What Does it Mean for the Prosecutor to be a Political Actor?

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In the wake of Luis Moreno Ocampo’s application for an arrest warrant for Sudanese President Omar al Bashir, a number of commentators have been keen to point out that the prosecution of a state’s leadership is always an inherently political act. While this observation has the potential to be an illuminating starting-point for analysis, it is instead frequently presented as an unexamined basis for entirely separate arguments. Too often it is presented as if both the meaning and consequences of such a statement were self-evident; they are not. We should be asking, In what ways is such prosecution political? Crucially, what follows from the realisation that the role of the ICC prosecutor is, in at least some ways, a political one?

That ICC prosecution of a head of state has political consequences is undeniable, but this alone does not qualify such prosecution as a political act. Political consequences can exist in the total absence of agency, as with natural disasters that alter the political landscape (take, for instance, the 2005 Indian Ocean tsunami). Action in various fields, taken for apolitical reasons, can also have political ramifications. This is frequently the case with new scientific discoveries or technical innovations. Likewise, this could be the case with prosecutions pursued entirely according to norms of justice. The impartial prosecution of domestic politicians for domestic abuse, for instance, could change the outcome of an election but will often not be a political act.

When consideration of political consequences plays a role in prosecutorial decision-making, a line is crossed into political action. The thrust of much criticism is that it would be irresponsible for the prosecutor to fail to do so. Thus, many critics would see the prosecutor play a role as a fully-fledged political actor. This brings us to a series of important questions: Should the prosecutor play such a role as a political actor, or attempt to leave political considerations to others (such as the UN security council)? If the prosecutor is to be a political actor, which considerations are relevant?

There are certainly political considerations that we would not want to enter into prosecutorial decision-making. Great care has been taken to ensure the independence of the office of the prosecutor from undue political influence. If the prosecutor is to be making political decisions, some way must be found of ensuring that such decisions are not taken to further the interests of powerful actors or to pursue agendas other than those for which the court was established.

There is also a political role for the prosecutor that is more ambiguous. When the prosecutor acts to bolster support for his fledgling institution, he acts politically. This can be helpful; when the prosecutor engages with the media to act as an ambassador for the court, he may be acting entirely within his mandate. However, if decisions on whom and
how to prosecute are made in order to secure support from powerful states or to ensure new signatories, it is likelier that the integrity of the prosecutor’s office is undermined. Nevertheless, the prosecutor may have an important role to play in ensuring the survival and success of the court. Once again, serious discussion is necessary about how to ensure that the prosecutor exercises appropriate political agency.

The prosecutor of the ICC is not unique in having a political role that includes substantial discretion. However, he differs from prosecutors in domestic courts in some important ways. First, because the ICC can initially take on so few cases and there are, regrettably, so many crimes being committed, prosecution is much more selective than is usually the case. This greatly increases the scope of discretion; if political factors are allowed to influence decisions, they could be making the difference between prosecution and no action. Second, the prosecution involves an international actor (the prosecutor and ICC) affecting domestic and international politics. In domestic prosecutions, political consequences flow directly from the structure they affect, greatly reducing the resultant controversy; exogenous action is much more likely to be seen as disruptive and political in a negative sense. Third, the ICC remains a relatively new entity in which, in the absence of regularised institutional patterns and standards of behaviour, there is great scope for individual action. On the other hand, new institutions are much less resilient – and therefore cannot as easily afford individual error.

I suggest, then, that it is appropriate to focus more on the (political) conduct of the prosecutor as an individual – and as more than just a metonym for the ICC. Simply stating that his action is political does not get us very far. If he is to be a political actor, what is the appropriate form of agency? How can we ensure that such agency is exercised appropriately? These are difficult questions to which we do not, as yet, have ready answers. Yet the controversy over the latest indictment shows that it is important that we find them.

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