigations are conducted by the police; an investigation may also be opened at the orders of the prosecutor who has the power to give instructions to the police regarding the investigations or to stop it.
	Institutional independence and functional autonomy	Institutional dependence and functional autonomy	Institutional dependence and functional subordination	no role	Supervising the police or other investigative agencies
Papua New Guinea	Public Prosecutor Office is not subject to direction or control from any person or authority.				The power to investigate belongs to the police.
Peru	The Public Ministry is an autonomous and independent institution, which does not belong to the executive, legislative, or judiciary.				The prosecutor can initiate and conclude an investigation without police participation; in practice both police and attorneys initiate investigations.
Philippines			Prosecutorial functions are part of the executive branch and the Secretary of Justice has		Police and prosecutors conduct both investigations.

the lower, this rarely occurs directly, while guidelines from the top are not binding. The Public Prosecution Service is regarded as part of the judiciary and the prosecutor is referred to as the “standing magistrate” the judge being the “sitting magistrate”. Public prosecutors and judges receive exactly the same professional training.

Romania			the power to supervise and control the National Prosecution Service; the power include the authority to act directly on any matter within the jurisdiction of the prosecution. The prosecutors are magistrates and developed their functions in prosecutor's offices within the Public Ministry under the Minister of Justice authority; the Minister could give general or specific orders.		Prosecutors, police and other investigative bodies perform investigations; the prosecutor managed control police criminal pursuit activity, which must obey prosecutor's orders and directions under the law provisions.
	Institutional independence and functional autonomy	Institutional dependence and functional autonomy	Institutional dependence and functional subordination	no role	Supervising the police or other investigative agencies
Russian Federation	Prosecutorial bodies are independent and any pressure of any kind upon a prosecutor shall lead to responsibility stipulated by law including criminal responsibility.				Prosecutors, police and other investigative bodies are entitled to perform investigations; prosecutors are exclusively authorized to investigate most dangerous and complicated crimes.
South Africa			The Minister of Justice exercises final responsibility over the National Prosecuting	Apart from requesting the police to obtain certain evidence, or giving advice and direction, prosecutor do	

Sweden	<p>The prosecution service is an independent organization of other law enforcement organizations and also quite independent of the executive authority; even the Prosecutor General is subordinated to the Government, it cannot order how to handle in a particular case.</p>	Authority.	not participate in the investigation process.	<p>The prosecutor supervises the investigations in all serious cases; when the prosecutor leads the investigation, a policeman is appointed to perform all the practical work during an investigation.</p>
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USA	<p>Institutional independence and functional autonomy</p>	<p>Institutional dependence and functional autonomy</p>	<p>Institutional dependence and functional subordination</p>	no role	<p>Supervising the police or other investigative agencies</p>
		<p>Federal criminal offences are prosecuted by US Attorneys the US Attorneys and the US Attorney General are appointed by the President with the advice of the Senate Each of the fifty states</p>		<p>Under federal law the investigative agencies are charged with the responsibility of conducting criminal investigations, but at any stage the investigators may consult with the US Attorney Office While there generally no laws</p>	

has an Attorney General, and in most states, these elected officials have the power to bring prosecutions only under circumstances specified by the state law.

prohibiting prosecuting entities from participating in criminal investigations, the large majority of public prosecutions offices do not have criminal investigators in their employ; most prosecutors therefore depend upon police and other law enforcement agents to conduct the investigations.