Chapter 12  The selection of cases by the Office of the Prosecutor of the International Criminal Court

Fabricio Guariglia*

1. Introductory remarks

The selection of cases for investigation and prosecution in the context of international crimes is a thorny issue that has haunted all criminal jurisdictions to date. How to select among hundreds of instances of brutal victimization, each of them demanding restoration and accountability in equal terms? How to determine who, within a huge spectrum of individuals involved in those crimes, from foot soldier to general, from municipal leader to prime minister, should be singled out for prosecution? In the reign of radical evil,¹ is there truly room for pragmatic considerations and for attempts to maximize, in a utilitarian calculus, the positive impact of a confined number of investigations and prosecutions? Or should rather a Kantian approach prevail, and thus all efforts be exhausted to ensure that every single instance of victimization and every single perpetrator is adequately dealt with? These questions are not new. Yet, they are still debated, over and over again, each time that a new effort aimed at ensuring accountability, be it national or international, starts taking shape.

The manner in which any jurisdiction approaches this complex matter can have far-reaching consequences and adversely affect its legitimacy and legacy. The selectivity of the post World War II prosecutions at Nuremberg and Tokyo is frequently stressed in negative terms, including the well-known allegations of victor’s justice and complete impunity of the Allies.² In the case of the Tokyo International Military

*  Senior Appeals Counsel, Office of the Prosecutor, International Criminal Court. The views expressed herein are solely the author’s and do not necessarily reflect those of the Office of the Prosecutor.

1  Nino refers to the Kantian concept of “radical evil” (offences against human dignity so widespread, persistent, and organized that normal moral assessment seems inappropriate) in the context of massive human rights violations. See Radical Evil on Trial, 1996, Introduction, p. vii.

2  For a more balanced discussion of this aspect of the Nuremberg legacy, see M. Kelly & T. McCormack, Contributions of the Nuremberg Trial to the Subsequent Development of International law, in D. Blumenthal & T. McCormack (eds.), The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance? (2008).

Tribunal (IMT), the criticism to the Tribunal’s selectivity was first formulated in the scathing dissents of some of its very own judges.3

One could contend that in the case of the IMTs of Nuremberg and Tokyo the critical discussion surrounding the selection of the cases that were ultimately brought to justice was inextricably linked to the particular genesis of those Tribunals and its consequences in terms of their legitimacy. However, the vexing questions of if and how selectivity should take place can also affect jurisdictions that are far less problematic in terms of legitimacy, such as the UN-established ad hoc Tribunals. The ICTY – where a rich discussion took place as to the types of cases on which the Tribunal should focus its limited resources (the so-called “big fish” vs. “small fish” debate, triggered by the arguably low level of the first perpetrators to be indicted, such as Dusko Tadic or Drazen Erdemovic) – provides a clear example.4 The underlying philosophical question has been: should prosecutions before international tribunals focus on those at the top of the decision-making process, or should they also include individuals situated in lower positions, and even executioners?

The rationale behind the affirmative answer to the first limb of the question would be that cases brought against those individuals located at the superior echelons present a higher “aggregate value”. Those at the top of the system are the ones that “control the anonymous will of its components”;5 accordingly, who pulls the trigger is not that important, since executioners are merely replaceable parts. In addition, it has been stated that the prosecution of those in leadership positions will normally provide a “broader narrative”, tell “a more complete story” about the crimes and their context than the prosecution of a low-level perpetrator.6 Hence, the argument could be properly made that “minor offences” and “minor roles” should not be prosecuted, or at least not by international jurisdictions, and be left for national authorities instead. From this viewpoint, the criticism of the ICTY’s initial prosecutions would appear to be correct.

However, a number of arguments can and have been offered in reply. First, it can be argued that within the universe of international crimes, there is no such thing as “minor crimes” and “minor roles”. A single event in the Milosevic Kosovo indictment, the massacre of Racak, involved the execution of over 40 civilians – an incident that would be viewed by all jurisdictions in the world as extremely grave. Erdemovic, a perpetrator located at the lowest echelons of the chain of command, killed around 200 people under his own admission. Under this competing logic, any jurisdiction dealing with crimes of this scale should refrain from getting entangled in superficial numeric calculations and overly simplistic divisions of roles, when reality shows that gravity is widespread and that all individuals involved play important parts that ena-

5 In the words used by the Argentine Court of Appeals for the Federal District of Buenos Aires in Juntas trial judgement, applying a theory of co-perpetration by means to hold the commanders criminally responsible; see (1988) 8 Human Rights Law Journal, 415-417.
6 See Akhavan, supra note 4, at 778-779.