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The role of the Prosecutor of the International Criminal Court in strengthening the international legal order

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Abstract

The article examines the special role of the Prosecutor of the International Criminal Court in strengthening the international legal order. This analysis was carried out through the prism of the study of certain issues: the concept of “Prosecutor of the International Criminal Court” and his place in the system of international criminal justice; the powers of the Prosecutor at certain stages of the proceedings in the International Criminal Court; the principles of strategy and priority in the activities of the Prosecutor. Historical, system-structural, analysis and synthesis, comparative legal, formal-legal, and formal dogmatic methods were used in the research. In the article was made conclusion that that the Prosecutor of the International Criminal Court has a preventive effect on international crimes, because the work of the Prosecutor of the International Criminal Court is aimed not only at punishing perpetrators of international crimes, but also at preventing the commitment of such crimes in the future. It is emphasized that such activities of the Prosecutor ultimately have a positive effect on strengthening the international legal order.

Keywords: Prosecutor; Office of the Prosecutor; International Criminal Court; international legal order; international crime.

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El papel del Fiscal de la Corte Penal Internacional en el fortalecimiento del orden jurídico internacional

Resumen

El artículo examina el papel especial del Fiscal de la Corte Penal Internacional en el fortalecimiento del orden jurídico internacional. Este análisis se realizó a través del prisma del estudio de ciertos temas, tales como el concepto de «Fiscal de la Corte Penal Internacional» y su lugar en el sistema de justicia penal internacional; las facultades del Fiscal en determinadas etapas del proceso en la Corte Penal Internacional; los principios de estrategia y prioridad en las actividades de la Fiscalía. En la investigación se utilizaron métodos históricos, sistémicos-estructurales, de análisis y síntesis, comparativos legales, formal-legales y métodos dogmáticos formales. En el artículo se llegó a la conclusión de que el Fiscal de la Corte Penal Internacional tiene un efecto preventivo sobre los crímenes internacionales, porque la labor del Fiscal de la Corte Penal Internacional está dirigida no solo a castigar a los autores de crímenes internacionales, sino también a prevenir la cometer tales delitos en el futuro. Se enfatiza que tales actividades del Fiscal en última instancia tienen un efecto positivo en el fortalecimiento del orden jurídico internacional.

Palabras clave: Fiscal; Fiscalía; Corte Penal Internacional; orden jurídico internacional; crimen internacional.

Introduction

Nowadays, the place and role of international law is being reconsidered, in particular in the context of its ability to respond to the challenges of the XXIst century and to ensure the effective regulation of international relations. Compared to domestic law, there is a lack of classical legislative, judicial, and executive powers in international law. There is no single body that is empowered to create legal norms that would be binding for all actors of international law, as well as an appropriate system of courts with jurisdiction over these subjects without a clear expression of their will. This determines the peculiarity of international justice.

Among the bodies of international justice, a special place is occupied by international criminal courts. International criminal courts and tribunals, according to an idea of their creators, should become bodies that administer justice to persons who are particularly defiant in violating international law, committing the most serious crimes of concern to the world community. At the same time, criminal prosecution is carried out against any person, regardless of possible immunities and status in society. Moreover, international criminal courts and tribunals were essentially

set up to ensure that senior officials did not escape responsibility for the committed crimes, given their special status in country.

The current stage of development of international criminal justice is associated with the establishment and activity of the permanent International Criminal Court (hereinafter - ICC). The ICC is the permanent body empowered to exercise jurisdiction over those responsible for the most serious crimes of concern to the international community. The Court operates on the basis of a multilateral treaty – the Rome Statute of the International Criminal Court, that was adopted on 17 July 1998 and entered into force on 1 July 2002.

The reasons for the establishment of the ICC are outlined in the preamble of the Rome Statute of the ICC (1998). In particular, in the first point of the preamble, it is noted that “the States Parties to this Statute, Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time”. The preamble further states that “during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity”, “such grave crimes threaten the peace, security and well-being of the world” and “the most serious crimes of concern to the international community as a whole must not go unpunished”. That is, based on the preamble, the connection between the creation of the ICC and the need to ensure international legal order becomes obvious.

The ICC, given its organizational structure, rules and procedures of activity, especially the election of judges, the ICC Prosecutor and his deputies, the Secretary and other officials, the peculiarities of funding and relations with the UN, allows us to speak of its institutional independence. This, in turn, is a prerequisite for an independent and impartial proceeding. Therefore, if the ICC prosecutes any high-ranking officials, there is no doubt that such prosecution is not political in nature. Of course, there are still some problems with the ICC’s cooperation with both the States Parties to the Rome Statute and other states, which is the biggest obstacle to the administration of justice before the ICC (The Prosecutor v. Omar Hassan Ahmad Al Bashir, 2018).

On the other hand, it should be noted that, compared to national authorities, the ICC has a much better reputation and credibility for its criminal proceedings. Because if national authorities prosecute their former high-ranking officials, it raises the issue of possible political persecution. In turn, this makes it difficult to put them on the international wanted list by issuing an Interpol warrant. There are no questions about possible political motives in criminal proceedings in the ICC.

Moreover, the principle of depoliticization is the main guarantee of the effective functioning of international criminal justice and excludes any influence of factors with a political component that are within the states.

A special place among the ICC bodies is occupied by the Office of the Prosecutor headed by the ICC Prosecutor. It is this body that can launch a mechanism of criminal prosecution in the ICC (Wenqi, 2006). However, it seems that its functions should be considered in the light of the goal of the ICC - not only to punish for international crimes but also to prevent the commission of new crimes in the future (Gutnyk, 2017).

This article has been solving the following tasks:

- to define the concept of “the ICC Prosecutor” and its place in the system of ICC organs.
- to find out the specific features of the powers of the Prosecutor of the International Criminal Court at certain stages of the proceedings.
- to identify the principles of strategies and priorities in the work of the ICC Prosecutor.
- to characterize the contribution of the Prosecutor of the International Criminal Court to the prevention of international crimes.

1. Literature Review

The legal status of the ICC Prosecutor has been the subject of research by a number of scholars. In particular, V. Roben researched the status and function of the Prosecutor of the ICC. Prosecutorial independence in the Rome statute, prosecutorial discretion, modes of accountability, the legitimacy of the prosecutor, and a call for prosecutorial guidelines were analyzed by A.M. Danner. Z. Wenqi explored the specifics of cooperation with states not party to the ICC. S. Grover researched “prosecuting international crimes and human rights abuses committed against children”.

However, the Prosecutor of the International Criminal Court in the point of view of his/her influence in strengthening the international legal order has not been the subject of separate scientific research until this time.

2. Methodology

This article has been devoted to analyzing of the role of Prosecutor of the International Criminal Court in strengthening the international legal order.

The study was made through the analysis of international law doctrine, legal documents of the ICC and the practice of the ICC. The focus is on the deterrent effect of the ICC Prosecutor's work on the prevention of new international crimes.

The subjects of the research were norms of the Rome Statute, internal legal documents of the Office of the Prosecutor of the ICC as well as the practice of the ICC. The subject study is the influence of the ICC Prosecutor on the international legal order.

In the article were used historical, system-structural, analysis and synthesis, comparative legal, formal-legal and formal dogmatic methods.

3. The concept of «the ICC Prosecutor» and its place in the system of ICC organs

The system of international criminal justice, having absorbed the best standards of the national criminal process, has not refused from borrowing the institution of the prosecutor's office. Moreover, the prosecution, based on the functions assigned to it by the world community, in the system of international criminal justice is a priority (The Prosecutor v. Stankovic, 2005).

The Statute of the ICC, the Rules of Procedure and Evidence of the ICC, the Regulations of the ICC, the Regulations of the Office of the Prosecutor, the ICC Agreement on the Privileges and Immunities, as well as other ICC internal documents repeatedly mention the Prosecutor.

The analysis of the above-mentioned documents allows us to conclude that the term «Prosecutor» is used in two meanings:

1) for the official - the head of the ICC Prosecutor's Office (see, for example, article 42 (2-9), articles 45-49 of the ICC Statute); 2) for all persons who work in the Prosecutor's Office- and whose powers include powers related to the investigation and criminal prosecution (see, for example, articles 53-56, articles 61, articles 65-66, article 68, article 72, article 76, articles 81-84 of the ICC Statute). Therefore, the legal status of the ICC Prosecutor is not limited to his procedural powers in the field of criminal prosecution; it includes his authority to manage the Office of the Prosecutor, cooperation (on his own behalf) with states and international organizations, etc.

To define the role of the ICC Prosecutor in strengthening the international legal order, it is first of all need to determine the place of the ICC Prosecutor's Office in the system of ICC organs, as well as to establish its structure and powers.

One of the four main organs of the ICC is the Office of the Prosecutor. This organ, given the tasks assigned to it, plays a key role in the ICC system (Danner, 2003; Novak, 2015; Nerida, 2016). The Prosecutor's Office headed by the ICC Prosecutor can launch a prosecution mechanism (Wenqi, 2006). In accordance with paragraph 1 of Art. 42 of the ICC Statute the Prosecutor's Office has three groups of tasks: to obtain and study any information about crimes under the jurisdiction of the ICC, conducting investigations and prosecutions.

The detailed list of powers of the Prosecutor's Office as a separate body of the ICC is not contained in the Statute, the Regulations of the Prosecutor's Office, or any other internal act of the ICC. Such powers can be identified only by generalizing the powers of its structural bodies.

An analysis of the Regulations of the Prosecutor's Office allows us to conclude that the Prosecutor's Office has the following organizational structure: the Executive Committee, divisions, sections and the Gender and Children Unit. The Prosecutor's Office is managed by the ICC Prosecutor, who may have one or more deputies. Let's consider the competence of these bodies more detailed.

The Executive Committee is responsible for developing and adopting the strategy, policy and budget of the Office, providing strategic guidance and coordinating the activities of the Office. The Executive Committee consists of the Prosecutor and the heads of the divisions.

The Prosecutor's Office consists of three divisions: the Jurisdiction, Complementarity and Cooperation Division, the Investigation Division and the Prosecution Division, each of which is the subject of a separate regulation of the Regulations of the Prosecutor's Office.

An analysis of the Regulations of the Prosecutor's Office allows us to conclude that the Division of Jurisdiction, Complementarity and Cooperation performs three functions: assessment and verification of information on the possibility of conducting an investigation; conducting analysis and providing recommendations on matters of jurisdiction; providing recommendations for cooperation.

The Investigation Division is tasked with: preparing the necessary security programs and protection policies in each case to ensure the safety of victims, witnesses, Office staff, and those at risk due to their interaction with the ICC, etc. ; conducting an investigative examination; preparation and coordination of the sphere of activity of the Office staff; establishing the circumstances of the crime and analyzing information and evidence in support of the initial investigative actions, investigation and prosecution. The Investigation Division includes investigative teams that involve consultants with professional knowledge in areas such as military affairs, politics and economics (Wenqi, 2006).

The Prosecution Division is responsible for providing legal advice on issues that arise during the investigation and may affect future trial proceedings; preparation of a trial strategy for review and approval by the Executive Committee and their subsequent implementation in the ICC Chambers; conduct the prosecution in the ICC Chambers; coordination and cooperation with the ICC Registrar on related issues in trial proceedings.

Thus, the work of one of the divisions of the Prosecutor's Office is aimed at fulfilling each of the tasks provided for in paragraph 1 of Article 42 of the ICC Statute.

The structure of the Prosecutor's Office includes two sections: the Services section and the Section of legal advisers (Regulations of the Office of the Prosecutor, 2009); Sections perform ancillary functions.

A separate body of the Prosecutor's Office is the Gender and Children Unit, which provides assistance to victims of gender-based violence and violence against children during the investigation and trial of cases at the ICC (Grover, 2009).

Hence, the organizational structure of the ICC Prosecutor's Office is quite broad, due to the fact that the tasks of the ICC Prosecutor are much wider than in national legal systems, including those related to the specifics of international crimes and their prevention in the future.

The Prosecutor and his deputies must be citizens of different countries. Interestingly, the ICC does not prohibit the same citizenship for judges and prosecutors. The latter provision, according to W. Schabas, provoked heated discussions during the development of the Rome Statute of the ICC, as this norm allows for the possibility of combining prosecution and trials by representatives of the same state (Schabas, 2011).

4. Powers of the Prosecutor of the International Criminal Court at certain stages of the proceedings

An analysis of the ICC Statute and the Rules of Procedures and Evidence allows us to conclude that the Prosecutor has broad powers at each stage of criminal proceedings. However, it appears that the Prosecutor has the broadest powers at the pre-trial stages.

Information on crimes falling within the Court's jurisdiction shall be transmitted to the ICC Prosecutor. In accordance with paragraph 2 of Article 15 of the ICC Statute, the Prosecutor assesses the seriousness of such information. He may request additional information from States, the United Nations bodies, intergovernmental and non-governmental organizations or from other sources as it deems appropriate. If he considers that there are

sufficient grounds to initiate an investigation, he shall apply to the Pre-Trial Chamber to authorize the investigation. The latter, having examined the materials provided, may authorize or refuse the investigation. However, even such a refusal does not prevent the Prosecutor, in the presence of new facts or evidence, from re-applying to the Pre-Trial Chamber for a sanction for the investigation.

After authorizing the investigation, the Prosecutor proceeds directly to the investigation itself. At the same time, he equally investigates the circumstances that indicate both the guilt and innocence of the person.

The powers of the Prosecutor during the investigation are defined in Art. 54 (3) of the ICC Statute, according to which the Prosecutor shall: “a) collect and examine evidence; b) request the presence of and question persons being investigated, victims and witnesses; c) Seek the cooperation of any State or intergovernmental organization or arrangement in accordance with its respective competence and/or mandate; d) enter into such arrangements or agreements, not inconsistent with this Statute, as may be necessary to facilitate the cooperation of a State, intergovernmental organization or person; e) agree not to disclose, at any stage of the proceedings, documents or information that the Prosecutor obtains on the condition of confidentiality and solely for the purpose of generating new evidence, unless the provider of the information consents; and f) take necessary measures, or request that necessary measures be taken, to ensure the confidentiality of information, the protection of any person or the preservation of evidence”.

Upon completion of the investigation, Pre-Trial Chamber shall hold a hearing to confirm the charges, on the basis of which the Prosecutor will request a trial. During such a hearing, in accordance with paragraph 5 of Article 61 of the ICC Statute, the Prosecutor supports the charge with evidence sufficient «to establish substantial grounds to believe that the person committed the crime charged».

After the confirmation of the charges, the case is on trial. It should be noted that Part 6 of the ICC Statute («The trial») does not contain a separate article on the powers of the Prosecutor during the trial. His powers, according to V. Roben, are similar to those he has during the investigation (Roben, 2003). The Prosecutor supports the charges in the Trial Chamber. To do this, he must present the facts and provide evidence that proves the guilt of the accused in the crime (Roben, 2003).

With regard to the stage of the appellate proceedings, in accordance with art. 81 (1)(a) of the ICC Statute, “the Prosecutor may make an appeal on any of the following grounds: (i) Procedural error, (ii) Error of fact, or (iii) Error of law”. The prosecutor has the right to appeal the sentence on the basis of the disproportion of the sentence to the crime committed. Interesting is the power of the Prosecutor to file an appeal on behalf of the

convicted under Article 81 (1) (b) of the ICC Statute, according to which, “the convicted person, or the Prosecutor on that person’s behalf, may make an appeal on any of the following grounds: (i) Procedural error, (ii) Error of fact, (iii) Error of law, or (iv) Any other ground that affects the fairness or reliability of the proceedings or decision”. This situation may cause confusion because the prosecution and the defence are opposite parties in the process. It seems, this provision is enshrined in the Statute to confirm the position of the Prosecutor not only as a party to the proceedings but also as a body acting in the interests of justice.

The ICC Statute and the Rules of Procedure and Evidence of the ICC do not contain a separate article on the powers of the Prosecutor during the proceedings of the case in the Appeals Chamber. However, based on the fact that in accordance with rule 149 of the ICC Rules of Procedure and Evidence «parts 5 and 6 and rules governing proceedings and the submission of evidence in the Pre-Trial and Trial Chambers shall apply *mutatis mutandis* to proceedings in the Appeals Chamber», the Prosecutor has powers similar to those he has during the pre-trial and trial.

The next stage of the proceedings is the stage of revision. The Prosecutor has the right to ask the Appeals Chamber to review the final decision on conviction or sentencing. However, in this case, in accordance with paragraph 1 of Article 84 of the Rome Statute of the ICC, the prosecutor has the right to request a revision only on behalf of the convicted, but not as the prosecution. Such a request for revision in accordance with art. 84 (1) of the ICC Statute, may be filed on the following grounds: “a) new evidence has been discovered that: (i) was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making application; and (ii) is sufficiently important that had it been proved at trial it would have been likely to have resulted in a different verdict; b) it has been newly discovered that decisive evidence, taken into account at trial and upon which the conviction depends, was false, forged or falsified; c) one or more of the judges who participated in conviction or confirmation of the charges has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of that judge or those judges from office under article 46”.

The ICC Chamber revising the sentence shall exercise, *mutatis mutandis*, all the powers of the Trial Chamber in accordance with Part 6 and the rules governing the examination and presentation of evidence in the Pre-Trial Chamber and the Trial Chamber. Consequently, in the revision of a sentence, the Prosecutor has, *mutatis mutandis*, the same powers as in the proceedings before the Pre-Trial Chamber and the Trial Chamber.

5. Discussion

The ICC Prosecutor has broad powers at every stage of the ICC proceedings, but the question arises: what is the strategic purpose of the Prosecutor's work? It seems that such a strategic goal, based on the functions of the Prosecutor and the purpose of the ICC, is prevention - to avoid committing new international crimes, which in turn affects the strengthening of international law and order.

The role of the ICC Prosecutor can be analyzed based on the strategic directions of its activities, which are contained in the Prosecutor's Strategy (strategic plan) and which are de facto the principles and directions of the Prosecutor's Office. It was developed (adopted) five times – in 2006 (Report on Prosecutorial Strategy, 2006), 2010 (Prosecutorial Strategy 2009 – 2012, 2010), 2013 (Strategic plan June 2012-2015, 2013), 2015 (The strategic plan of the Office of the Prosecutor 2016 – 2018, 2015) and 2019 (The strategic plan of the Office of the Prosecutor 2019-2021, 2019) – for a period of three years. For the first time, the main directions of the prosecutor's strategy were contained in the Report on the Prosecutorial Strategy of September 14, 2006. Now the activities of the Prosecutor's Office are carried out on the basis of the Strategic plan 2019-2021.

According to the Strategic Plan 2019-2021, the following mission of the ICC Prosecutor's Office is defined:

Complementary to national jurisdictions and in full respect of the jurisdictional regime, the mission of the Office of the Prosecutor embraces the effective and efficient conduct of preliminary examinations, investigations and prosecutions of the perpetrators of the crime of genocide, crimes against humanity, war crimes, and the crime of aggression, so as to help end impunity for the commission of such crimes, respond to the suffering of victims and communities affected by them, and thus contribute to their prevention in the future (The strategic plan of the Office of the Prosecutor, 2019: 56).

That is, all the work of the Prosecutor and his Office is directed "to help end impunity for the commission of such crimes, respond to the suffering of victims and communities affected by them, and thus contribute to their prevention in the future". The prosecutor performs his functions on the basis of the principle of positive complementarity, which is a compromise between the duty of the state to bear primary responsibility for bringing perpetrators to justice in its territory and the activities of the ICC (Pichon, 2008). The Office of the Prosecutor shall commence its activities in the territory of the State only in cases where such State is unwilling or unable to conduct effective criminal proceedings.

Therefore, because one of the goals of the ICC is to prevent future international crimes, ensure peace and security (Doria, 2010), the Office has a preventive influence in every area of its activities, from preliminary

examination to sentencing (Report on Prosecutorial Strategy, 2006; Prosecutorial Strategy 2009 – 2012, 2010). Crimes under the jurisdiction of the ICC are committed by large groups of persons or organizations and are accompanied by careful planning of such crimes. A simple announcement of the activities of the ICC, monitoring of situations can have a preventive effect on the commission of such crimes.

The ICC Prosecutor's Office has certain human and financial resources, and therefore the priority of the materials received by the ICC needs to be determined (Politi and Gioia, 2008). Such issues in the ICC Prosecutor's Office are regulated on the basis of the Policy paper on case selection and prioritization, 15 September 2016 (Policy paper on case selection and prioritisation, 2016). This Policy paper sets out the criteria for the exercise of prosecutorial discretion in the selection and prioritization of cases in investigations and prosecutions. It defines the policies and practices of the Office of the Prosecutor regarding the process of selecting incidents, persons and acts to be investigated and prosecuted in a particular situation, as well as the identification of priority situations (Policy paper on case selection and prioritisation, 2016).

It should be emphasized that this priority is quite flexible. In particular, as emphasized in the Policy paper, the selection of cases and the setting of priorities should be regularly updated on the basis of information and evidence obtained during the investigation of any ongoing crimes and the development of operational conditions that may affect the Office of the Prosecutor's ability to succeed in investigation and prosecution. It is important that «as part of this process, not only could a selection or prioritisation decision need to be revisited over time, the case hypothesis itself may need to be adjusted to take into account the evidence that has been collected. As such, case selection and prioritisation, as well as the preparation of the overall Case Selection Document, should be considered a dynamic process that seeks to continually refine the focus of the Office's investigations until such time as an article 58 application is made» (Policy paper on case selection and prioritisation, 2016).

The Office of the Prosecutor, in accordance with para.24 of the Policy paper, must ensure that cases selected for priority investigation and prosecution fall within the jurisdiction of the Court; that they be acceptable in terms of complementarity and severity; and that they do not conflict with the interests of justice (Policy paper on case selection and prioritisation, 2016).

Pursuant to para. 34 of the Policy paper, the Office of the Prosecutor selects a case for investigation and prosecution in view of the gravity of the crimes, the degree of responsibility of the alleged criminals and the potential charges. The weight given to each criterion should depend on the facts and circumstances of each case, each situation and the stage of development of the investigation (Policy paper on case selection and prioritisation, 2016).

Conclusion

Thus, the Prosecutor of the International Criminal Court is entrusted with very important tasks, which are primarily aimed at prosecuting those responsible for committing the most serious crimes of concern to the entire world community. For states where the justice system is inefficient, this is the only way to punish those who have committed such crimes, despite their immunities and status in society. International criminal justice also has a deterrent effect on the committing of new international crimes and, as a consequence, aims to ensure the sustainability of the international legal order.

The ICC Prosecutor exercises preventive influence in every area of his / her activity, from preliminary verification of information, investigation, trial to sentencing. Crimes falling within the jurisdiction of the Court are committed by large groups of persons or organizations and are accompanied by careful planning of such crimes. Even informing about the activities of the ICC, monitoring situations can have a preventive effect on the committing of crimes in the future.

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